**[Cite as *Garrett v. Columbus Civ. Serv. Comm.*, 2012-Ohio-3271.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| Paul Garrett, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 11AP-1113<br>(C.P.C. No. 10CVH-02-2125) |
| City of Columbus,<br>Civil Service Commission, | : | (ACCELERATED CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on July 19, 2012

*Teresa Villarreal*, for appellant.

*Richard C. Pfeiffer, Jr.*, City Attorney, and *Emily D. Warthman*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

**{¶ 1}** Paul Garrett is appealing from the granting of summary judgment in his lawsuit against his former employer the City of Columbus. For the following reasons we affirm the judgment of the Franklin County Court of Common Pleas.

**{¶ 2}** Garrett's assignment of error reads:

> The Trial Court erred in granting Defendant-Appellee City of Columbus', Motion for Summary Judgment pursuant to Ohio Civ. Proc. R. 56(C) and further erred in denying Plaintiff-Appellant Paul Garrett's Motion for Summary Judgment.

**{¶ 3}** The City of Columbus requires its employees to reside in Franklin County or in a county adjoining Franklin County. Paul Garrett was living with his mother in Malta, Ohio, during a period of time when he could not work due to an on-the-job injury.

**{¶ 4}** Since the Malta, Ohio residence is not in Franklin County or an adjoining county, once the planning and operations division of the city of Columbus became aware of Garrett's new address, it initiated proceedings to verify his address. As a result, Garrett was asked to appear for a hearing to determine his residence. Garrett attended, accompanied by counsel.

**{¶ 5}** At the hearing, Garrett was asked to provide documentation to prove his residency. Specifically, he was asked for copies of a lease or copies of a tax return showing his residence. Garrett stated he had no lease with his mother and had moved since he last filed a tax return. He had no other documents to prove an acceptable residence under the Collective Bargaining Agreement ("CBA") between the City of Columbus and employees such as Garrett.

**{¶ 6}** Ultimately, this led to Garrett being fired following a ruling from the Columbus Civil Service Commission that he was not in compliance with the residency requirement. Under the CBA, Garrett had the option of utilizing the grievance and arbitration procedure. The arbitrator had the authority to award reinstatement and back pay. Garrett did not file a grievance regarding his termination.

**{¶ 7}** Garrett attempted to appeal the ruling of the Civil Service Commission by initiating an appeal under R.C. 119.12 and R.C. 2506.01. This appeal was dismissed based upon a finding of a lack of jurisdiction. The dismissal was affirmed by this court in *Garrett v. Columbus Civ. Serv. Comm.*, 10th Dist. No. 10AP-77, 2010-Ohio-3895.

**{¶ 8}** In February 2010, Garrett filed a civil suit alleging a wrongful discharge. The lawsuit was based at least in part upon the recent decision of the Supreme Court of Ohio in *Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597. The lawsuit also was based upon the theory that his failure to pursue binding arbitration was not required by the CBA and therefore did not block a civil suit for wrongful discharge. This lawsuit is the lawsuit at issue in the present appeal.

**{¶ 9}** Also at issue in this lawsuit is the failure of the City of Columbus to follow Rule VI(D)(2) of the Rules and Regulations of the Civil Service Commission which provides, in part:

> Any employee found to be in violation of the City's residency requirement by the Civil Service Commission will be placed on unpaid administrative leave. If within 30 calendar days, the employee establishes an appropriate residence, as determined by the Commission, the employee will be returned to work as soon as practicable. Any employee who fails to establish an appropriate residence during the first 30 days of the unpaid leave, shall remain in unpaid administrative leave status pending the outcome of disciplinary proceedings, as appropriate to the individual employee, and establishment of an appropriate residence as determined by the Commission.
>
> Noncompliance with the residency requirement for 31 days or longer constitutes just cause for termination.

**{¶ 10}** Garrett was found not to be in compliance on July 27, 2009, and his payroll status was certified effective August 9, 2009.

**{¶ 11}** Both parties filed cross-motions for summary judgment. The trial court denied Garrett's motion and granted the City of Columbus' motion on November 21, 2011. The trial court found that Garrett was not an at-will employee and could not bring a tort of wrongful discharge. The trial court also found that Garrett failed to exhaust his administrative remedies before filing in the common pleas court. Garrett timely appealed the decision.

**{¶ 12}** Garrett argues that the City of Columbus' summary judgment motion was improperly granted and his own summary judgment motion was improperly denied. Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

> [T]he pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

**{¶ 13}** Accordingly, summary judgment is appropriate only where: (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 and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65-66 (1978). Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992).

**{¶ 14}** De novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). We stand in the shoes of the trial court and conduct an independent review of the record applying the same summary judgment standard. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party, at the trial court, are found to support it, even if the trial court failed to consider those grounds. See *Dresher*; *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

**{¶ 15}** As noted above, Garrett's claim is for wrongful discharge. The cause of action for wrongful discharge is an exception to the employment-at-will doctrine. *Greely v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228 (1990). A member of a union covered by a CBA is not an at-will employee. This is clearly stated in *Haynes v. Zoological Society of Cincinnati*, 73 Ohio St.3d 254, 258 (1995).

> *Greeley* provides an exception to the *employment-at-will* doctrine. Thus, as stated above, in order for an employee to bring a cause of action pursuant to *Greeley*, *supra*, that employee must have been an employee at will. * * * Haynes clearly does not qualify as an employee at will. As a member of a union, the terms of her employment relationship were governed by a collective bargaining agreement. * * * Because she was not an employee at will, she is outside the class of employees for whom *Greeley* provides protection.

(Emphasis sic.)

**{¶ 16}** Garrett was a member of a union, the American Federation of State, County and Municipal Employees, Ohio Council 8, Local 1632 ("AFSCME"), and his position was covered by the CBA. The CBA provides that management retains the right to "discipline,

suspend and discharge employees for just cause." CBA Section 3.2(A)(3). Since Garrett was not an employee-at-will, he cannot bring a tort of wrongful discharge.

**{¶ 17}** Garrett claims he also seeks a declaratory judgment that section 158-1 of the Columbus Charter, relating to residency requirement, is in violation of R.C. 9.481. R.C. 9.48 prohibits residency restrictions imposed by Ohio political subdivisions upon its employees. He further alleges his situation does not fall within the exception of R.C. 9.481(B)(2)(b) which allows municipalities to maintain residency requirements of residing within the same or an adjoining county to ensure adequate response times by certain employees to emergencies or disasters. Garrett was employed in the Public Service Department as a Traffic Paint/Sign Worker.

**{¶ 18}** Garrett would have us look to the recent Supreme Court of Ohio decision of *Lima*, which declared R.C. 9.481 constitutional and holding that the home-rule provision of the Ohio Constitution could not impair the legislature's power to enact legislation pursuant to the general welfare clause.

**{¶ 19}** As an affirmative defense, the City of Columbus argues that Garrett failed to exhaust his administrative remedies by failing to pursue the grievance and arbitration procedure provided by the CBA. Therefore, Garrett's claims should be dismissed as a matter of law. The City of Columbus relies on R.C. 4117.10 and the CBA to establish that the exclusive remedy for Garrett's claims is the grievance and arbitration procedure laid out in the CBA and that Garrett's failure to initiate these procedures prevents the trial court from proceeding to address the merits of his claims.

**{¶ 20}** "It is a well-established principle of Ohio law that, prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal." *Noernberg v. Brook Park*, 63 Ohio St.2d 26, 29 (1980). If a party fails to exhaust the available administrative remedies first, a trial court may decline to intervene as a matter of judicial economy. *See Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 111 (1990). Indeed, "[t]he purpose of the doctrine '* * * is to permit an administrative agency to apply its special expertise * * * and in developing a factual record without premature judicial intervention.' " *Id.*, citing *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 702 (6th Cir.1985). "The failure to exhaust administrative remedies is not a jurisdictional defect but is rather an affirmative

defense, if timely asserted and maintained." *Dworning v. Euclid*, 119 Ohio St.3d 83, 2008-Ohio-3318, ¶ 11.

**{¶ 21}** R.C. 4117.10(A) governs the scope of a CBA and provides, in part:

> An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure * * *.

This court has stated that "if the parties have entered into a CBA pursuant to R.C. Chapter 4117 that provides for a grievance procedure culminating in final and binding arbitration, the claimant's exclusive remedy is to file a grievance in accordance with the CBA." *Ryther v. Gahanna*, 10th Dist. No. 04AP-1220, 2005-Ohio-2670, ¶ 12.

**{¶ 22}** The CBA entered into by AFSCME and the City of Columbus clearly states that the grievance procedure therein is the exclusive remedy. *See* Section 11.2 of the CBA. R.C. Chapter 4117 and the CBA require that any grievance of Garrett's be first pursued through arbitration

**{¶ 23}** Garrett argues that he was under no obligation to participate in arbitration before filing suit in the common pleas court and that the arbitration was optional. He asserts that, pursuant to Section 149-1 of the Columbus City Charter, "any employee of the City of Columbus in the classified service, who is suspended, reduced in rank or compensation or discharged * * * may appeal from such decision or order therefor, to the civil service commission within ten days from and after the date of such decision or order." Garrett asserts that the presence of the word "may" in the city charter allows him to pursue other routes of appeal especially when those appeals address issues of facial constitutional challenges.

**{¶ 24}** We do not agree with this interpretation of the presence of the word "may" in the Columbus City Charter. The word "may" simply allows an employee "to choose between pursuing the grievance beyond informal methods, should those efforts fail, or discontinuing the process at that point." *Ryther* at ¶ 21. Further, Section 11.8(A) of the

CBA specifically waives the right of an employee to appeal decisions to the Civil Service Commission under Section 149-1 of the City Charter.

**{¶ 25}** Garrett also asserts that he need not exhaust his administrative remedies in order to bring a facial constitutional challenge because the City of Columbus had no authority to address such a challenge. Garrett contends that he has a constitutional right to reside wherever he wished and that the City of Columbus had no legal right to terminate him for exercising his constitutional right to do so.

**{¶ 26}** Garrett argues that exhaustion of his administrative appeals is not required where such appeals would be futile in deciding constitutional questions and that " 'to raise an issue for the first time in an appeal to the court of common pleas would frustrate the statutory system for having issues raised and decided through the administrative process.' " *Carmack v. Caltrider*, 164 Ohio App.3d 76, 2005-Ohio-5575, ¶ 6 (2nd Dist.), quoting *Kaltenbach v. Mayfield* (Apr. 27, 1990), 4th Dist. No. 89-CA-10. This is explained by the Supreme Court of Ohio:

> We have long held that failure to exhaust administrative remedies is not a necessary prerequisite to an action challenging the constitutionality of a statute, ordinance, or administrative rule.
>
> The policy interest underlying the rule distinguishing between cases presenting constitutional issues and others is simply the conservation of public resources. Because administrative bodies have no authority to interpret the Constitution, requiring litigants to assert constitutional arguments * * * "administrative remedies would be wholly futile, exhaustion is not required."

*Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 460-61 (1997).

**{¶ 27}** The policy interest underlying the rule distinguishing between cases presenting constitutional issues and others is simply the conservation of public resources. Because administrative bodies have no authority to interpret the Ohio Constitution, requiring litigants to assert constitutional arguments administratively would be a waste of time and effort for all involved.

**{¶ 28}** Garrett, however, is not presenting a facial constitutional challenge which would be required in order to avoid exhausting all administrative remedies and bring the

case directly to a common pleas court. A party may raise a facial constitutional challenge in an administrative appeal even where the party did not raise the challenge before the commission or agency. *State ex rel. Kingsley v. State Emp. Relations Bd.*, 10th Dist. No. 09AP-1085, 2011-Ohio-428, ¶ 18. A facial challenge is decided without regard to extrinsic facts. *Union Twp. Bd. of Trustees v. Old 74 Corp.*, 137 Ohio App.3d 289, 295 (12th Dist.2000). In contrast to a facial challenge, however, when a litigant challenges the constitutionality of a statute as applied to a specific set of facts, extrinsic facts are needed, and the litigant must raise the as-applied challenge, in the first instance, before the administrative agency to allow the parties to develop an evidentiary record. *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181, ¶ 15-16.

**{¶ 29}** Garrett has not made a facial constitutional challenge. Garrett seeks a determination of whether or not Section 158-1 of the Columbus Charter satisfies the exception contained in R.C. 9.481(B)(2)(b) in relation to the Supreme Court of Ohio's ruling in *Lima*. Thus, he seeks an interpretation of a statutory matter, not a constitutional matter.

**{¶ 30}** This not being a facial constitutional challenge, Garrett was required to bring arguments that Section 158-1, as it applied to him, was in conflict with R.C. 9.481 through the grievance and arbitration process that was outlined in the CBA. Failing to do so, Garrett has not exhausted his administrative remedies and the City of Columbus was entitled to summary judgment.

**{¶ 31}** Garrett also asserts that the City of Columbus failed to follow Rule VI(D)(2) of the Rules and Regulations of the Civil Service Commission which provides:

> Any employee found to be in violation of the City's residency requirement by the Civil Service Commission will be placed on unpaid administrative leave. If within 30 calendar days, the employee establishes an appropriate residence, as determined by the Commission, the employee will be returned to work as soon as practicable. Any employee who fails to establish an appropriate residence during the first 30 days of the unpaid leave, shall remain in unpaid administrative leave status pending the outcome of disciplinary proceedings, as appropriate residence to the individual employee, and establishment of an appropriate residence as determined by the Commission.

> Noncompliance with the residency requirement for 31 days or longer constitutes just cause for termination.

Again, the CBA provides the exclusive remedy for claims through the grievance and arbitration procedure. Any violation of Rule VI(D)(2) should be addressed in an administrative process first, not initially brought before the common pleas court.

**{¶ 32}** In summary, Garrett is not an at-will employee and cannot bring a tort of wrongful discharge. Garrett failed to exhaust his administrative remedies by not first going through the arbitration process laid out in the CBA as the exclusive remedy for grievances. He has not brought a facial constitutional challenge that would allow him to bring a claim directly to the common pleas court. Therefore, Garrett's assignment of error is overruled.

**{¶ 33}** The judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and SADLER, JJ., concur.