

[Cite as *Bailey v. Beasley*, 2010-Ohio-1146.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Edwin David Bailey, | : | |
| | : | |
| Plaintiff-Appellant, | : | |
| | : | No. 09AP-682 |
| v. | : | (C.P.C. No. 08CVH-12-18171) |
| | : | |
| James Beasley, Director, | : | (ACCELERATED CALENDAR) |
| Ohio Department of Transportation, | : | |
| | : | |
| Defendants-Appellees. | : | |
| | : | |

D E C I S I O N

Rendered on March 23, 2010

Edwin David Bailey, pro se.

Richard Cordray, Attorney General, *Mahjabeen F. Qadir*,
and *Jack W. Decker*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, Edwin David Bailey ("Bailey"), appeals the Franklin County Court of Common Pleas' entry of summary judgment in favor of defendants-appellees, Ohio Department of Transportation ("ODOT") and its Director, James Beasley (collectively, "appellees"), on Bailey's complaint for breach of contract. Also

before the court are Bailey's motion for a preliminary injunction and appellees' motion to dismiss this appeal.

{¶2} Bailey was employed by ODOT as a highway maintenance worker from 1980 to 1999, during which time he was disciplined on multiple occasions. On April 23, 1998, Bailey's union, the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO ("OCSEA"), and ODOT settled grievances concerning all outstanding discipline against Bailey. The settlement included a last chance agreement, pursuant to which Bailey was ultimately terminated from his employment in July 1998. Bailey filed a grievance regarding his termination. The grievance was scheduled for arbitration in accordance with the collective bargaining agreement ("CBA") between OCSEA and the state of Ohio. On September 23, 1999, ODOT, OCSEA, and Bailey executed a Grievance Settlement Agreement ("GSA"). The GSA called for ODOT to pay Bailey \$17,000 to settle his grievance and in exchange for Bailey dropping criminal charges against ODOT employee Matt Long. Bailey was also permitted to resign from his employment, effective September 23, 1999, and to have the time since his termination treated as administrative leave without pay.

{¶3} Despite executing the GSA in September 1999, Bailey has subsequently pursued myriad avenues for additional relief relating to the termination of his employment. After executing the GSA, but prior to filing this action, Bailey filed an unfair labor practice charge with the State Employment Relations Board ("SERB"), alleging that OCSEA failed to represent him fairly in the grievance process. Bailey's SERB charge was dismissed. Bailey also filed two applications to vacate the GSA in

the Cuyahoga County Court of Common Pleas, an application to vacate the GSA in the Franklin County Court of Common Pleas, and appeals in both the Eighth District Court of Appeals and this court. The Eighth District Court of Appeals ultimately determined, pursuant to R.C. 5501.22, that an application to vacate the GSA must be filed in Franklin County and that the Cuyahoga County Court of Common Pleas therefore lacked jurisdiction over Bailey's application. The Franklin County Court of Common Pleas dismissed Bailey's subsequent application to vacate the GSA as untimely, and this court affirmed. See *Bailey v. Ohio State Dept. of Transp.*, 10th Dist. No. 07AP-849, 2008-Ohio-1513.

{¶4} On March 28, 2005, Bailey and his wife filed a voluntary Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the Northern District of Ohio. See *In re Bailey* (Bankr.N.D. Ohio 2009), 421 B.R. 841. The Baileys listed a claim against ODOT in their Schedule B as a contingent and unliquidated claim.

{¶5} On December 22, 2008, Bailey initiated this action by filing a three-paragraph, pro se complaint for breach of contract against ODOT.¹ Bailey alleged that ODOT breached the CBA on July 31, 1998, when it terminated his employment without just cause, and, as a result, he requested reinstatement, full back pay with uninterrupted seniority, and all benefits. The complaint identifies R.C. 2305.06 and 4117.09(B)(1) and the Due Process Clauses of the United States and Ohio Constitutions as the bases for this action.

¹ Although the case caption identifies "James Beasley, Director," as a defendant, the allegations in Bailey's complaint refer only to ODOT.

{¶6} ODOT moved for summary judgment on February 10, 2009, arguing that the trial court lacked jurisdiction because Bailey's claim was subject solely to binding arbitration under the CBA and R.C. 4117.10(A). ODOT also argued that Bailey's execution of the GSA barred his contract claim and that Bailey's complaint did not state a due process claim upon which relief could be granted. The trial court granted ODOT's motion for summary judgment on June 11, 2009, and entered final judgment on July 14, 2009. The court concluded, pursuant to R.C. 4117.10(A) and *State ex rel. Wilkinson v. Reed*, 99 Ohio St.3d 106, 2003-Ohio-2506, that it lacked jurisdiction over Bailey's claims.

{¶7} In this timely appeal, Bailey raises the following assignments of error:

1. The trial court erred by granting summary judgment to [appellees] by claiming [the] court lacked jurisdiction over R.C. 4117 common law breach of contract.
2. The trial court erred when [it] granted summary judgment to [appellees] and deprived [Bailey] due process under the 14th U.S. Amendment and Article 1, Section 16 of the Ohio Constitution by failing to hear his case.

{¶8} Before turning to Bailey's assignments of error, we briefly address appellees' January 28, 2010 motion to dismiss this appeal for lack of standing, based on a Settlement Agreement and Release ("Settlement Agreement") between ODOT and the Trustee in Bailey's bankruptcy proceeding.

{¶9} On December 10, 2009, the bankruptcy court issued an order granting the Trustee authority to settle all of Bailey's pre-petition claims against the state of Ohio and ODOT. In January 2010, the Trustee and ODOT executed the Settlement Agreement. Pursuant to the Settlement Agreement, in exchange for a payment of \$17,000 by

ODOT, the Trustee waived, released, and discharged the state of Ohio, ODOT, and its officers, agents, and employees from any and all of the Baileys' claims and causes of action arising prior to the bankruptcy petition, including all claims brought or that could have been brought in connection with Bailey's termination, the settlement of his grievance, and this appeal. The Settlement Agreement expressly addresses this appeal and states that it "represents the entire and only settlement agreement between the parties" resolving this appeal.

{¶10} Although appellees maintain that the Settlement Agreement bars the maintenance of this appeal, they also note that the Settlement Agreement contains a contingency clause, stating that the release contained therein is void if the bankruptcy court's order authorizing settlement is vacated or modified on appeal. The parties agree that an appeal regarding the order authorizing settlement is currently pending. Accordingly, the possibility remains that the release, which would ostensibly bar this appeal, may be rendered void. Appellees suggest that this court may independently conclude that Bailey lacks standing to maintain this appeal or may simply affirm the trial court's judgment on the merits by concluding that the trial court lacked jurisdiction over Bailey's claims.

{¶11} The question of standing is not jurisdictional in this context. *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275, fn. 4. Rather, standing is "jurisdictional only in limited cases involving administrative appeals, where parties must meet strict standing requirements in order to satisfy the threshold requirement for the administrative tribunal to obtain jurisdiction." *Id.* While we recognize a question

regarding Bailey's ongoing standing to maintain this appeal, lack of standing does not challenge the subject-matter jurisdiction of the court. *Id.* at 77. Because the validity of the Settlement Agreement remains unresolved in the pending bankruptcy appeal, and because we find that the trial court lacked jurisdiction over Bailey's claims, we deny appellees' motion to dismiss. Instead, we address Bailey's appeal on the merits and ultimately affirm the trial court's entry of summary judgment. See *Miller v. Keybank Natl. Assn.*, 8th Dist. No. 86327, 2006-Ohio-1725, ¶20 (declining to address question of standing as "not the pivotal issue" where the asserted claims otherwise failed on the merits).

{¶12} In his first assignment of error, Bailey contends that the trial court erred by granting summary judgment in favor of appellees based on lack of subject-matter jurisdiction. We review a summary judgment *de novo*. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d

356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶13} Bailey expressly premises his complaint on R.C. 4117.09(B)(1).² Generally, "R.C. Chapter 4117 sets forth the rights and obligations of public employers, public employees, and public employee organizations insofar as they engage in collective bargaining." *Dayton v. Fraternal Order of Police* (June 2, 2000), 2d Dist. No. 18158. Under Chapter 4117, collective bargaining agreements must provide for "a grievance procedure which may culminate with final and binding arbitration of unresolved grievances." R.C. 4117.09(B)(1). It is undisputed that the CBA at issue here established a five-step grievance procedure culminating in final and binding arbitration, as authorized by that section. R.C. 4117.09(B)(1) goes on to state that "[a] party to the [collective bargaining] agreement may bring suits for violation of agreements or the enforcement of an award by an arbitrator in the court of common pleas of any county wherein a party resides or transacts business." Nevertheless, if the collective bargaining agreement "provides for final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure." R.C. 4117.10(A).

{¶14} The Supreme Court of Ohio has addressed the interplay between R.C. 4117.09(B)(1), 4117.10(A), and the common pleas court's jurisdiction over claims involving a collective bargaining agreement between a public employer and a union.

² Although Bailey's complaint also cites R.C. 2305.06, that statute merely establishes a 15-year statute of limitations for contract claims.

See *Reed* at ¶¶19-20. In *Reed*, the Ohio Department of Rehabilitation and Correction ("ODRC") and other relators filed an action in the Supreme Court of Ohio for a writ of prohibition to prevent the Allen County Court of Common Pleas from exercising jurisdiction over an action for injunctive relief filed by OCSEA, which represented correction officers employed by ODRC. In its complaint for injunctive relief in the court of common pleas, OCSEA alleged that ODRC refused to bargain with the union over its announced plan to close a state prison, reassign bargaining-unit work, relocate bargaining-unit work, and lay off bargaining-unit employees, in violation of R.C. 4117.09(B)(1), 4117.11(C), and the collective bargaining agreement between OCSEA and the state of Ohio. OCSEA requested an order prohibiting ODRC from closing the prison " 'until good faith bargaining on that subject * * * resulted in an agreement or ultimate good faith impasse.' " *Reed* at ¶5. Although OCSEA filed a grievance before filing its complaint in the court of common pleas, ODRC denied the grievance, and OCSEA did not proceed with the next step in the grievance procedure. The common pleas court granted a temporary restraining order, after which the relators filed their action for a writ of prohibition.

{¶15} The Supreme Court concluded that the common pleas court "patently and unambiguously lack[ed] jurisdiction" over OCSEA's claim for injunctive relief. *Id.* at ¶30. The Supreme Court rejected R.C. 4117.09(B)(1) as the source of jurisdiction over OCSEA's claim, citing the Eighth District Court of Appeals' holding that R.C. 4117.09(B)(1) " 'does not provide a right to an original action in the court of common pleas.' " *Id.* at ¶19, quoting *Johnson v. Ohio Council Eight* (2001), 146 Ohio App.3d

348, 352. Based on R.C. 4117.10(A), the Supreme Court held that, "[i]nsofar as the union claims that relators' actions violated the collective bargaining agreement, binding arbitration is its exclusive remedy," and the trial court lacked jurisdiction to consider OCSEA's claim. *Reed* at ¶20-21.

{¶16} Like OCSEA in *Reed*, and despite the Supreme Court's holding in that case, Bailey argues that the trial court has jurisdiction over his claim pursuant to R.C. 4117.09(B)(1)'s language that "[a] party to [a collective bargaining] agreement may bring suits for violation of agreements or the enforcement of an award by an arbitrator in the court of common pleas." This court has rejected reliance on that language, however, to sidestep final and binding arbitration required by a collective bargaining agreement. See *Albright v. Jackson* (May 15, 1990), 10th Dist. No. 89AP-1215 (holding that R.C. 4117.10 controls over R.C. 4117.09 and requires binding arbitration as the sole remedy where a collective bargaining agreement grievance procedure culminates with final and binding arbitration). Accordingly, we reject Bailey's argument that R.C. 4117.09(B)(1) invests the trial court with subject-matter jurisdiction over his claim for violations of the CBA.

{¶17} Bailey also argues that *Reed* is distinguishable from this case because *Reed* did not involve a claim for breach of a settlement agreement, but we reject Bailey's attempt to avoid the impact of the Supreme Court's holding. To distinguish *Reed*, Bailey argues that his complaint stated a claim for violation of the GSA, based on ODOT's withholding of payment due Bailey, rather than a claim for a violation of the CBA.

{¶18} Bailey's argument fails for two reasons. First, his complaint does not allege a violation of the GSA. Rather, the complaint, which does not even mention the GSA, sets forth a claim that appellees violated the CBA on July 31, 1998, long before the GSA existed. Nothing in either Bailey's complaint or his arguments in the trial court would have put appellees on notice that he was pursuing a claim for breach of the GSA. See *Gammon v. Hinkle*, 6th Dist. No. L-03-1210, 2004-Ohio-473, ¶9-12. Where an issue was not briefed and argued in the trial court, the issue is waived for purposes of appeal. *Thompson v. Preferred Risk Mut. Ins. Co.* (1987), 32 Ohio St.3d 340, 342. Consequently, Bailey has waived any claim for a purported violation of the GSA. See *State v. Am. Bail Bond Agency* (1998), 129 Ohio App.3d 708, 716, citing *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 1993-Ohio-119. Second, even if Bailey's complaint asserted a claim for breach of the GSA, the trial court would lack subject-matter jurisdiction over that claim. A settlement agreement "arising out of a collective bargaining agreement between public employees and employers in the state of Ohio, pursuant to R.C. 4117, continue[s] to be subject to the grievance procedure. A common pleas court does not have subject-matter jurisdiction over [it]." *Bryant v. Witkosky*, 11th Dist. No. 2001-P-0047, 2002-Ohio-1477. See also *Reed* at ¶21, citing *Bryant*.

{¶19} In his appellate brief, Bailey asserts two alternative statutory bases for his claim in an attempt to demonstrate the trial court's jurisdiction. He first cites R.C. 4117.03(A)(5), which states that public employees have the right to "[p]resent grievances and have them adjusted, without the intervention of the bargaining

representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect." The Eighth District Court of Appeals has held that the right expressed by R.C. 4117.03(A)(5) "exist[s] only before the employee invokes union representation." *Johnson v. Metro Health Med. Ctr.*, 8th Dist. No. 79403, 2001-Ohio-4259. "Once the employee chooses union representation, that employee lacks standing on all matters." *Id.* Thus, even if R.C. 4117.03(A)(5) authorized Bailey to act independent of union representation, that right terminated once Bailey elected union representation to pursue his grievance regarding his termination in 1998. In further support of jurisdiction, Bailey cites R.C. 4117.14(E). R.C. 4117.14, however, sets forth procedures that govern between a public employer and an exclusive representative concerning termination or modification of an existing collective bargaining agreement or the negotiation of an initial or successor collective bargaining agreement. See R.C. 4117.14(A). Nothing in that section is relevant to an individual employee's ability to assert a claim for breach of a collective bargaining agreement in the court of common pleas.

{¶20} Similar to OCSEA's common pleas complaint in *Reed*, Bailey's complaint here alleges a violation of the CBA. Further, in both cases, the respective collective bargaining agreements provided for final and binding arbitration of grievances. Accordingly, based on *Reed* and R.C. 4117.10(A), we agree with the trial court that it lacked jurisdiction to consider Bailey's claim. For these reasons, we overrule Bailey's first assignment of error.

{¶21} By his second assignment of error, Bailey contends that the trial court's grant of summary judgment deprived him of due process of law. Bailey argues that ODOT's assertions, in pleadings and motions throughout these proceedings, that Bailey is a nuisance, prejudiced the trial court against him, amounting to a deprivation of due process. Of course, a " 'fair trial in a fair tribunal is a basic requirement of due process,' " and a biased decision maker is constitutionally unacceptable. *Withrow v. Larkin* (1975), 421 U.S. 35, 46-47, 95 S.Ct. 1456, 1464, quoting *In re Murchison* (1955), 349 U.S. 133, 136, 75 S.Ct. 623, 625. Most matters relating to judicial bias, however, do not rise to a constitutional level. *Caperton v. A.T. Massey Coal Co., Inc.* (2009), ___ U.S. ___, 129 S.Ct. 2252, 2259, citing *Fed. Trade Comm. v. Cement Inst.* (1948), 333 U.S. 683, 702, 68 S.Ct. 793, 804. Moreover, a bare allegation of bias does not state a claim that due process has been violated. *New York State Inspection, Sec. & Law Enforcement Emp., Dist. Council 82, AFSCME, AFL-CIO v. New York State Pub. Emp. Relations Bd.* (N.D.N.Y.1984), 629 F.Supp. 33, 39-40. Cases where the probability of judicial bias has been deemed too high to be constitutionally tolerable are limited and include those where the judge has a pecuniary interest in the outcome of the case and where the judge has been the target of personal abuse or criticism by the party before him. See *Withrow* at 47. Bailey's assertions do not describe a situation in which the probability of actual bias on the part of the trial judge is constitutionally intolerable. Nor do we discern any other possible due process violation upon which Bailey could maintain a claim. Accordingly, we reject Bailey's due process argument and overrule his second assignment of error.

{¶22} Finally, we deny Bailey's motion for injunctive relief. Bailey premises his motion on Fed.R.Civ.P. 65(B), which does not apply to proceedings in this court. Moreover, Bailey asks this court to enjoin compliance with the Settlement Agreement executed and filed in bankruptcy court, arguing, in part, that the bankruptcy Trustee rejected his claim against ODOT. The bankruptcy court squarely addressed and rejected that argument in its decision authorizing the Trustee to settle with ODOT. Finding no legal or factual basis entitling Bailey to the relief requested in his motion, we overrule Bailey's motion for injunctive relief.

{¶23} In conclusion, we overrule Bailey's assignments of error, deny Bailey's motion for a preliminary injunction, deny appellees' motion to dismiss, and affirm the judgment of the Franklin County Court of Common Pleas.

Motions denied and judgment affirmed.

BROWN and CONNOR, JJ., concur.
