

ORIGINAL

IN THE OHIO SUPREME COURT

11-0621

KEITH LAWRENCE)
)
 Plaintiff-Appellant)
)
 vs.)
)
 CITY OF YOUNGSTOWN)
)
 Defendant-Appellee)

CASE NO. _____
 APPEAL FROM DECISION
 OF THE SEVENTH DISTRICT
 COURT OF APPEALS IN
 CASE NO. 09 MA 189

ON APPEAL FROM THE SEVENTH DISTRICT COURT OF APPEALS

NOTICE OF CERTIFIED CONFLICT

MARTIN S. HUME (0020422)
 MARTIN S. HUME CO., L.P.A.
 6 Federal Plaza Central, Suite 905
 Youngstown, OH 44504
 Telephone: (330) 746-8491
 Fax: (330) 746-8493
 Email: mhumel@ameritech.net

Attorney for Plaintiff-Appellant

NEIL D. SCHOR (0042228)
 HARRINGTON, HOPPE & MITCHELL, LTD.
 26 Market Street, Suite 1200
 Youngstown, Ohio 44503
 Telephone: (330) 744-1111
 Fax: (330) 744-2029

Attorney for Defendant-Appellee

Martin S. Hume Co., L.P.A.
 Law Offices

6 Central Square
 Suite 905
 Youngstown, Ohio 44503
 Phone: (330) 746-8491
 Fax: (330) 746-8493

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Now comes the Appellant, Keith Lawrence, through his attorney, and gives notice that on April 8, 2011, the Seventh District Court of Appeals issued a Journal Entry certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. A copy of the Journal Entry is attached hereto as Exhibit "A." The court certified a conflict between the decision of the Seventh District Court of Appeals in this case (Lawrence v. City of Youngstown (2011), Seventh District Court of Appeals Case No., 09 MA 189, 2011-Ohio-998, a copy of which is attached hereto as Exhibit "B," and the decisions of the Eleventh District Court of Appeals in the case of Mechling v. K-Mart Corp. (1989), 62 Ohio App. 3d 46, and the Sixth District Court of Appeals in the case of O'Rourke v. Collingwood Helath Care, Inc. (Apr. 15, 1988), 6th Dist. No. L-87-345. Copies of the Mechling and O'Rourke cases are attached hereto as Exhibits "C" and "D."

The issue certified by the Seventh District Court of Appeals is as follows:

R.C. 4123.90 requires the action to be filed within one hundred eighty days 'immediately following the discharge, demotion, reassignment, or punitive action taken' and requires the employer to receive written notice of the claimed violation within ninety days 'immediately following the discharge, demotion, reassignment, or punitive action taken.' Does the quoted portion of the statute mean the time limits begin to run on the effective date of the discharge or when considering R.C. 4123.95's directive for liberal construction does R.C. 4123.90 mean the time limits begin to run upon receiving notice of the discharge?

Martin S. Hume Co., L.P.A.
Law Offices

6 Central Square
Suite 905
Youngstown, Ohio 44503
Phone: (330) 746-8491
Fax: (330) 746-8493

Wherefore, Appellant respectfully requests the court to determine that a conflict exists and invoke its appellate jurisdiction to determine the legal issue certified by the Seventh District Court of Appeals.

Respectfully Submitted,



MARTIN S. HUME (0020422)
MARTIN S. HUME CO., L.P.A.
Attorney for Plaintiff-Appellant
6 Federal Plaza Central, Suite 905
Youngstown, Ohio 44503-1506
Telephone: 330-746-8491
Fax: 330-746-8493
E-mail: mhumel@ameritech.net

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Certified Conflict was served this 14th day of April, 2011 by regular U.S. mail upon Neil D Schor, Harrington, Hoppe, and Mitchell, Ltd., 26 Market Street, Ste. 1200, P.O. Box 6077, Youngstown, OH 44503, Attorney for Defendant-Appellee.



MARTIN S. HUME (0020422)
MARTIN S. HUME CO., L.P.A.
Attorney for Plaintiff-Appellant
6 Federal Plaza Central, Suite 905
Youngstown, Ohio 44503-1506
Telephone: 330-746-8491
Fax: 330-746-8493
E-mail: mhumel@ameritech.net

Martin S. Hume Co., L.P.A.
Law Offices

6 Central Square
Suite 905
Youngstown, Ohio 44503
Phone: (330) 746-8491
Fax: (330) 746-8493

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STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
)
 MAHONING COUNTY) SS: SEVENTH DISTRICT
)
 KEITH LAWRENCE,)
) CASE NO. 09 MA 189
 PLAINTIFF-APPELLANT,)
)
 VS.) JOURNAL ENTRY
)
 CITY OF YOUNGSTOWN,)
)
 DEFENDANT-APPELLEE.)

Pursuant to App.R. 25, on March 7, 2011, appellant Keith Lawrence timely moved this court to certify a conflict between its decision in *Lawrence v. City of Youngstown*, 7th Dist. No. 09MA189, 2011-Ohio-998, and the decisions of the Eighth and Sixth Appellate Districts respectively in *Mechling v. K-Mart Corp.* (1989), 62 Ohio App.3d 46 and *O'Rourke v. Collingwood Health Care, Inc.* (Apr. 15, 1988), 6th Dist. No. L-87-345. On March 16, 2011, appellee City of Youngstown filed a timely motion opposing the motion to certify.

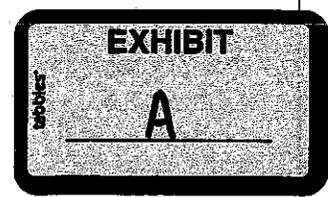
In *Lawrence*, under the second assignment of error, we were asked to determine whether the language of R.C. 4123.90 requiring the notice of intent to be sued to be received by the employer within ninety days of discharge meant that the time began to run on the effective date of discharge or if it began to run upon receiving notice of the discharge. The language of R.C. 4123.90 provides:

"The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken." R.C. 4123.90.



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Given the language, we held that the ninety day notice requirement began to run on the effective date of discharge. *Lawrence*, supra, at ¶5, 30. We explained:

“As to the ninety day notice requirement, the statute quoted above specifically states ‘ninety days immediately following the discharge, demotion, reassignment, or punitive action taken.’ This language clearly references the date of discharge, not notice of discharge. If the General Assembly had intended the time periods to begin to run upon notice of discharge, the statute could have easily been written to indicate as such. Accordingly, we find that the time limits begin to run on the effective date of discharge.

“That said, it is acknowledged that R.C. 4123.95 does state that R.C. 4123.02 to R.C. 4123.94 must be liberally construed in favor of employees and the dependents of deceased employees. However, to liberally construe this unambiguous statute to mean the notice of discharge, this court would have to add the words ‘notice of’ in front of the word discharge. As the Supreme Court has noted, ‘a court may not add words to an unambiguous statute, but must apply the statute as written.’ *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, ¶15.” *Id.* at ¶30-31.

In reaching our decision we recognized that there is a split among the appellate districts in this state as to when the ninety day notice time limit and the one hundred and eighty day filing requirement begins. *Id.* at ¶26. We cited both the *Mechling* and *O'Rourke* decisions as standing for the proposition that the language of R.C. 4123.90 has the time limits beginning upon notice of termination, not on the actual date of discharge.

Mechling dealt specifically with the 180 day filing requirement. The Eleventh Appellate District stated that it is unreasonable for the period of time for the filing of an action to begin without any notice to the individual. *Mechling*, supra, at 49. It specifically used R.C. 4123.95 and its directive of liberal construction to reach its decision.

Similarly, *O'Rourke* also dealt with the 180 day filing requirement. Admittedly the letter sent to O'Rourke made the effective date of termination three days after the letter was mailed. The City claims that the Eighth Appellate District indicated in *Butler v. Cleveland Christian Home*, 8th Dist. No. 86198, 2005-Ohio-4425, ¶7, that there is no

conflict with *O'Rourke* because if the statute of limitations commenced on the actual date of termination, *O'Rourke* filed within the time limits. The *O'Rourke* court, however, did not employ that reasoning, although it could have. Instead it relied on the notice aspect:

"Appellee cited *Berarducci v. Oscar Mayer Foods Corp.* (Aug. 17, 1984), Erié App. No. E-84-2, unreported, for the proposition that the statute of limitations began to run on March 28, 1986, the date of the letter of discharge. However, a major factual difference between *Berarducci* and the instant case exists. Mr. Berarducci was notified of his offer to retire early in person, at a meeting, rather than by a letter. Appellant in the instant case was notified by letter of her discharge. It is unlikely that she received the letter the same day it was mailed. Therefore, even assuming that appellant received the notification letter the day after its supposed mailing, i.e., March 29, 1986, September 25, 1986 would have been the one hundred eightieth day. The complaint, being filed September 25, 1986, was timely. Appellant was not barred by the one hundred eighty day statute of limitations." *O'Rourke*, 6th Dist. No. L-87-345.

As the City points out our statement in the opinion that there is a split among the districts, does not necessarily mean that there is a conflict that must be certified to the Ohio Supreme Court for resolution. Section 3(B)(4), Article IV of the Ohio Constitution gives the courts of appeals of this state the power to certify the record of a case to the Supreme Court of Ohio "[w]henever * * * a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other Court of Appeals." Before certifying a case to the Supreme Court of Ohio, an appellate court must satisfy three conditions: (1) the court must find that the asserted conflict is "upon the same question;" (2) the alleged conflict must be on a rule of law—not facts; (3) in its journal entry or opinion, the court must clearly set forth the rule of law that it contends is in conflict with the judgment on the same question by another district court of appeals. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596.

Even though our case deals specifically with the notice of intent to sue requirement and both *Mechling* and *O'Rourke* dealt with the filing requirement, both requirements are jurisdictional, *Lawrence*, supra, at ¶25, and all the decisions are

based upon the meaning of the language "immediately following the discharge, demotion, reassignment, or punitive action taken." Also at least as to *Mechling* and *Lawrence*, both opinions consider the impact of R.C. 4123.95's directive for liberal construction of the workers' compensation statutes. Thus, we find that there is an actual conflict "upon the same question."

Consequently, we certify the record in this case for review and final determination to the Ohio Supreme Court for the following issue:

"R.C. 4123.90 requires the action to be filed within one hundred eighty days 'immediately following the discharge, demotion, reassignment, or punitive action taken' and requires the employer to receive written notice of the claimed violation within ninety days 'immediately following the discharge, demotion, reassignment, or punitive action taken.' Does the quoted portion of the statute mean the time limits begin to run on the effective date of discharge or when considering R.C. 4123.95's directive for liberal construction does R.C. 4123.90 mean the time limits begin to run upon receiving notice of the discharge?"



JOSEPH J. VUKOVICH,



CHERYL WAITE,



MARY DeGENARO, JUDGES.

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 (Cite as: 2011 WL 773422 (Ohio App. 7 Dist.))

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Seventh District, Mahoning County.
Keith LAWRENCE, Plaintiff-Appellant,
 v.
 City of **YOUNGSTOWN**, Defendant-Appellee.

No. 09 MA 189.
 Decided Feb. 25, 2011.

Civil Appeal from Common Pleas Court, Case No.
 07CV2447.

Attorney Martin Hume, **Youngstown**, OH, for
 Plaintiff-Appellant.

Attorney Neil Schor, **Youngstown**, OH, for De-
 fendant-Appellee.

VUKOVICH, J.

* ¶ 1 Plaintiff-appellant **Keith Lawrence** ap-
 peals the decision of the Mahoning County Com-
 mon Pleas Court granting summary judgment to de-
 fendant-appellee **City of Youngstown**. Multiple ar-
 guments are presented in this appeal, however, the
 dispositive issues are raised in the second and sixth
 assignments of error.

¶ 2 The second assignment of error addresses
Lawrence's R.C. 4123.90 workers' compensation
 retaliation claim against **Youngstown**. **Lawrence**
 maintains that the magistrate incorrectly concluded
 that the court lacked jurisdiction over the retaliation
 claim because of a purported failure by appellant to
 abide by the notice requirement in R.C. 4123.90. In
 support of that position, he asserts that while he
 was required to give **Youngstown** written notice of
 the claims against it within ninety days of his dis-
 charge, the ninety day time limit did not begin to

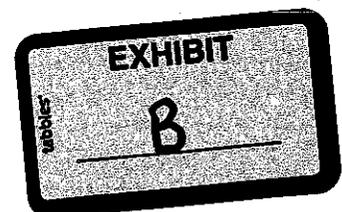
run until he received notice of the discharge. Since
 his notice of claims letter was received by **Young-**
stown within ninety days of when he allegedly re-
 ceived notice of his discharge, he argues that the
 court had jurisdiction over the claim.

¶ 3 **Youngstown**, on the other hand, argues
 that the ninety day time limit starts to run on the
 date of discharge. Accordingly, it asserts that since
 the notice of claims letter was received more than
 ninety days after the date of discharge, the trial
 court lacked jurisdiction over the retaliation claim
 and summary judgment was proper.

¶ 4 **Lawrence's** sixth assignment of error ad-
 dresses his racial discrimination claim against
Youngstown. He contends that the trial court incor-
 rectly determined that there were no genuine issues
 of material fact as to this claim. Specifically, he as-
 serts that there is a genuine issue of material fact as
 to whether he was qualified for the position and
 that he was treated differently than non-protected
 similarly situated employees.

¶ 5 After reviewing the arguments presented
 by each party, as to the Workers' Compensation Re-
 tialiation claim we find that R.C. 4123.90's ninety
 day notice requirement is jurisdictional. The statute
 as written requires written notice of the claims to be
 received within ninety days of the effective date of
 termination, not within ninety days of receiving no-
 tice of the termination. Accordingly, the ninety day
 time limit began on the date of termination. Thus,
 since **Lawrence's** notice of claims letter was not re-
 ceived within that period of time, the workers' com-
 pensation retaliation claim is barred by the time
 limits in R.C. 4123.90.

¶ 6 As to the racial discrimination claim, we
 find that **Lawrence** cannot establish a prima facie
 case of race discrimination. The employees he uses
 in an attempt to support his race discrimination
 claims were not similarly situated and/or were pro-
 tected employees. Thus, the evidence he presents



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does not show that he was treated differently than a non-protected similarly situated employee.

{¶ 7} Consequently, for those reasons and the ones elaborated below, the judgment of the trial court is hereby affirmed.

STATEMENT OF CASE

*2 {¶ 8} Lawrence is an African-American male who was hired by the Youngstown Street Department (YSD) as a seasonal worker in 1999 and 2000. His position was a laborer and, as such, he was required to operate power equipment and automobiles and have a valid Commercial Driver's License. In 2000, his employment changed from a seasonal worker to a full-time position. However, Lawrence was laid off in September 2002 when Youngstown conducted massive layoffs. From 1999 until his layoff, Lawrence made three separate claims for workers' compensation, he missed significant hours of work while being off on Injured on Duty status, utilized extensive sick hours during that time, and on one occasion was written up for violating Youngstown's reporting off policy.

{¶ 9} Lawrence was rehired by Youngstown in 2006 upon the request of former Councilman Gillam. Lawrence was required to execute an employment agreement that extended the typical ninety day probationary period to one year, provided that Lawrence's termination during that period could be with or without cause, and stated that Lawrence was to obtain a valid CDL within the first ninety days of his probationary period (Exhibit F to Youngstown's Motion for Summary Judgment-Employment Agreement). The Agreement also contained a waiver provision whereby Lawrence waived the right to sue Youngstown for terminating him during the probationary period.

{¶ 10} In September 2006, Youngstown hired a new Commissioner of Building and Grounds, Sean McKinney. McKinney was in charge of overseeing operations of YSD. Sometime in the winter, he reviewed all employees' driving records and discovered that Lawrence's Ohio driver's license was

suspended on December 10, 2006 for refusing to take a breath test for suspected driving under the influence. McKinney also discovered that Lawrence had failed to advise YSD of his license suspension. Lawrence was still under his one year probationary period when this occurred.

{¶ 11} Due to the license suspension, on January 7, 2007, Lawrence was suspended without pay. Two days later, McKinney advised Mayor Jay Williams and the City Law Director of his findings and recommended that Lawrence be terminated from his position with Youngstown. A letter dated that day was signed by Mayor Williams indicating that Lawrence's employment with Youngstown was terminated effective January 9, 2007.

{¶ 12} As a result of the above, on April 17, 2007, counsel for Lawrence sent a letter to Youngstown indicating that Lawrence intended to sue the city because his termination was racially discriminatory and constituted unlawful retaliation for filing workers' compensation claims. The complaint alleging workers' compensation retaliation (Count I) and racial discrimination (Count II) was filed July 6, 2007.

{¶ 13} Following discovery, Youngstown filed a motion for summary judgment arguing that the trial court lacked subject matter jurisdiction over the workers' compensation retaliation claim because Lawrence failed to comply with R.C. 4123.90 and that alternatively, Lawrence cannot create a genuine issue of material fact concerning the retaliation claim. As to the racial discrimination claim, Youngstown contended that Lawrence cannot create a genuine issue of material fact concerning the claim. As to both claims, it also argued that the employment agreement was a "Last Chance Agreement" and that the waiver provision in the Agreement relinquished Lawrence's right to sue over his termination. Also, Youngstown argued that Lawrence's claims are barred due to the doctrine of judicial estoppel because on Lawrence's bankruptcy petition and the Amended Schedule he did not note these claims.

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*3 ¶ 14} **Lawrence** filed a motion in opposition to the motion for summary judgment. He disputed all of **Youngstown's** arguments. The matter was heard by the magistrate.

¶ 15} On the workers' compensation retaliation claim, the magistrate decided that **Lawrence** had not complied with R.C. 4123.90 and thus, the court did not have subject matter jurisdiction. Additionally, it found that **Lawrence** could not establish a genuine issue of material fact on that claim. On the racial discrimination claim, the magistrate decided **Lawrence** could not establish a genuine issue of material fact on that claim. As to the arguments about the validity of the Agreement, waiver and judicial estoppel, the magistrate found that the Agreement was a "Last Chance" agreement and that the waiver provision in the Agreement barred the suit. It also found that judicial estoppel barred the suit. Consequently, it found that summary judgment was appropriate on Counts I and II of the complaint.

¶ 16} **Lawrence** filed timely objections to all the above findings made by the magistrate. **Youngstown** filed a response to those objections. The trial court overruled the objections and affirmed the magistrate's decision. However, it did not address all the reasons why the magistrate found that summary judgment was warranted for **Youngstown**, rather it stated:

¶ 17} "The Court finds that there are no genuine issues of material fact as to these claims under Counts I and II brought against **Youngstown** by **Keith Lawrence** and that reasonable minds can come to but one conclusion: that even construing the evidence in favor of **Lawrence**, **Youngstown** is entitled to judgment as a matter of law on these two remaining claims." 10/21/09 J.E.

¶ 18} **Lawrence** timely appeals the trial court's grant of summary judgment.

STANDARD OF REVIEW

¶ 19} An appellate court reviews a trial court's summary judgment decision de novo, applying the

same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, ¶ 5. A motion for summary judgment is properly granted if the court, upon viewing the evidence in a light most favorable to the party against whom the motion is made, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. Civ.R. 56(C); *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10. When a court considers a motion for summary judgment the facts must be taken in the light most favorable to the nonmoving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

¶ 20} With that standard in mind, we now turn to the arguments raised. However, for ease of discussion and due to the dispositive nature of some of the arguments presented, the assignments of error are addressed slightly out of order.

SECOND ASSIGNMENT OF ERROR

*4 ¶ 21} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE BASED UPON A FINDING THAT LAWRENCE FAILED TO TIMELY SUBMIT A 90 DAY NOTICE TO THE CITY OF YOUNGSTOWN THAT HE CLAIMED THE CITY VIOLATED OHIO REVISED CODE SECTION 4123.90."

¶ 22} R.C. 4123.90 states in pertinent part:

¶ 23} "No 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. Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted

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shall be limited to reinstatement with back pay, if the action is based upon discharge, or an award for wages lost if based upon demotion, reassignment, or punitive action taken, offset by earnings subsequent to discharge, demotion, reassignment, or punitive action taken, and payments received pursuant to section 4123.56 and Chapter 4141. of the Revised Code plus reasonable attorney fees. The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and *no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken.*" R.C. 4123.90. (Emphasis Added).

{¶ 24} Our focus in this assignment of error deals with the emphasized portion of the above statute. Specifically, we must determine when the discharge is effective. Is it the actual date of discharge or is it when the employee receives notice of the discharge?

{¶ 25} Courts have indicated that the ninety day notice requirement and one hundred eighty day filing requirement in R.C. 4123.90 are mandatory and jurisdictional. *Parham v. Jo-Ann Stores, Inc.*, 9th Dist. No. 24749, 2009-Ohio-5944, ¶ 17; *Gribbons v. Acor Orthopedic, Inc.*, 8th Dist. No. 84212, 2004-Ohio-5872, ¶ 17-18.

{¶ 26} There is a split among the districts as to when the ninety day time limit begins to run. The Sixth and Eleventh Appellate Districts have held that the date of notice of the termination is controlling for computing both the ninety day notice requirement and the one hundred eighty day filing requirement in R.C. 4123.90. *Mechling v. K-Mart Corp.* (1989), 62 Ohio App.3d 46, 48-49; *O'Rourke v. Collingwood Health Care, Inc.* (Apr. 15, 1988), 6th Dist. No. L-87-345. The Eleventh Appellate District explained that to find otherwise would be unreasonable and would be fundamentally unfair. *Mechling*, supra, at 48. In holding as such, it quoted

the Ohio Supreme Court for the proposition that formal rules of pleading and procedure are not applicable to workers' compensation proceedings and that an injured employee's claim should not be unjustly defeated by a mere technicality. *Id.* quoting *Toler v. Copeland Corp.* (1983), 5 Ohio St.3d 88, 91. *Mechling* also quoted *Toler* for its indication that that policy is consistent with the General Assembly's expressed intent in R.C. 4123.95 that R.C. Chapter 4123 should be liberally construed in favor of the claimant. *Id.*

*5 {¶ 27} Conversely, the Eighth, Ninth, and Tenth Appellate Districts have stated that the official date of termination, not the date the employee received notice of the termination, is the date the ninety day notice and one hundred eighty day filing requirements in R.C. 4123.90 commence. *Parham*, supra, at ¶ 19-21; *Butler v. Cleveland Christian Home*, 8th Dist. No. 86108; 2005-Ohio-4425, ¶ 8; *Gribbons*, supra, at ¶ 18; *Browning v. Navistar Internatl. Corp.* (July, 24, 1990), 10th Dist. No. 89AP-1081. The *Gribbons* court, when addressing the argument that R.C. 4123.90 should be liberally construed, stated:

{¶ 28} "The statute of limitations' provision contained in R.C. 4123.90 is not ambiguous; therefore, the liberal construction provision of R.C. 4123.95 has no application." *Gribbons*, supra, at ¶ 18.

{¶ 29} Furthermore, these districts, in coming to the conclusion that the ninety day notice requirement begins on the date of discharge, have also consistently stated that Ohio courts have refused to apply a discovery rule to R.C. 4123.90. *Parham*, supra, at ¶ 20-21 (discovery rule used in the sense that employee is to be aware of all facts by employer so that he or she is aware of cause of action under R.C. 4123.90); *Gribbons*, supra, at ¶ 17 (discovery rule used in sense that discovery is of the termination, not of a cause of action under R.C. 4123.90).

{¶ 30} Considering the language of the statute

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we embrace the approach taken by the Eighth, Ninth and Tenth Appellate Districts, rather than the approach taken by the Sixth and Eleventh Appellate Districts. As to the ninety day notice requirement, the statute quoted above specifically states "ninety days immediately following the discharge, demotion, reassignment, or punitive action taken." This language clearly references the date of discharge, not notice of discharge. If the General Assembly had intended the time periods to begin to run upon notice of discharge, the statute could have easily been written to indicate as such. Accordingly, we find that the time limits begin to run on the effective date of discharge.

{¶ 31} That said, it is acknowledged that R.C. 4123.95 does state that R.C. 4123.02 to R.C. 4123.94 must be liberally construed in favor of employees and the dependents of deceased employees. However, to liberally construe this unambiguous statute to mean the notice of discharge, this court would have to add the words "notice of" in front of the word discharge. As the Supreme Court has noted, "a court may not add words to an unambiguous statute, but must apply the statute as written." *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, ¶ 15.

{¶ 32} We acknowledge that our holding that the ninety day notice time begins to run on the date of discharge and not the date of notice of discharge might give employers the incentive to not notify the employee until after ninety days have passed. However, in the case before us, there is no clear allegation that Youngstown withheld the letter of termination for the purpose of preventing Lawrence from filing a suit. Even if we accept Lawrence's position that he did not receive notice of his termination until February 19, 2007, he had forty-nine days to get the notice of claims letter to the city. Furthermore, we note that the complaint was filed within the requisite one hundred eighty day time limit. Thus, any potential delay on the part of Youngstown did not prevent Lawrence from complying with the filing time limits. This is not a situ-

ation were it could be found that the employer intentionally withheld the notice of discharge from the employee in an attempt to protect itself from liability.

*6 {¶ 33} Consequently, we hold that the ninety day notice requirement of R.C. 4123.90 begins on the date of discharge. The termination letter dated January 9, 2007, clearly indicates that Lawrence's effective date of termination was January 9, 2007. See *Butler*, 8th Dist. No. 86108, 2005-Ohio-4425, at ¶ 8 (stating that the date on the discharge letter is the date of discharge). Therefore, as per the language of the statute, the notice of claims letter had to be received within ninety days of January 9, 2007. Or in other words, Youngstown had to receive it no later than April 9, 2007. Lawrence's notice of claims letter was received April 17, 2007 and, as such, was untimely. Accordingly, the trial court did not have jurisdiction over the workers' compensation retaliation claim and summary judgment was proper. This assignment of error lacks merit.

THIRD ASSIGNMENT OF ERROR

{¶ 34} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE BASED WHERE THERE WAS DIRECT EVIDENCE OF UNLAWFUL RETALIATION AGAINST LAWRENCE FOR FILING HIS WORKER'S COMPENSATION CLAIMS."

FOURTH ASSIGNMENT OF ERROR

{¶ 35} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE BASED UPON A FINDING THAT LAWRENCE FAILED TO ESTABLISH A PRIMA FACIE CASE OF UNLAWFUL RETALIATION AGAINST HIM FOR FILING WORKER'S COMPENSATION CLAIMS."

FIFTH ASSIGNMENT OF ERROR

{¶ 36} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FA-

VOR OF DEFENDANT-APPELLEE WHERE THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE REASON FOR DISCHARGE PROFFERED [SIC] BY THE CITY OF YOUNGSTOWN WAS PRETEXTUAL.”

{¶ 37} The third, fourth and fifth assignments of error address the merits of the workers' compensation retaliation claim. Due to our resolution of the second assignment of error, these assignments of error are moot and, as such, will not be addressed. App.R. 12(A)(1)(c).

SIXTH ASSIGNMENT OF ERROR

{¶ 38} “THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE BASED UPON A FINDING THAT LAWRENCE DID NOT ESTABLISH A PRIMA FACIE CASE OF RACIAL DISCRIMINATION.”

{¶ 39} In general, a prima facie case of racial discrimination requires a plaintiff to establish that he or she: (1) is a member of a protected class; (2) suffered an adverse employment action; (3) was qualified for the position either lost or not gained; and (4) either he was replaced by someone outside the protected class or a non-protected similarly situated person was treated better. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. See, also, *Farris v. Port Clinton School Dist.*, 6th Dist. No. OT-05-41, 2006-Ohio-1864, ¶ 50. The burden is on the employee to prove the prima facie case of racial discrimination. *McDonnell Douglas*, supra, at 802.

{¶ 40} It is undisputed that Lawrence meets the first two elements of the *McDonnell Douglas* test. He is an African American and that he was terminated.

*7 {¶ 41} The third element is qualification for the position. Youngstown offers evidence that he was not qualified for the position because his license was suspended. It also contends that his previous write-up for not properly reporting off is evidence that he did not perform his job satisfactorily.

ily. *Mastropietro Aff.* ¶ 8. Lawrence, on the other hand, attempted to present evidence that he was qualified for the position and that he performed his job satisfactorily. In his own affidavit attached to his motion in opposition to summary judgment, Lawrence references a letter of recommendation written from Jones, Superintendent of Streets, that Lawrence claims shows that he performed his duties satisfactorily. The letter shows that Jones was the General Foreman of the Street Department under former Mayor George McKelvey. In the letter, Jones states that Lawrence is highly recommended for a position as a laborer or maintenance worker, and that Lawrence learned new tasks quickly and was able to complete assignments without constant supervision. Lawrence also provided affidavits from other laborers that stated that Lawrence could have performed his duties as a laborer without driving. *Moody Aff.* ¶ 3; *Large Aff.* ¶ 3. Those affidavits referred to other employees who were not discharged when their licenses were suspended. *Moody Aff.* ¶ 4; *Large Aff.* ¶ 4.

{¶ 42} The above evidence creates a factual issue of whether Lawrence was qualified for the position when his license was suspended. While *Moody* and *Large* are not supervisors and are only laborers, their affidavits indicate that Lawrence could have performed the duties of a laborer without a driver's license. Those statements are the opinion of his fellow workers. The statements may be somewhat speculative because those employees are not in the position of authority to draw such a conclusion that an employee could still perform the work without a license. Although *Moody* and *Large's* testimony might not carry much weight, when viewed in the light most favorable to Lawrence, the statements do tend to show an issue as to whether he was qualified. Thus, it appears Lawrence presented enough evidence to survive summary judgment on the third element.

{¶ 43} That said, he fails to offer a genuine issue of material fact to survive the fourth element of the *McDonnell Douglas* test. Under the fourth ele-

ment, Lawrence makes two separate arguments as to how non-protected similarly situated persons were treated better.

{¶ 44} In his first argument he contends that non-protected similarly situated employees were only given a ninety day probationary period, not a year probationary period. Those employees were Boris, Cooling, and Rogers.

{¶ 45} As to Boris and Cooling, the magistrate explains in paragraph forty-nine of its opinion that they were new employees, not rehires. That factual conclusion is confirmed by Lawrence's testimony. Lawrence Depo. 95-96. The requirement of similarly situated requires the comparators to be similarly situated in all respects. *Mitchell v. Toledo Hosp.* (C.A.6, 1992), 964 F.2d 577, 583. Consequently, since they are new employees and he was a rehire, those employees were not similarly situated.

*8 {¶ 46} At this point, we note that Lawrence finds faults with Youngstown's position that it rehired him. He contends that he was a new employee. He cites the introduction of the employment agreement to support that position.

{¶ 47} The introduction to the Employment Agreement states that Lawrence has "no present entitlement to being * * * rehired by the City." Following that statement the Agreement states:

{¶ 48} "NOW, THEREFORE, the parties to this Agreement agree as follows:

{¶ 49} "I. Employer's Agreement

{¶ 50} "The Employer agrees to rehire and appoint Employee to the position of driver/laborer in the Street Department."

{¶ 51} Thus, although this agreement acknowledges that at the time of employment Lawrence was not entitled to rehire, Youngstown did agree to rehire him. Consequently, without any other evidence, Lawrence's claim that he was a new hire and

not a rehire fails by the clear language of the employment contract he signed. Thus, his argument that he was similarly situated to Boris and Cooling fails.

{¶ 52} However, as to Rogers, Lawrence was similarly situated. Rogers was rehired by Youngstown after having been previously laid off. Lawrence Depo. 25, 96. Upon his rehire, Rogers was not required to sign an agreement that subjected him to one year probation, rather he was subject to the ninety day probationary period. Lawrence Depo. 96. Thus, Lawrence was treated differently than Rogers by having to sign an extended probationary period.

{¶ 53} Despite the fact that he was similarly situated to Rogers, Lawrence cannot establish the fourth element of *McDonnell Douglas*. The fourth element requires evidence that a **non-protected** similarly situated person was treated better. Rogers is Hispanic. Lawrence Depo. 25. Thus, he is a protected employee and does not provide evidence of discrimination. *Santiago v. Tool & Die Systems, Inc.* (N.D. Ohio 2010), N.D. Ohio No. 1:09-CV-1224.

{¶ 54} Lawrence failed to offer evidence of any other employee who could qualify as similarly situated. Thus, for those reasons, Lawrence cannot show that the implementation of the extended probationary period was done on the basis of race.

{¶ 55} His second argument under the fourth element of the *McDonnell Douglas* test is that he was treated differently than other similarly situated employees who had their license's suspended. He was discharged, while they were not. Those employees were Cerimele, Carter, Cox and Shade. Moody Aff. ¶ 4; Large Aff. ¶ 4.

{¶ 56} The record reflects that all four of those workers had their licenses suspended and were not terminated because of that suspension. Carter, Cox and Shade were not under the probationary period, however, as to Cerimele the record indicates that

Lawrence does not know whether he was under the probationary period when his license was suspended. Lawrence Depo. 98-99, 102. Youngstown maintains he was not under a probationary period. As stated above, the requirement of similarly situated requires the comparators to be similarly situated in all respects. *Mitchell*, 964 F.2d at 583. Thus, to be similarly situated the other employee also had to be under the probationary period at the time that employee's license was suspended. Considering the evidence presented, we cannot find that those employees were similarly situated to Lawrence since there is no evidence that any of the mentioned employees were under the probationary period when their license was suspended.

*9 {¶ 57} However, even if we were to conclude that they were similarly situated, Lawrence still cannot establish the fourth element of the *McDonnell Douglas* test. Cerimele is Caucasian, while the others are African American. Lawrence Depo. 98-99; McKinney Affidavit ¶ 6. Lawrence cannot use Cerimele to show race discrimination when the other three employees who were African American were treated exactly the same as Cerimele, i.e. none of them were discharged based upon the suspension. The fact that other African Americans were treated the same as the Caucasian demonstrates that Lawrence's discharge was not based on his African American race.

{¶ 58} Consequently both of Lawrence's arguments under the fourth prong of *McDonnell Douglas* test fail and accordingly, he cannot show a prima facie case of race discrimination. This assignment of error lacks merit.

SEVENTH ASSIGNMENT OF ERROR

{¶ 59} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE BASED UPON A FINDING THAT THE PROFERRED [SIC] REASON FOR LAWRENCE'S DISCHARGE WAS NOT PRETEXTUAL."

{¶ 60} The arguments made in this assignment

of error only need to be addressed if we find that Lawrence established a prima facie case of race discrimination. In the sixth assignment of error we found that Lawrence failed to establish a prima facie case. Thus, this assignment of error is rendered moot, and will not be addressed. App.R. 12(A)(1)(c).

FIRST ASSIGNMENT OF ERROR

{¶ 61} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE BASED UPON A FINDING THAT LAWRENCE'S CLAIMS OF UNLAWFUL RETALIATION FOR FILING WORKER'S COMPENSATION CLAIMS AND RACIAL DISCRIMINATION WERE WAIVED."

{¶ 62} This assignment of error deals with the purported "Last Chance Agreement" Lawrence signed upon his rehire. The trial court determined the agreement validly waived his right to seek legal recourse for terminating him within the one year probationary period. As such, it determined that both the workers' compensation retaliation and racial discrimination claims were barred.

{¶ 63} Our resolution of the second and sixth assignments of error indicates that summary judgment was properly granted on both the workers' compensation retaliation and racial discrimination claims. Consequently, this assignment of error is rendered moot and will not be addressed. App.R. 12(A)(1)(c).

EIGHTH ASSIGNMENT OF ERROR

{¶ 64} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE BASED UPON A FINDING THAT LAWRENCE'S CLAIMS WERE BARRED BY THE DOCTRINE OF JUDICIAL ESTOPPEL."

{¶ 65} As one of its reasons for granting summary judgment, the magistrate determined that judicial estoppel barred both claims because Lawrence

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did not include the claims in his bankruptcy petition or in the amended schedules to the bankruptcy petition. Under this assignment of error, Lawrence argues that that determination is erroneous.

*10 {¶ 66} As explained under the first assignment of error, our resolution of the second and sixth assignments of error indicates that the grant of summary judgment on both claims was appropriate for other reasons. Thus, the arguments made under this assignment of error are moot and will not be addressed. App.R. 12(A)(1)(c).

CONCLUSION

{¶ 67} For the reasons expressed above, summary judgment was correctly granted on both the workers' compensation retaliation and racial discrimination claims. The trial court lacked jurisdiction over the retaliation claim because Lawrence did not comply with R.C. 4123.90's ninety day notice requirement. Lawrence failed to establish a prima facie case of race discrimination. Accordingly, the second and sixth assignments of error lack merit. All other assignments of error are rendered moot.

{¶ 68} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

WAITE, P.J., and DeGENARO, J., concur.

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(Cite as: 62 Ohio App.3d 46, 574 N.E.2d 557)

▷

Court of Appeals of Ohio, Eleventh District, Trumbull County.
MECHLING, n.k.a. Edenfield, Appellee,
v.
K-MART CORPORATION, Appellant.

No. 3988.
Decided March 6, 1989.

Former employee brought action alleging wrongful discharge for filing a workers' compensation claim. The Court of Common Pleas, Trumbull County, entered judgment for former employee and appeal was taken. The Court of Appeals, Randall L. Basinger, J., sitting by assignment, held that: (1) limitations period for filing action began on date former employee received notice of discharge, rather than date appearing on discharge notice, and (2) reinstatement of benefits could be ordered, even though not specifically provided for in applicable statute.

Affirmed.

Parrino, J., dissented with opinion.

West Headnotes

[1] Limitation of Actions 241 ⚡46(7)

241 Limitation of Actions

241III Computation of Period of Limitation

241III(A) Accrual of Right of Action or Defense

241k46 Contracts in General

241k46(7) k. Contract of Employment.

Most Cited Cases

Period for filing claim of wrongful discharge based on taking of workers' compensation claim began to run from date that worker received notice of discharge, rather than date appearing on notice. R.C. § 4123.90.

[2] ⚡863(2)

231H Labor and Employment

231HVIII Adverse Employment Action

231HVIII(B) Actions

231Hk859 Evidence

231Hk863 Weight and Sufficiency

231Hk863(2) k. Exercise of Rights or Duties; Retaliation. Most Cited Cases (Formerly 255k40(4) Master and Servant)

Evidence, although conflicting, supported trial court's decision that employee had been discharged for filing workers' compensation claim. R.C. § 4123.90.

[3] ⚡866

231H Labor and Employment

231HVIII Adverse Employment Action

231HVIII(B) Actions

231Hk864 Monetary Relief; Damages

231Hk866 k. Grounds and Subjects.

Most Cited Cases

(Formerly 255k41(1) Master and Servant)

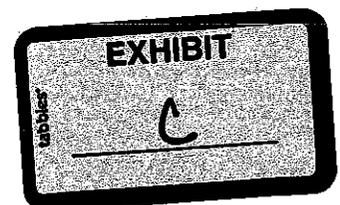
Employee who had been discharged for filing of workers' compensation claim was entitled to reinstatement of benefits, even though that remedy was not specifically mentioned in statute setting forth remedies for wrongful discharge. R.C. § 4123.90.

**557 *46 W. Leo Keating, Warren, for appellee.

Julianne Piston and Timm H. Judson, Cleveland, for appellant.

*47 RANDALL L. BASINGER, Judge.

Appellee, Diane Mechling, was hired by appellant, K-Mart Corporation, on August 24, 1982. On June 18, 1983, appellee sustained an injury during the course of and arising out of her employment. She was treated by Dr. Novosel, her family physician, and was instructed to discontinue work for one week.



On June 28, 1983, appellee filed a workers' compensation claim. Appellant certified that claim and has continued to pay to appellee temporary total compensation.

On July 2 and July 5, 1983, appellee visited Dr. Novosel's office. He indicated she should remain off work until July 10 and could return to work July 11, 1983. On July 8, appellee was treated by Dr. Pannozzo and filed a request to change physicians from Novosel to Pannozzo.

On July 14, 1983, appellee received treatment from Dr. James, retained by appellant to conduct pre-employment and return-to-work examinations for industrial injuries. Based upon the results of the examination, Dr. James extended appellee's disability to July 18, 1983. Based upon subsequent examinations, Dr. James, who was appellee's doctor of record, extended disability through August 15, 1983. On August 12, 1983, Dr. James examined appellee and reiterated that she could return to work on August 15.

Appellee returned to work on the 15th, but after experiencing back spasms, she attempted to schedule an appointment with Dr. James. The doctor refused to schedule the appointment, noting appellee would experience some discomfort.

Appellee continued to work, and on August 19, 1983, she discussed her injury with the personnel manager. Appellee was reassigned to work in a different division at the facility.

On August 29, 1983, appellee returned to her original duties. On September 2, 1983, after being unable to schedule an appointment**558 with Dr. James, appellee again visited Dr. Novosel for her injury. Following that examination, the doctor took appellee off work until September 19. Appellee presented the note from Dr. Novosel to appellant. Appellee was informed that the notification was not acceptable because Dr. Novosel was not the doctor of record and because the note contained no specific diagnosis. Appellee was also advised that any ab-

sence from work would be considered personal time.

Based upon the examination by Dr. Novosel, appellee was absent from work on September 6, 7, and 8. She did not call in and report off pursuant to the company handbook. On the following day, appellant drafted a separation agreement, dating it September 9, 1983.

*48 On March 9, 1984, one hundred and eighty-two days after September 9, 1983, appellee filed a complaint alleging she had been discharged for filing a workers' compensation claim in violation of R.C. 4123.90.

Appellant filed a motion for summary judgment based upon the untimeliness of the complaint. The court denied that motion.

On September 21, 1987, a bench trial took place and judgment was entered for appellee on October 21, 1987. The court concluded appellee had been wrongfully discharged and ordered her reinstated with all rights, privileges and benefits lost since her discharge, excluding back wages. Appellant appealed that decision based upon the following assignments of error:

"1. The trial court erred in overruling defendant-appellant's motion for summary judgment.

* "2. The trial court's findings that K-Mart's discharge of plaintiff-appellee violated R.C. 4123.90 is against the manifest weight of the evidence.

"3. The trial court erred in reinstating the plaintiff-appellee certain employee benefits."

[1] In its first assignment, appellant argues that this cause is time barred. Appellant suggests that the time to file began to run on September 9, 1983, and that March 9, 1984, the date the complaint was filed, was one hundred and eighty-two days after the termination.

R.C. 4123.90 provides in part:

“ * * * Such action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken.”

Appellant argues that the actual date of discharge and not the date of notice is controlling. The appellee was not notified of her discharge until September 19, 1983, when she returned to work. As a matter of fundamental fairness, it would seem unreasonable for the period of time for the filing of an action to begin without any notice to the individual.

The Ohio Supreme Court in *Toler v. Copeland Corp.* (1983), 5 Ohio St.3d 88, at 91, 5 OBR.140, at 143, 448 N.E.2d 1386, at 1389, stated:

“This court has previously expressed the view that formal rules of pleading and procedure are not applicable to workers' compensation proceedings. *W.S. Tyler Co. v. Rebic* (1928), 118 Ohio St. 522 [161 N.E. 790]; *Kaiser v. Indus. Comm.* (1940), 136 Ohio St. 440, 444 [17 O.O. 22, 24, 26 N.E.2d 449, 452]. An *49 injured employee's claim should not be unjustly defeated by a mere technicality. *Roma v. Indus. Comm.* (1918), 97 Ohio St. 247 [119 N.E. 461]. This policy is consistent with the General Assembly's express intent that R.C. Chapter 4123 be liberally construed in favor of the claimant.”

For similar reasons, we find it inappropriate to apply technical standards to defeat appellee's claim in the case *sub judice*.

In the within case, ten days elapsed from the date of termination to the time of notice to the appellee. The filing of the claim in this case would be precluded if appellee were charged with the running of the statute**559 for that period. We feel such a result is not the intent of the statute nor is it fundamentally fair. We therefore hold that the one hun-

dred eighty day time period begins on September 19, 1983. The complaint filed by appellee on March 9, 1984, therefore, falls within the statutory one hundred eighty day limitation.

Appellant's first assignment of error is not well-taken and is hereby overruled.

[2] Appellant next argues that the decision is against the manifest weight of the evidence. The standard for reversal by an appellate court is noted in *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus, where the Ohio Supreme Court held:

“Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.”

Appellee offered testimony that she was discharged for filing a claim. While contradictory testimony was offered by appellant, the weight to be given all the testimony is a decision for the trier of fact.

We will not substitute our opinion for that of the trier of fact who was in a better position to weigh the credibility of the witnesses and to make a determination in this case. The trial court's decision was supported by competent, credible evidence and must be upheld. As such, it is not against the manifest weight of the evidence.

Appellant's second assignment of error is without merit and is hereby overruled.

[3] In the third assignment of error, appellant suggests that the trial court incorrectly ordered reinstatement of benefits. This argument assumes that the employee was wrongfully discharged and the claim timely filed, both positions adopted by this court.

R.C. 4123.90 provides in relevant part:

*50 " * * * Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted shall be limited to reinstatement with back pay, if the action is based upon discharge, or an award for wages lost if based upon demotion, reassignment, or punitive action taken * * *."

The statute is silent as to reinstatement of benefits. However, one may infer that the intent of the legislation is to return the employee to the same position as he would have been had he not been discharged. It would be unreasonable for an employer to benefit from the wrongful discharge of an employee.

The trial court ordered reinstatement with all rights, privileges and benefits lost since discharge, excluding back wages. No prohibition exists precluding such an order under the statute. On the contrary, it would seem that such an order would be appropriate. The arguments of appellant are therefore without merit.

Appellant's third assignment is not well-taken.

Judgment affirmed.

STILLMAN, P.J., concurs.

PARRINO, J., dissents.

RANDALL L. BASINGER, of the Court of Common Pleas of Putnam County, sitting by assignment.

SAUL G. STILLMAN, P.J., retired, of the Eighth Appellate District, sitting by assignment.

THOMAS J. PARRINO, J., retired, of the Eighth Appellate District, sitting by assignment.

THOMAS J. PARRINO, Judge, dissenting.

Since I disagree with the majority's resolution of appellant's first assignment of error and with their affirmance of the trial court's judgment, I must respectfully dissent.

Appellee brought this action against appellant claiming she was wrongfully discharged from her job. The action was brought pursuant to the relief

prescribed in R.C. 4123.90. It is clear that appellee's **560 complaint was filed one hundred eighty-two days after she was discharged from her job. R.C. 4123.90, however, specifically provides that a party seeking relief under this statute must file a complaint in the court of common pleas within one hundred *51 eighty days immediately following an unlawful discharge. The time limitation within which such an action must be brought is clear and unambiguous.

The majority opinion holds that the time bar provision of this statute did not commence on the date that appellee was discharged but rather commenced on the date that she first learned she was discharged. In so doing, the majority seeks to apply a judicially created discovery rule. I cannot agree with this conclusion.

Three appellate courts of this state have declined to apply a discovery rule when construing the time bar limitations contained in R.C. 4123.90. *Griffith v. Allen Trailer Sales* (Oct. 18, 1984), Lorain App. No. 3630, unreported, 1984 WL 3986; *Guy v. Lykins* (Nov. 27, 1985), Belmont App. No. B-22, unreported, 1985 WL 3965; *Jackson v. Central Ohio Transit Authority* (Oct. 9, 1986), Franklin App. No. 86AP-459, unreported, 1986 WL 11298. I find the reasoning in these cases to be persuasive.

Accordingly, I would sustain appellant's first assignment of error and find that the trial court should have granted appellant's motion for summary judgment because the limitation period recited in R.C. 4123.90 had already expired when appellee filed her complaint. Therefore, I would reverse the judgment of the trial court and enter judgment for appellant.

Ohio App., 1989.

Mechling v. K-Mart Corp.

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Not Reported in N.E.2d, 1988 WL 37587 (Ohio App. 6 Dist.)
 (Cite as: 1988 WL 37587 (Ohio App. 6 Dist.))

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Lucas
 County.

Maryann O'ROURKE, Appellant,

v.

COLLINGWOOD HEALTH CARE, INC. dba
 Mark's Nursing Home, Appellee.

No. L-87-345.
 April 15, 1988.

Appeal From Lucas County Common Pleas Court
 No. CV 86-2922.

DECISION AND JOURNAL ENTRY

*1 This cause is before the court on appeal from a judgment of the Lucas County Common Pleas Court wherein that court granted defendant-appellee Collingwood Health Care, Inc.'s motion for summary judgment and dismissed plaintiff-appellant, Maryann O'Rourke's complaint with prejudice.

Appellant filed a timely notice of appeal and asserts the following as her sole assignment of error:

"I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, BY FINDING THAT PLAINTIFF'S DISCHARGE WAS NOT A VIOLATION OF O.R.C. SECTION 4123.90."

Appellant was an employee of appellee since February 1, 1980. On February 9, 1986, appellant suffered acute lumbar strain when assisting a patient in the course of her employment. Appellant filed an application for and was awarded workers'

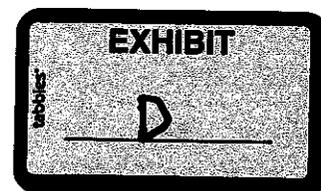
compensation medical benefits for her injury. Appellee fully certified the validity of appellant's claim on her application. In early March, appellant requested additional time off and was instructed by appellee to obtain medical leave of absence in accordance with the collective bargaining agreement and company policy. The collective bargaining agreement provided, in pertinent part:

" * * * Leave of Absence for illness upon satisfactory proof of illness by means of a Doctor's Certificate shall be granted for a period of up to one year or a period of time equivalent to the employees [sic] seniority, whichever is less. When a leave of absence is [sic] due to illness extends beyond thirty (30) days, the employee will renew the leave of absence every thirty (30) days by submitting a Doctor's certificate proving the on-going illness for each succeeding thirty (30) day period."

Company policy, promulgated and posted since October 1984, stated:

"Leave of absence for illness upon satisfactory proof of illness by means of a medical doctor's or doctor of osteopathic medicine's certificate shall be granted for a period of up to one (1) year or a period of time equivalent to the employees [sic] seniority, whichever is less. When a leave of absence due to illness extends beyond thirty (30) days, the employee will renew the leave of absence every thirty (30) days by submitting a medical doctor's or doctor of osteopathic medicine's certificate proving an ongoing illness for each succeeding thirty (30) day period."

Appellant informed appellee that the chiropractor who was treating her recommended that she remain at home until March 31. Appellee repeatedly advised appellant that the certification of a chiropractor did not comply with the leave of absence policy requirements of a medical doctor or osteopathic physician's certification. Appellant never obtained the approval of a medical doctor or os-



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teopathic doctor. Due to this failure to comply with the leave of absence policy, appellee sent a letter dated March 28, 1986 to appellant, notifying her that she was discharged, effective April 1, 1986. Appellant filed a complaint September 25, 1986, alleging that appellee had wrongfully discharged her in retaliation for her filing for workers' compensation benefits, in violation of R.C. 4123.90.

Initially, we will address appellee's contention that appellant's claim is barred by the statute of limitations. R.C. 4123.90 provides in pertinent part that an employee's action against an employer for wrongful discharge or other punitive action taken because the employee filed a claim under the workers' compensation act:

*2 " * * * shall be forever barred unless filed within one hundred eighty days immediately following such discharge, demotion, reassignment, or punitive action taken * * * "

Appellee cites *Berarducci v. Oscar Mayer Foods Corp.* (Aug. 17, 1984), Erie App. No. E-84-2, unreported, for the proposition that the statute of limitations began to run on March 28, 1986, the date of the letter of discharge. However, a major factual difference between *Berarducci* and the instant case exists. Mr. Berarducci was notified of his offer to retire early in person, at a meeting, rather than by a letter. Appellant in the instant case was notified by letter of her discharge. It is unlikely that she received the letter the same day it was mailed. Therefore, even assuming that appellant received the notification letter the day after its supposed mailing, *i.e.*, March 29, 1986, September 25, 1986 would have been the one hundred eightieth day. The complaint, being filed September 25, 1986, was timely. Appellant was not barred by the one hundred eighty day statute of limitations.

Turning to appellant's assignment of error, appellant contends that the trial court erred in granting summary judgment. In order for a trial court to grant summary judgment, it must find:

" * * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

Appellant alleges that appellee violated R.C. 4123.90 by discharging her because she filed a claim for workers' compensation benefits due to a work-related injury. As previously stated, appellee maintained that appellant was discharged because she failed to comply with company policy by obtaining a medical leave recommendation from a medical doctor or osteopathic physician.

In essence, appellant claims that because she filed for workers' compensation benefits and because under R.C. 4123.651(A) she has " * * * free choice to select such licensed physician as [s]he may desire to have serve [her] * * * ", which includes having a chiropractor serve her, R.C. 4734.09, it is impermissible for appellee to require her to present the certificate of a medical doctor or doctor of osteopathic medicine to obtain a leave of absence. We disagree.

Medical leaves of absence and workers' compensation are not synonymous and do not necessarily occur simultaneously. Medical leaves of absence may be granted for non-work related injuries as well as for work-related compensable injuries. Appellee has a right to promulgate and adopt company policies and may specifically require the certificate of a medical or osteopathic doctor in its policy regarding medical leaves of absence. This policy does not strictly apply to work-related injuries but applies to all employees irrespective of whether they have applied for workers' compensation benefits. Appellant could have avoided the discharge by simply complying with the policy. Thus, since this discharge was pursuant to the company's medical leave of absence policy and not due to appellant ap-

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plying for workers' compensation benefits, it was not a retaliatory discharge in violation of R.C. 4123.90. See *Vince v. Parma Community General Hospital* (Jan. 21, 1988), Cuyahoga App. No. 53180, unreported, citing *Wilson v. Riverside Hospital* (1985), 18 Ohio St.3d 8, 11 (Holmes, J., dissenting) and other cases cited therein.

Therefore, viewing the evidence in a light most favorable to appellant, summary judgment was appropriately granted.

*3 Accordingly, appellant's sole assignment of error is found not well-taken.

On consideration whereof, the court finds substantial justice has been done the party complaining, and judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp.R. 4, amended 1/1/80.

RESNICK, P.J., and CONNORS and HAND-
WORK, JJ., concur.

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