[Cite as *Ferguson v. SanMar Corp.*, 2009-Ohio-4132.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

THOMAS FERGUSON,	:	
Plaintiff-Appellant,	:	CASE NO. CA2008-11-283
	:	O P I N I O N
- vs -		8/17/2009
	:	
SANMAR CORPORATION,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2007-06-2260

Albert T. Brown, Jr., 1014 Vine Street, Suite 2350, Cincinnati, OH 45202, for plaintiff-appellant

Dinsmore & Shohl LLP, Louise S. Brock, David A. Nenni, 1900 Chemed Center, 255 East Fifth Street, Cincinnati, OH 45202, for defendant-appellee

Michael & Alexander, PLLC, Stephanie R. Alexander, One Convention Place, 701 Pike Street, Suite 1150, Seattle, WA 98101, for defendant-appellee

POWELL, J.

{¶1} Plaintiff-appellant, Thomas Ferguson, appeals a summary judgment granted in favor of defendant-appellee, SanMar Corporation, in Ferguson's wrongful employment termination action. For the reasons that follow, we affirm the trial court's judgment.

{¶2} Ferguson began working for SanMar in March, 2006. Approximately nine

months later, he began experiencing discomfort in his upper back. On December 15, 2006, Ferguson informed his supervisor, Paul Boellke, of his condition. Boellke asked whether Ferguson had been injured at work or needed medical attention. Ferguson responded in the negative. Boellke also told Ferguson that if he wanted to see his physician he could leave early, but Ferguson declined and said he would see a doctor after finishing his shift.

{¶3} Ferguson went to Bethesda North Hospital that evening and explained to a nurse that his discomfort was due to the harness he was required to wear when operating an aerial delivery platform at SanMar. Upon hearing the injury was work-related, the nurse asked Ferguson to fill out workers' compensation claim paperwork and submit to a drug test. The next day, Ferguson went to Bethesda Care in Norwood where he obtained medication and paperwork which restricted him to light-duty work.

{¶4} The following week, Ferguson reported to Deanna Adams, SanMar's Human Resources Administrator, and presented his light-duty restrictions paperwork. Upon discerning that Ferguson was reporting a work-related injury, Adams advised Ferguson that he needed to go to a drug testing facility for testing. Although Ferguson made clear that he received a drug test at the hospital on the preceding Friday, Adams explained that the previous test did not conform to company policy. Another SanMar employee transported Ferguson to Bethesda Care in Sharonville to submit to a drug test.

{¶5} At some point during Adams and Ferguson's discussion, Forest Kirk, the Assistant Manager of the facility, entered Adams' office. After observing Ferguson's response to being "re-tested," Kirk decided to require monitoring of Ferguson's drug test. Thus, when Ferguson arrived at Bethesda Care, he was told by hospital personnel that the drug test would be witnessed. Upon learning that the drug test would be observed, Ferguson refused to be tested. Ferguson was transported back to SanMar and was subsequently terminated for refusing to submit to a drug test in contravention of company policy.

{¶6} Ferguson filed suit, alleging the company had terminated him in retaliation for filing a workers' compensation claim in violation of R.C. 4123.90. SanMar moved for summary judgment, arguing it only terminated Ferguson because he violated company policy when he refused to submit to a monitored drug test. The trial court granted SanMar's motion for summary judgment, finding Ferguson had not shown that SanMar had terminated him in violation of R.C. 4123.90. Ferguson appealed, raising a single assignment of error.

{¶7} "THE TRIAL COURT ERRED BY GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT."

{¶8} Ferguson argues a genuine issue of material fact exists regarding the retaliatory nature of his discharge which would preclude an award of summary judgment to SanMar.

{¶9} An appellate court examines a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. Thus, a reviewing court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran* 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. We must, therefore, review a trial court's decision regarding summary judgment independently, without any deference to the trial court's judgment. Id. at ¶9, citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 295.

{¶10} Summary judgment is proper where: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion adverse to the nonmoving party. Civ. R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The party moving for summary judgment bears the burden of demonstrating no genuine issue of material fact exists with regards to the essential elements of the claim(s) of

the nonmoving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505.

{¶11} The burden is then on the nonmoving party to present evidence showing that there is some issue of material fact yet remaining for the trial court to resolve. *Dresher* at 293. The nonmoving party may not rely on mere allegations or denials in his pleading. Civ. R. 56(E); *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. Instead, the nonmoving party must respond with specificity to show a genuine issue of material fact. Id. The nonmoving party is, however, entitled to have any doubts resolved and evidence construed most strongly in his favor. *Welco Indus., Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191. Nevertheless, summary judgment is appropriate where a nonmoving party fails to produce evidence essential to his claim. Id.

{¶12} R.C. 4123.90 prohibits an employer from taking an adverse employment action against an employee because the employee filed, or pursued, a workers' compensation claim for an injury which arose and occurred in the course of his employment with the employer.[1] "The scope of the statute is nevertheless narrow, and R.C. 4123.90 does not prevent an employer from [taking an adverse employment action against] an employee who is unable to perform his or her duties * * * [or] for just and lawful reasons. The statute protects only against [adverse employment actions] in direct response to the filing or pursuit of a workers' compensation claim." *White v. Mt. Carmel Med. Ctr.*, 150 Ohio App.3d 316, 2002-Ohio-6446, ¶36, quoting *Sidenstricker v. Miller Pavement Maintenance, Inc.*, Franklin App. Nos. 00AP-1146 and 00AP-1460, 2001-Ohio-4111, ¶55. "An employee may assert a claim under this

1. R.C. 4123.90 states in pertinent part: "[n]o employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer."

statute only if he alleges and proves that he was demoted or dismissed, not because of his job-related injury, but rather because of his pursuit of a workers' compensation claim." *Blair v. Milford Exempted Village School Dist. Bd. of Edn.* (1989), 62 Ohio App.3d 424, 431, abrogated on other grounds by *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357.

{¶13} Courts in Ohio have addressed claims filed pursuant to R.C. 4123.90 under a burden-shifting framework. See, e.g. *McDannald v. Fry & Assoc., Inc.*, Madison App. No. CA2007-08-027, 2008-Ohio-4169, ¶17. Appellant concedes that the trial court correctly applied the burden-shifting framework in the case at bar, but claims a genuine issue of fact with respect to the retaliatory nature of his discharge.

{¶14} Under the burden-shifting scheme, the employee must first set forth a prima facie case of retaliation, then the burden shifts to the employer to set forth a legitimate nonretaliatory reason for the adverse employment action and, finally, the burden shifts back to the employee to establish that the employer used that nonretaliatory reason as a pretext for the adverse employment action. *Markham v. Earle M. Jorgensen Co.* (2000), 138 Ohio App.3d 484, 492. "The burden of proving that the employer had a retaliatory motive remains at all times on the employee." Id.

{¶15} For purposes of the summary judgment motion, the trial court found that Ferguson established a prima facie case. Having done so, "* * * the burden of production shifts to the employer to articulate a legitimate nonretaliatory reason for its action." *Sidenstricker* at ¶59. "[T]he burden does not require the employer to prove the absence of a retaliatory discharge. It merely requires the employer to set forth a legitimate, nonretaliatory reason for the employee's discharge." *Kilbarger v. Anchor Hocking Glass Co.* (1997), 120 Ohio App.3d 332, 338. "When considering whether an employer has a legitimate nonretaliatory reason for discharging an employee, the court must keep in mind the fact that

an employee who files a workers' compensation claim is not insulated from discharge." *Markham*, 138 Ohio App.3d at 492. "R.C. 4123.90 does not operate to suspend the rights of an employer nor does it insulate an employee from otherwise lawful actions taken by the employer. To hold otherwise would render employers virtually powerless to combat fraud and/or blatant inefficaciousness on the part of any employee who happened to have a pending workers' compensation claim." Id. at 494.

{¶16} Because the burden shifts to the employer to articulate a legitimate nonretaliatory reason for the adverse employment action, we must examine SanMar's reason for the discharge, which in this case was Ferguson's refusal to submit to a drug test.

{¶17} SanMar's written company policy contains the following pertinent provisions:

{¶18} "Employees may be required to submit to drug and/or alcohol screening under the following circumstances:

{¶19} "1.Involvement in an accident, or injury which resulted in, or in the judgment of a supervisor or manager could have resulted in, damage to property or personal injury that requires medical attention. * * *

{¶20} "*A positive test may result in disciplinary action, up to and including termination. As a condition of employment, all employees must consent to being tested in accordance with this policy; a refusal to be tested may result in termination or employment based on failure to comply with company policy.* (Emphasis sic.) * * *

{¶21} "Bethesda Care Occupational Clinics and their affiliates (see your supervisor for designated clinics in your area) are our designated collection facilities. Actual testing will be done by a [certified] laboratory * * * and will be conducted by independent medical personnel in a manner scientifically accepted as reliable and designed to minimize intrusion into individual privacy. * * *

{¶22} "In all circumstances of suspected drug and alcohol use on company premises

employees must be transported to the testing facility * * *"

{¶23} SanMar submitted evidence indicating that in all workplace injuries reported between January 1, 2006, and March 12, 2008, company policy required the injured employee to submit to a drug test. In fact, no employee who reported a workplace injury was ever exempted from the testing policy. Of the 65 employees who reported injuries and submitted to drug tests, 61 tested negative, three tested positive, while one, Ferguson, refused to submit to the test. Two of the three who tested positive were terminated, and one resigned before he could be terminated. One of the three who ultimately tested positive was also required to have an observed test. Finally, SanMar stated that no employee had ever been terminated for filing a workers' compensation claim, and most are still employed with the company.

{¶24} Consistent with its drug testing policy, SanMar asked Ferguson to submit to a drug test upon reporting a workplace injury. When Ferguson refused to take the test, he was terminated, which is also consistent with company policy. "[A]n employee's termination under an employer's * * * policy is not considered a retaliatory discharge if the company policy is neutral in its application." *Oliver v. Wal-Mart Stores, Inc.*, Franklin App. No. 02AP-229, 2002-Ohio-5005, ¶17, citing *Metheney v. Sajar Plastics, Inc.* (1990), 69 Ohio App.3d 428, 432. Ferguson was asked to submit to a neutral drug testing policy, which he refused, resulting in his termination. Thus, SanMar has established a legitimate nonretaliatory reason for Ferguson's discharge.

{¶25} "[I]f the employer sets forth a legitimate, nonretaliatory reason, the burden once again shifts to the employee * * * [who] must then establish that the reason articulated by the employer is pretextual and that the real reason for the discharge was the employee's protected activity under the Ohio Workers' Compensation Act." *Kilbarger* at 338. Pretext may be shown in a variety of different manners. The employee may show that the

employer's proffered reason: (1) had no basis in fact, (2) did not actually motivate the adverse employment action, or (3) was insufficient to motivate the adverse employment action. *King v. Jewish Home*, 178 Ohio App.3d 387, 2008-Ohio-4729, ¶9.

{¶26} The thrust of Ferguson's argument is that by subjecting him to the unwritten policies of transportation to, and observation of, the drug test, as well as being asked to "retest," he was being retaliated against for filing a workers' compensation claim. His argument, however, misstates what he must prove under the final stage of burden-shifting paradigm, namely that SanMar's decision to discharge him based on a violation of the drug testing policy: (1) had no basis in fact, (2) did not actually motivate the adverse employment action, or (3) was insufficient to motivate the adverse employment action.

{¶27} While the SanMar employee handbook does not specifically state that all persons submitting to a drug test will be transported to the facility by another employee, except in those cases where drug use is suspected, evidence indicated that the practice is standard, at least when a workplace injury is reported. The purpose of this policy, according to SanMar, is to "ensure the integrity of the drug-test." The trial court found that SanMar had "an unwritten but well-established policy, whereby when an employee incurs a workplace injury he/she is to be transported to a medical facility, accompanied or by, a fellow employee." After viewing the evidence in a light most favorable to Ferguson, we believe that a long-standing transportation policy existed, and, despite Ferguson's arguments to the contrary, SanMar did not just invent the policy as a way to punish or harass him. Thus, even though Ferguson had already submitted to a drug test, it did not, as Adams explained, comply with SanMar's policy, and he was required to resubmit to the test.[2]

2. The policy also requires the employee to be tested at a place of SanMar's choosing, rather than a facility of the employee's choosing. Ferguson was initially tested at Bethesda North Hospital, and SanMar sent him to be "retested" at Bethesda Care Sharonville, thus Ferguson's selection of testing facilities also did not comply with company policy.

{¶28} While the unwritten "observation" policy was not as well-established as the "transportation" policy, SanMar offered evidence to show that Ferguson was not the only employee who had been asked to submit to a witnessed drug test. Adams explained that management decides whether an observed drug test is required. Kirk, as assistant facility manager, made that determination after noticing Ferguson's "nervous and fidgety" reaction to being asked to resubmit to a drug test. Kirk's decision was not punitive action against Ferguson because Ferguson filed a workers' compensation claim. Instead, it was a management decision predicated on a suspicion that Ferguson was using drugs or alcohol in the workplace.

{¶29} For Ferguson's argument to succeed, the evidence would have to show that SanMar knew that requiring him to be transported to the hospital and observed while he submitted to the test would induce Ferguson's refusal to be tested. There is no way that SanMar, or anyone for that matter, could have known that Ferguson would refuse to be tested, especially since no employee before Ferguson had ever refused the test. It was Ferguson's own refusal to submit to the test that motivated his discharge. That refusal, under the written policy, was likewise sufficient to result in Ferguson's discharge.

{¶30} Ferguson also argues that there was no reason to submit to a drug test because the injury for which he was filing the claim occurred well past the window required by R.C. 4123.54, the alcohol and drug testing provision of the workers' compensation statute. However, we note that R.C. 4123.54 applies only to the industrial commission's decision-making process in that it operates to deny benefits to those who test positive for dugs and alcohol within a specified time period. That statute places no requirements on when a company must conduct the testing, nor does it have anything to do with a company's own policy of requiring employees who report workplace injuries to be tested when the company first learns of the existence of the injury.

{¶31} Finally, we note that during his deposition, when Ferguson was asked why he was terminated, he did not respond that he was being retaliated against for filing a workers' compensation claim; he simply stated he was discharged because he refused to submit to a drug test:

{¶32} "Q. All right. Did you ask her [Adams] any questions about your termination, about what happened, why, anything?

{¶33} "A. I mean, I knew. I knew when I left. I mean, like I said, they explained everything. They said I didn't – I didn't cooperate, so –

{¶34} "Q. So you were told that – well, just give me a better understanding of that. What was you understanding of why you were terminated?

{¶35} "A. Because I refused the drug test."

{¶36} Even after viewing the evidence in a light most favorable to Ferguson, no question of material fact remains as to the reason for his discharge. Ferguson was not fired in retaliation for filing a workers' compensation claim, he was terminated because he refused to submit to a drug test. Ferguson has not presented any evidence to show this reason was pretextual; therefore summary judgment was properly granted to SanMar, and Ferguson's assignment of error is overruled.

{¶37} Judgment affirmed.

BRESSLER, P.J., and YOUNG, J., concur.

[Cite as *Ferguson v. SanMar Corp.*, 2009-Ohio-4132.]