

ORIGINAL

IN THE SUPREME COURT OF OHIO

NURSING CARE MANAGEMENT	:	CASE NO. 2009-0756
OF AMERICA, INC. D/B/A	:	
PATASKALA OAKS CARE	:	
CENTER	:	
	:	On Appeal from the
Appellant	:	Court of Appeals of
	:	Licking County, Ohio
	:	Fifth Appellate District
vs.	:	
	:	Court of Appeals
OHIO CIVIL RIGHTS	:	Case No. 08CA0030
COMMISSION	:	
	:	
Appellee	:	

MERIT BRIEF OF AMICUS CURIAE, OHIO HEALTH CARE ASSOCIATION

Carol Rolf (0038356)
 Robert C. Pivonka (0067311)
 (COUNSEL OF RECORD)
 Rolf & Goffman Co., L.P.A.
 30100 Chagrin Blvd., Suite 350
 Cleveland, OH 44124-5705
 Phone: 216-514-1100
 Fax: 216-514-0030
 Email: pivonka@rolfgoffman.com

Jan E. Hensel (0040785)
 (COUNSEL OF RECORD)
 Dinsmore & Shohl LLP
 191 W. Nationwide Blvd., Suite 300
 Columbus, OH 43215
 Phone: 614-227-4267
 Fax: 614-221-8590
 Email: jhensel@dinslaw.com

COUNSEL FOR AMICUS CURIAE, OHIO
 HEALTH CARE ASSOCIATION

Patricia Gavigan (0081258)
 Dinsmore & Shohl LLP
 255 E. 5th Street, Suite 1900
 Cincinnati, OH 45202
 Phone: 513-977-8200
 Fax: 513-977-8141
 Email: pgavigan@dinslaw.com

Patrick M. Dull (0064783)
 (COUNSEL OF RECORD)
 Assistant Attorney General
 30 East Broad Street, 15th Floor
 Columbus, OH 43215-3428
 Phone: 614-466-7900
 Fax: 614-466-2437
 Email: pdull@ag.state.oh.us

COUNSEL FOR APPELLANT, NURSING
 CARE MANAGEMENT OF
 AMERICA, INC. D/B/A PATASKALA
 OAKS CARE CENTER

COUNSEL FOR APPELLEE,
 OHIO CIVIL RIGHTS COMMISSION

FILED
 SEP 25 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

RECEIVED
 SEP 25 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	5
<u>Proposition of Law No. I:</u> Ohio’s pregnancy discrimination law does not require employers to offer preferential treatment to pregnant employees.	5
<u>Proposition of Law No. II:</u> The OCRC’s own regulations specifically envision and permit minimum length of service requirements for leave policies.	10
<u>Proposition of Law No. III:</u> The <i>McDonnell Douglas</i> burden-shifting test applies because there is no direct evidence of discrimination.	16
<u>Proposition of Law No. IV:</u> Ohio courts have not specifically held that minimum length of service requirements are discriminatory.....	18
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	22
APPENDIX	<u>Appx. Page</u>
<u>UNREPORTED CASES</u>	
<i>Coleman v. ARC Automotive, Inc.</i> (C.A.6, 2007), 255 Fed. Appx. 948, 2007 U.S.App. LEXIS 26618.....	1
<i>Frazier v. The Practice Mgt. Resource Group, Inc.</i> (June 27, 1995), Franklin App. No. 95APE01-46, 1995 Ohio App. LEXIS 2750.....	11
<i>Johnson v. Watkins Motor Lines, Inc.</i> (Oct. 3, 2001), 2001 Ohio Civil Rights Comm. LEXIS 10	20
<i>Tessmer v. Nationwide Life Ins. Co.</i> (Sept. 30, 1999), Franklin App. No. 98AP-1278, 1999 Ohio App. LEXIS 4633	26

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Abraham v. Graphic Arts Internatl. Union</i> (1981) 660 F.2d 811, 815, 212 U.S. App. D.C. 412, 26 Fair Emp. Prac. Cas. (BNA) 818	17
<i>Armstrong v. Flowers Hosp. Inc.</i> (M.D.Ala.1993), 812 F.Supp. 1183.....	10
<i>California Fed. S. & L. Assn. v. Guerra</i> (1987), 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613.....	6, 7
<i>Coleman v. ARC Automotive, Inc.</i> (C.A.6, 2007), 255 Fed. Appx. 948, 2007 U.S.App. LEXIS 26618	15
<i>D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. Of Health</i> , 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536	8, 11
<i>Frank v. Toledo Hosp.</i> (1992), 84 Ohio App.3d 610, 617 N.E.2d 774.....	9, 15, 17, 19, 20
<i>Frazier v. The Practice Mgt. Resource Group, Inc.</i> (June 27, 1995), Franklin App. No. 95APE01-46, 1995 Ohio App. LEXIS 2750	9, 10
<i>Johnson v. Watkins Motor Lines, Inc.</i> (Oct. 3, 2001), 2001 Ohio Civil Rights Comm. LEXIS 10.....	13
<i>Kleiber v. Honda of America Mfg., Inc.</i> (C.A.6, 2007) 485 F.3d 862	16
<i>Kohmescher v. Kroger Co.</i> (1991), 61 Ohio St. 3d 501, 504, 575 N.E.2d 439	16
<i>Marvel Consultants, Inc. v. Ohio Civ. Rights Comm.</i> (8th Dist. 1994), 93 Ohio App. 3d 838, 639 N.E.2d 1265	19
<i>McConaughy v. Boswell Oil Co.</i> (1998), 126 Ohio App.3d 820, 711 N.E.2d 719	17, 19
<i>McCoy v. McCoy</i> (1995), 105 Ohio App.3d 651, 664 N.E.2d 1012.....	12
<i>McDonnell Douglas Corp. v. Green</i> (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668.....	16
<i>Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.</i> (1981), 66 Ohio St.2d 192, 421 N.E.2d 128	6, 7
<i>Priest v. TFH-EB, Inc.</i> (1998), 127 Ohio App.3d 159, 711 N.E.2d 1070	9, 17

Tessmer v. Nationwide Life Ins. Co. (Sept. 30, 1999),
Franklin App. No. 98AP-1278, 1999 Ohio App. LEXIS 4633.....16, 17

Woodworth v. Concord Mgt. Ltd. (S.D.Ohio 2000), 164 F.Supp.2d 97818

OHIO STATUTES AND REGULATIONS

R.C. 1.5112

R.C. 4112.01(B).....5

R.C. 4112.02(A).....5

R.C. 4112.045

Ohio Adm. Code 3701-17-081

Ohio Adm. Code 3701-17-541

Ohio Adm. Code 4112-5-015, 6

Ohio Adm. Code 4112-5-055

Ohio Adm. Code 4112-5-05(G)(2)11, 12

Ohio Adm. Code 4112-5-05(G)(5)11, 12

Ohio Adm. Code 5123:2-3-071

FEDERAL STATUTES

Section 2611(2)(A)(i), Title 29, U.S. Code6

Section 2611, *et seq.*, Title 29, U.S. Code8

Section 2000e(k), Title 42, U.S. Code6, 8

FOREIGN STATUTES

Cal. Govt. Code 12940.....8

Cal. Govt. Code 12945.....8

HOUSE COMMITTEE REPORTS

103 H. Rpt. 8.....7

STATEMENT OF THE INTEREST OF AMICUS CURIAE

The Ohio Health Care Association ("OHCA") represents nearly 750 nursing facilities, assisted living communities, and intermediate care facilities for the mentally retarded ("ICF/MR"). These facilities, and the more than 100,000 women and men who work as long-term care professionals, provide Ohio's elderly and disabled residents with critical health care services, including skilled nursing, personal care, and habilitation. OHCA strives to identify best practices to ensure quality improvement in long-term care and to keep member facilities informed of laws and regulations governing the profession.

Providing long-term health care is a vital, around-the-clock service, and to ensure quality care, OHCA's members need reliable, qualified and trained professionals. In 2008, Ohio long-term care professionals provided to nursing home residents 156,775,237 hours of direct care services, 21,301,700 hours of dietary services, 9,331,701 hours of social and pastoral services, and 12,188,193 hours of housekeeping services, all of which are essential to maintain the health and safety of the residents served. Additionally, in 2007, professionals at ICFs/MR provided 15,650,120 hours of direct care services, 778,055 hours of dietary services, 116,348 hours of social and pastoral services, and 569,899 hours of housekeeping services.

The majority of long-term care professionals are women, and therefore OHCA's members are particularly affected by the outcome of this case. OHCA's members cannot provide essential health services to Ohio's elderly and disabled residents without a qualified and dependable workforce. Importantly, OHCA's members are required by statute to maintain specified staffing levels to uphold their high standard of care and comply with licensure requirements. See Ohio Adm. Code 3701-17-08, 3701-17-54, and 5123:2-3-07. Because these

facilities are required to maintain specific staffing levels, they must secure replacements for employees who take maternity leave.

If these facilities are required to offer maternity leave for all pregnant employees, regardless of their length of service, it will create an undue burden for these crucial caregivers. OHCA's members will be forced to either constantly restructure work assignments upon the return of an employee following maternity leave, or fire the employee's replacement. Such turnover is problematic in any workplace, but even more so when the employees at issue are entrusted with the care of some of Ohio's most vulnerable citizens. Requiring a minimum length of service before employees become eligible to take a leave of absence – including a maternity leave – helps ensure that the employees who are given the benefit of leave and the privilege of reinstatement to their positions have proven themselves reliable and trustworthy employees. Consequently, the enforceability of minimum length of service requirements will greatly impact how OHCA members administer their leave policies and will affect the quality of care provided to their residents.

STATEMENT OF THE CASE AND FACTS

Ms. Tiffany R. McFee (“McFee”) began employment with Nursing Care Management of America, Inc. d/b/a Pataskala Oaks Care Center (“Pataskala Oaks”) on June 9, 2003. *Opinion of Court of Appeals* at ¶3. At the time of McFee’s hire, Pataskala Oaks had a leave of absence policy maintained in accordance with the Family Medical Leave Act, providing that employees were eligible for up to 12 weeks of leave after completing one year of service. *Id.* Under the policy, employees who requested leave and did not meet the one year service requirement were not eligible for leave. If the employee required leave for any reason, but he or she was not yet eligible for this benefit, his or her employment was terminated but he or she was eligible to re-apply for employment once able to resume work.

On January 26, 2004, McFee provided Pataskala Oaks with a physician’s note stating she was unable to perform her duties due to pregnancy-related swelling. *Id.* at ¶4. On February 4, 2004, because McFee had not completed one year of service at Pataskala Oaks and was not eligible for a leave of absence for any reason under Pataskala Oaks’ neutral leave policy, her employment was terminated. *Id.* at ¶5. On February 25, 2004, Pataskala Oaks’ Director of Nursing contacted McFee to inform her that a full-time day shift position had become available, but McFee never returned the call. *Id.* at ¶6.

McFee filed a charge with the Ohio Civil Rights Commission (“OCRC”) on March 2, 2004. *Id.* at ¶8. After reviewing the relevant facts, an Administrative Law Judge recommended the complaint be dismissed because the OCRC’s regulations authorized an equally applied length of service requirement for leave time. *Id.* at ¶9. However, the OCRC rejected this recommendation and held that McFee’s employment had been terminated in violation of Ohio’s laws against pregnancy discrimination. *Id.* at ¶10. Pataskala Oaks filed a Petition for Judicial

Review with the Licking County Court of Common Pleas, and on February 11, 2008, the court issued a judgment reversing the OCRC and finding Pataskala Oaks' minimum length of service requirement lawful. *Id.* at ¶11. The OCRC then appealed to the Court of Appeals of Ohio, Fifth Appellate District, which reversed the Court of Common Pleas and affirmed the OCRC's final order on March 11, 2009. *Id.* at ¶1. On April 24, 2009, Pataskala Oaks asked this Court to accept jurisdiction over this case and to review of the Court of Appeals decision. This Court accepted the appeal on July 29, 2009.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Ohio's pregnancy discrimination law does not require employers to offer preferential treatment to pregnant employees.

In enacting Ohio's law against pregnancy discrimination, the Ohio General Assembly did not require that pregnant women be given preferential treatment. To the contrary, Ohio's anti-discrimination law mandates that pregnant employees be treated the *same* for employment purposes as other similarly situated non-pregnant employees.

R.C. 4112.02(A) states that it is an unlawful discriminatory practice for an employer "because of the * * * sex * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." R.C. 4112.01(B) clarifies that the term "because of sex" applies to pregnancy, and clearly mandates that "women affected by pregnancy, childbirth, or related medical conditions shall be *treated the same* for *all* employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work * * *" (Emphasis added.) The unambiguous language of R.C. 4112.01(B) requires only that pregnant employees be treated the same as other non-pregnant employees, including for the receipt of employment benefits such as leaves of absence (i.e., maternity leave).

To effectuate R.C. Chapter 4112, the legislature charged the OCRC with adopting rules, and that agency's rules addressing sex discrimination are set forth in Ohio Adm. Code 4112-5-05. See R.C. 4112.04(A)(4), Ohio Adm. Code 4112-5-01, and Ohio Adm. Code 4112-5-05. Significantly, the OCRC recognized and stated that its regulations "are not intended to either

expand or contract the coverage of Chapter 4112 of the Revised Code.” Ohio Adm. Code 4112-5-01. Thus, it is reasonable to conclude that the Ohio General Assembly did not contemplate the OCRC mandating preferential treatment for pregnant employees in contravention of Chapter 4112 of the Revised Code.

- A. Analysis of the federal Pregnancy Discrimination Act supports the interpretation that R.C. Chapter 4112 does not mandate preferential treatment and/or maternity leave for pregnant employees.

Ohio’s pregnancy discrimination law is comparable to the Federal Pregnancy Discrimination Act provisions of Title VII of the Civil Rights Act of 1964, as amended (“PDA”), which do not require preferential treatment or mandate maternity leave for pregnant employees. If there was any doubt that R.C. 4112.01(B) does not require maternity leave, the PDA provides further understanding.¹ In enacting the PDA, Congress examined that law’s limits and explained that the PDA does not require any preferential treatment for pregnant women or new programs by employers. See *California Fed. S. & L. Assn. v. Guerra* (1987), 479 U.S. 272, 286, 107 S.Ct. 683, 93 L.Ed.2d 613. The language of R.C. 4112.01(B) similarly contemplates comparable, but not preferential, treatment for pregnant employees.

That the PDA does not require employers to provide maternity leave is illustrated by the enactment of the Family and Medical Leave Act of 1993 (“FMLA”). When enacting the FMLA, Congress carefully considered the issue of minimum length of service requirements and codified such a requirement by limiting FMLA leave to employees with at least one year of service. Section 2611(2)(A)(i), Title 29, U.S. Code. At the time, using language very similar to that in Chapter 4112, the PDA had already specified that sex discrimination included discrimination on

¹ See *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission* (1981), 66 Ohio St.2d 192, 196, 421 N.E.2d 128 (stating that federal case law interpreting Title VII is generally applicable to cases involving alleged violations of R. C. Chapter 4112).

the basis of pregnancy. See Section 2000e(k), Title 42, U.S. Code. Therefore, not only did Congress presumably agree that there was a legitimate nondiscriminatory business justification for a minimum length of service requirement, but it found that the anti-discrimination statute did not mandate leave.²

This same legislative approach to pregnancy discrimination and mandatory leave is evident in *Guerra*. The Court of Appeals below improperly cited *Guerra*, to support its holding that Ohio law requires preferential treatment in granting all pregnant employees leave for reasonable period of time. *Guerra* addresses only whether preferential treatment is *permitted* under Title VII, not whether it is *required*. *Guerra*, 479 U.S. at 283-284. In *Guerra*, the court examined whether Title VII preempted a California state statute that requires employers to provide leave and reinstatement to employees disabled by pregnancy. *Id.* at 274-275. *Guerra* is inapposite to the case at issue, as no party here is arguing R.C. Chapter 4112 is preempted by Title VII. Rather, the parties likely are in agreement that Title VII would *permit* preferential treatment of pregnant employees if Ohio's General Assembly passed a law mandating maternity leave for all pregnant women, but they certainly disagree over whether Ohio's current law *requires* such leave.

Significantly, *Guerra* interprets California Government Code Section 12945, which specifically requires employers to provide female employees an unpaid pregnancy disability

² The language of R.C. 4112.02 is nearly identical to the PDA, and the Supreme Court of Ohio has held that federal case law interpreting Title VII is applicable to cases involving alleged violations of Chapter 4112. *Plumbers & Steamfitters*, 66 Ohio St.2d at 196. Additionally, in examining Title II of the FMLA, which provided FMLA leave to civil service employees, the House Committee examined and reinforced that Title VII and the PDA are only anti-discrimination laws requiring that employers treat all employees equally. The Committee recognized that if an employer denied benefits to its work force, it would be in full compliance with the anti-discrimination laws because it treated all employees equally. Therefore, FMLA was designed to fill those gaps left by Title VII and the PDA "which an anti-discrimination law by its nature cannot fill." 103 H. Rpt. 8.

leave up to four months. *Id.* at 275-276. This leave statute was enacted by the California legislature *in addition to* California's anti-discrimination statute. See, e.g., Cal. Govt. Code 12940 and 12945. Presumably, the California legislature realized that the state's anti-discrimination statute did not place an affirmative duty on employers to provide leave, and therefore it enacted another and separate law to create the obligation to provide maternity leave.³ Ohio, on the other hand, does not have a statutory leave requirement for pregnancy.

Essentially, the OCRC is asking this Court to rubber stamp that agency's attempt to fundamentally change and expand the scope of Ohio's pregnancy discrimination law. Although Ohio's General Assembly has elected not to enact a pregnancy leave law, and although Ohio's anti-discrimination statute only requires the *same* treatment for pregnant employees, the OCRC would have this Court go along with its attempt to rewrite Ohio's anti-discrimination law and mandate preferential treatment of pregnant employees by requiring employers to grant them leave in excess of and regardless of an equally applied internal leave policy. OCRC's attempt to legislate is beyond that agency's rule making authority. See *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. Of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶41.

All that was required under Ohio's anti-discrimination statute was that Pataskala Oaks treat McFee the same as all other employees who did not meet the minimum length of service requirement under its leave policy. Pataskala Oaks complied with Ohio's pregnancy discrimination laws when it enforced its facially neutral and non-discriminatory minimum service requirement.

³ This is comparable to the Federal scheme under which the PDA prohibits discrimination against pregnant women, and a separate law, the FMLA, provides for mandatory leave. See, generally, Section 2000e(k), Title 42, U.S. Code and Section 2611 et seq., Title 29, U.S. Code.

B. Ohio courts have rejected the argument that R.C. Chapter 4112 requires preferential treatment and/or maternity leave for pregnant employees.

Ohio courts also have rejected the preferential treatment approach. See *Priest v. TFH-EB, Inc.* (1998), 127 Ohio App.3d 159, 165, 711 N.E.2d 1070, discretionary appeal not allowed (1998), 82 Ohio St.3d 1480, 696 N.E.2d 1087 (noting that Ohio courts have “implicitly * * * and expressly * * * recognize[d] that an employer need not accommodate pregnant women to the extent that such accommodation amounts to preferential treatment” (citing *Frank v. Toledo Hosp.* (1992), 84 Ohio App.3d 610, 617 N.E.2d 774, *Frazier v. The Practice Mgt. Resource Group, Inc.* (June 27, 1995), Franklin App. No. 95APE01-46, 1995 Ohio App. LEXIS 2750)).

For example, in *Frank v. Toledo Hosp.*, 84 Ohio App.3d 610, by not requiring the employer to provide leave in excess of that provided to non-pregnant employees, the court implicitly found that preferential treatment of pregnant employees is not required. The employer in that case terminated the pregnant plaintiff’s employment when she refused to receive a rubella vaccination that was required of all employees under the employer’s policy. *Id.* at 611-612. The employee argued she should have been allowed maternity leave in lieu of termination because her refusal of the required vaccination was due to her concern about harm to her fetus. *Id.* at 611, 613. Because no evidence was presented that leave was provided to non-pregnant employees refusing the vaccine, the court concluded that pregnancy was not a factor in the employee’s discharge, even though her pregnancy was the reason the employee refused the vaccine. *Id.* at 616-618. In upholding summary judgment for the employer, the appellate court stated that a failure to provide leave to a pregnant employee in lieu of termination is not discriminatory, “unless it is shown that such employee was terminated because of, or on the basis of, sex, including pregnancy.” *Id.* at 618.

In *Frazier v. The Practice Mgt. Resource Group, Inc.*, Franklin App. No. 95APE01-46, in overturning a verdict in favor of a pregnant plaintiff, the court explicitly reaffirmed that R.C. Chapter 4112 does *not* require accommodations amounting to preferential treatment. The plaintiff in *Frazier* alleged she was unlawfully terminated when pregnancy complications caused her to exceed the 42 calendar days of leave available under the employer's leave policy.⁴ *Id.* at *4-*5. The court stated that an employer was not required to have a policy allowing unlimited maternity leave. *Id.* at *10. The court further stated that an employer's policy should be applied in the case of pregnancy *on the same terms and conditions* as for other disabilities. *Id.* In applying federal case law interpreting Title VII to R.C. Chapter 4112, the court stated that the PDA, and thereby also Chapter 4112, do not require accommodation of pregnant women that amounts to preferential treatment. *Id.* at *10-*11 (citing *Armstrong v. Flowers Hosp. Inc.* (M.D.Ala.1993), 812 F.Supp. 1183). Neither the Ohio anti-discrimination statute, nor the decisions of Ohio courts, have indicated that preferential treatment of pregnant employees is required, or even permitted, in Ohio.

Proposition of Law No. II: The OCRC's own regulations specifically envision and permit minimum length of service requirements for leave policies.

As stated above, the Ohio anti-discrimination statute requires only equal treatment for pregnant employees as their similarly situated counterparts, and Ohio's General Assembly has not expanded this requirement to mandate maternity leave. The purpose of administrative regulations is to develop and administer policy established by the Ohio General Assembly, not to

⁴ The employer extended the employee's leave beyond the 42 days, but stated that if the employee returned after the 42 days, she would be treated as a new employee with her insurance cancelled and decreased pay rate. The facts were disputed whether the employee was terminated or voluntarily abandoned her employment. *Frazier* at *5-*8.

dictate public policy or make law. See *D.A.B.E., Inc.*, supra, 96 Ohio St.3d at ¶41. Even assuming the OCRC has the rule-making authority to expand the state's anti-discrimination law to require FMLA-like mandatory leave (albeit with no FMLA-like minimum service requirement), *which it does not*, the OCRC's regulations do *not* mandate maternity leave.

There are two primary regulations that are most relevant to this matter: Ohio Adm. Code 4112-5-05(G)(2) and Ohio Adm. Code 4112-5-05(G)(5). Ohio Adm. Code 4112-5-05(G)(2), upon which OCRC relies, states simply that termination caused by an employment policy under which "insufficient or no maternity leave is available" shall constitute discrimination. However, Ohio Adm. Code 4112-5-05(G)(5) specifically envisions employers implementing leave policies that include a minimum length of service requirement:

"When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. *For example, if the female meets the equally applied minimum length of service requirements for leave time*, she must be granted a reasonable leave on account of childbearing. Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer's leave policy." (Emphasis added.) Ohio Adm. Code 4112-5-05(G)(5).

It could not be clearer. The OCRC is saying, "if the employee qualifies for leave under the employer's policy, then childbearing must be considered a valid reason for the leave." Presumably, the converse also is true in that, "if the employee does *not* qualify for leave under the employer's policy, then the employee need not be granted leave." The OCRC is taking the position that whether or not the pregnant employee qualifies for leave under the employer's policy, she gets leave.

Significantly, out of all the possible examples of eligibility criteria that could be used in a leave policy (*e.g.*, hours worked, attendance record, disciplinary history), the OCRC chose a minimum length of service requirement as its *sole* example. Again, if the OCRC is saying that, “if a female meets the equally applied minimum length of service requirement” she must be granted leave, then it follows that “if a female does *not* meet the equally applied minimum length of service requirement” she need not be granted leave. Here again, the OCRC wants to have it both ways, notwithstanding the express language of its regulation. By using a minimum length of service requirement as its sole example, the OCRC unmistakably indicated its approval of such policies. The Court of Appeals ignored this clear language in its analysis, and instead relied solely on 4112-5-05(G)(2).

At first glance, 4112-5-05(G)(2) and 4112-5-05(G)(5) may seem contradictory. However, following the rule of construction that the specific prevails over the general, the two regulations can be reconciled. See R.C. 1.51; *McCoy v. McCoy* (1995), 105 Ohio App.3d 651, 656, 664 N.E.2d 1012 (stating that “courts are not free to construe general language of [a] statute in a manner that renders specific enumerations meaningless”). Ohio Adm. Code 4112-5-05(G)(5) clarifies 4112-5-05(G)(2). Expressly, Ohio Adm. Code 4112-5-05(G)(2) states that a leave policy under which “insufficient or no maternity leave” is available would be discriminatory where it causes termination of an employee temporarily disabled due to pregnancy, but it does not define what constitutes “insufficient or no maternity leave.” Therefore, Ohio Adm. Code 4112-5-05(G)(5) is a more specific provision that provides an example of one sort of eligibility/qualification policy (*i.e.*, a minimum length of service requirement) that will *not* be deemed to provide insufficient leave. In other words, a leave policy with a minimum length of service requirement is *not* considered by the OCRC’s regulations to be

a policy under which “insufficient or no maternity leave is available.” Again, this is the only specific leave policy discussed in the regulation, presumably because the OCRC wanted to explicitly allow its use. Pataskala Oaks’ policy with a year length of service requirement is clearly not discriminatory under Ohio Adm. Code 4112-5-05(G)(2) or 4112-5-05(G)(5).

The OCRC’s own actions also indicate that this reading of Ohio Adm. Code 4112-5-05(G)(5) is consistent with that agency’s original intent. In 2001, an OCRC Hearing Examiner issued a decision specifically upholding a minimum length of service requirement. See *Johnson v. Watkins Motor Lines*, 2001 Ohio Civil Rights Comm. LEXIS 10, *3. In *Johnson*, the OCRC examined an employer’s generally applicable leave of absence policy, which provided for up to six months of unpaid leave, but only after an employee had been employed for at least six months. *Id.* A pregnant employee filed a charge with the OCRC after she was denied leave requested for pregnancy complications because she did not meet the six-month length of service requirement. *Id.* The OCRC Hearing Examiner examined Ohio Adm. Code 4112-5-05(G)(5) and Ohio case law interpreting R.C. 4112.02(B), and found that the respondent’s leave policy was consistent with both. *Id.* at *7-8. In fact, the Hearing Examiner expressly rejected the argument that Ohio Adm. Code 4112-5-05(G)(2) was applicable, stating that the more specific 4112-5-05(G)(5) should prevail over the general 4112-5-05(G)(2). *Id.* at *9 (“The Commission’s argument fails because Adm. Code 4112-5-05(G)(5) is a specific provision and thus takes precedence over the more general provision.”). Notably, notwithstanding the respondent’s minimum length of service requirement, the Hearing Examiner concluded that the policy, “provides sufficient maternity leave” and “is in compliance with Adm. Code 4112-5-05(G)(2).” *Id.* at *10. The Hearing Examiner recommended dismissal of the charge. *Id.* at *12.

Also, in 2007, the OCRC set out to change its regulations to eliminate the language of 4112-5-05(G)(5) which unmistakably permits minimum length of service requirements for maternity leave. The OCRC sought to add language making distinctions based upon length of service discriminatory and requiring twelve weeks of leave for all pregnant employees, unless a contrary policy was justified by business necessity. If the current law does not allow minimum length of service requirements as the OCRC now argues, then why did the OCRC seek to redraft its regulations in this manner? Regardless, the Joint Committee on Agency Rule Review (“JCARR”) voted to strike down the proposed rule change because the OCRC failed to properly report on the economic impact of the revised rule.⁵ In spite of the fact that the revised rules never were implemented, OCRC now seeks to enforce the apparently abandoned regulations by requiring employers to provide maternity leave when that is not required under the current regulations. This would, in effect, allow the OCRC to execute an “end-run” around JCARR and implement its proposed rule without satisfying JCARR’s order and without regard to the actual language of the current rule.

The Court of Appeals further states that the only provision expressly applying to termination is 4112-5-05(G)(2), and claims that the OCRC was correct in relying on this provision because no maternity leave was available to McFee. This argument is flawed, as leave indisputably would have been available to McFee after a year of service. Assuming all other facts remained the same, if a pregnant McFee had requested her leave on June 26, 2004 (just six months later), she would have qualified for leave under Pataskala Oaks’ leave policy, and Pataskala Oaks would have granted her request. Thus, it was her tenure, and not her pregnancy,

⁵ During the JCARR hearing on the proposed rule, the OCRC reported that the rule would have no economic impact on employers because they were already required to provide leave for a reasonable time. JCARR rejected this contention and ordered the OCRC to provide more economic data on how the rule would financially impact employers.

that led to McFee's discharge. Where the employee's pregnancy simply creates the situation in which a facially neutral policy requires termination, her pregnancy is *not* considered a factor in the termination. See, e.g., *Frank v. Toledo*, supra, 84 Ohio App.3d at 617-618 (stating that failure to make leave available to a pregnant employee in lieu of terminating her was not discriminatory *unless* it was shown that such employee was terminated because of, or on the basis of, pregnancy).

The Court of Appeals also inexplicably asserts that Ohio Adm. Code 4112-5-05(G)(5) should not apply to termination cases because termination is not a "condition" of employment. To the contrary, termination is the *ultimate* condition of employment. The United States Court of Appeals, Sixth Circuit has stated that a materially adverse change in "terms and conditions" of employment might be indicated by a *termination of employment*, a demotion evidenced by a decrease in salary, a less distinguished title, and more. *Coleman v. ARC Automotive, Inc.* (C.A.6, 2007), 255 Fed. Appx. 948, 951, 2007 U.S.App. LEXIS 26618.

Pataskala Oaks' leave policy placed a one-year minimum length of service requirement on leave, as specifically permitted by Ohio Adm. Code 4112-5-05(G)(5). The Ohio General Assembly was given the opportunity to change this regulation and require leave for pregnant employees, and it did not take the opportunity to do so. McFee was not eligible for leave (and therefore was terminated) because she did not meet this minimum length of service requirement, not because of her pregnancy. Consequently, Pataskala Oaks did not violate Ohio's anti-discrimination laws.

Proposition of Law No. III: The *McDonnell Douglas* burden-shifting test applies because there is no direct evidence of discrimination.

In a discrimination case, the ultimate question for the court is whether the employer acted with a discriminatory motive. Courts have struggled with determining the motive of employers, and, consequently, both direct evidence and indirect evidence approaches to proving discrimination have emerged. See *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 801-802, 93 S. Ct. 1817, 36 L.E.2d 668.

The plaintiff making a discrimination claim in the absence of direct evidence has the burden of first proving a prima facie case of discrimination. *Id.* at 802. If the employee is able to establish a prima facie case of discrimination, the burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the discharge. *Id.* at 826. If the employer does so, the burden once again shifts back to the employee to demonstrate that the reasons offered by the employer are pretextual and the actual motivation for the action as discriminatory animus. *Id.* Thus, proof of the ultimate motive of the employer, the determining issue in a discrimination claim, lies with the plaintiff.

Direct evidence has been defined as evidence that does not require any inference to conclude that the employee has proven discrimination. *Kleiber v. Honda of America Mfg., Inc.* (C.A.6, 2007) 485 F.3d 862, 868. For example, courts have found direct evidence present in cases involving facially discriminatory policies and comments. See, e.g., *Kohmescher v. Kroger Co.* (1991), 61 Ohio St. 3d 501, 504, 575 N.E.2d 439 (finding direct evidence in an age discrimination claim where employer's written statement indicated plaintiff was selected for a reduction in force because he was eligible for the retirement window); *Tessmer v. Nationwide Life Ins. Co.* (Sept. 30, 1999), Franklin App. No. 98AP-1278, 1999 Ohio App. LEXIS 4633

(finding direct evidence in sex discrimination claim where management employee made statements that it was a problem to have female plaintiff in a part-time position, and that a male employee would “straighten” the part-time employees out).

The purpose of the *McDonnell Douglas* test, in contrast, is to allow the plaintiff to raise an inference of discriminatory intent indirectly. *McConaughy v. Boswell Oil Co.* (1998), 126 Ohio App.3d 820, 826, 711 N.E.2d 719. Under the test, the plaintiff must show (1) she was a member of the protected class, (2) she suffered an adverse employment action, (3) she was qualified for the job she lost, and (4) she was replaced by someone outside the protected class, or another employee similar in his or her ability or inability to work received more favorable treatment. *Id.* at 827. Facially neutral policies necessarily require the court to *infer* discriminatory intent, and therefore application of the *McDonnell Douglas* burden-shifting framework to claims involving facially neutral policies is clearly required. See, e.g., *Frank v. Toledo Hosp.*, supra, 84 Ohio App. 3d at 613-616 (applying *McDonnell Douglas* to a facially neutral rubella vaccination policy); *Abraham v. Graphic Arts Internatl. Union* (1981), 660 F.2d 811, 815, 212 U.S. App. D.C. 412, 26 Fair Emp. Prac. Cas. (BNA) 818 (applying *McDonnell Douglas* to a facially neutral leave policy). Additionally, numerous courts have found that the *McDonnell Douglas* framework and burden shifting-approach should be used in determining discrimination claims under the Pregnancy Discrimination Act and R.C. Chapter 4112. See, e.g., *Priest v. TFH-EB, Inc.*, supra, 127 Ohio App.3d at 166-167; *McConaughy*, 126 Ohio App.3d at 826-827.

Here, there is simply no direct evidence of discrimination, either in the form of a facially discriminatory statement or a discriminatory policy. McFee stipulated that she was terminated because of her failure to meet Pataskala Oaks’ minimum length of service requirements.

Pataskala Oaks' policy is a facially neutral policy, and McFee has not alleged that it was applied discriminatorily. Thus, the burden-shifting analysis of *McDonnell Douglas* clearly applies.

Proposition of Law No. IV: Ohio courts have not specifically held that minimum length of service requirements are discriminatory.

In its jurisdictional memorandum, OCRC makes the bald assertion that all Ohio appellate courts applying RC 4112.02(A) to the issue of maternity leave have concluded that leave must be provided “for a reasonable period of time.” (Memorandum Opposing Jurisdiction of Appellee Ohio Civil Rights Commission, hereinafter “OCRC Jurisdictional Memorandum”, p. 6, ¶2.) However, the cases cited by OCRC do not squarely address the issue before this Court: whether a minimum length of service requirement is permitted under Ohio’s pregnancy discrimination law. Rather, the cases cited by the OCRC examine a variety of very different issues such as whether the leave provided under an employer’s policy was in fact “reasonable,” a determination not at issue here. OCRC ignores a fundamental element missing from all of these cases that is necessary to analogize to the dispute herein – the existence of a neutral leave policy containing a minimum length of service requirement.

First, OCRC argues that *Woodworth v. Concord Mgt. Ltd.* (S.D.Ohio 2000), 164 F.Supp.2d 978, has held that an employee must be granted a reasonable leave on account of childbearing. (OCRC Jurisdictional Memorandum, p. 6, ¶2.) However, the plaintiff in *Woodworth* did not argue that the defendant employer’s policy provided insufficient or no leave, but rather, “she challenge[d] the *application* of that policy, stating that she was treated differently than nonpregnant individuals taking such leave.” *Id.* at 986. Consequently, the court examined the application of the employer’s leave policy pursuant to the *McDonnell Douglas* framework.

Id. at 982-985. Any discussion regarding reasonableness of leave or mandatory leave requirements is dicta.

Next, OCRC argues that *McConaughy v. Boswell Oil*, supra, 126 Ohio App.3d 820, supports its position, stating that the *McConaughy* court examined situations both where a leave policy existed and where it did not, and concluded that in both instances the leave must be for a reasonable period of time. (OCRC Jurisdictional Memorandum, p. 7, ¶2.) Again, the issue here is not whether the leave provided was for a reasonable period of time, but whether Pataskala Oaks' minimum length of service requirement was discriminatory. OCRC ignores that Pataskala Oaks *does have* a leave policy, and that it has not disputed the reasonableness of the time period of leave Pataskala Oaks provides.

OCRC then turns to *Marvel Consultants, Inc. v. Ohio Civ. Rights Comm.* (8th Dist. 1994), 93 Ohio App. 3d 838, 639 N.E.2d 1265. However, in *Marvel*, the employer had no leave policy in place, and the court therefore applied 4112-5-05(G)(6). *Id.* at 841. Like the other cases relied upon by OCRC, *Marvel* did not examine a leave policy with a length of service requirement, nor did it consider or interpret 4112-5-05(G)(5).

Finally, OCRC cites *Frank v. Toledo Hosp.*, supra, 84 Ohio App. 3d 610, to argue that an employer must provide a pregnant employee maternity leave even if no disability leave is generally available. *Frank* also does not apply to this situation – where an employer *does* have a neutral policy with a length of service requirement. The court in *Frank* did not examine a leave policy, but an employment policy related to rubella vaccinations. *Id.* at 611. The plaintiff, who was discharged after she refused to undergo a rubella vaccination because of the anticipated danger to her pregnancy, argued that she should have been offered maternity leave in lieu of termination, but did not point to any leave policy in effect at the time. *Id.* at 611-613. The court

opined generally on the purpose of 4112-5-05(G)(2) and (6), but did not examine 4112-5-05(G)(5). *Id.* at 617. Additionally, and significantly, the court reasoned that the plaintiff's pregnancy could not be construed to have been a factor in her discharge. *Id.* at 618. The *Frank* court did not even get to the point of examining whether there was a leave policy or whether reasonable leave was available; the plaintiff could not provide direct evidence of discrimination because she was discharged based on a neutral policy and not on account of her pregnancy, and there was no evidence that the policy had a disparate impact on pregnant employees. *Id.* at 617.

The OCRC's contention that leave should be provided for a reasonable time is not argued. Regardless, Ohio courts have not examined whether a minimum length of service requirement qualifies as discrimination, most likely because Ohio Adm. Code 4112-5-05(G)(5) specifically provides otherwise.

CONCLUSION

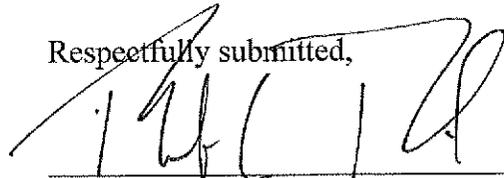
The facts presented before the Court are simple and undisputed. Pataskala Oaks had a leave of absence policy providing that employees are eligible for up to 12 weeks of leave after completing one year of service. McFee did not meet the one year minimum length of service requirement when she requested pregnancy leave. In accordance with Pataskala Oaks' neutrally applied leave policy, McFee's employment was terminated, and she was eligible to re-apply for employment following her absence.

Ohio's pregnancy discrimination law, under which McFee now seeks relief, requires only that employers treat pregnant employees the *same* as other employees. This is exactly what Pataskala Oaks did. Nevertheless, the OCRC is now seeking to fundamentally expand the scope of Ohio's pregnancy discrimination law to provide pregnant employees *preferential* treatment.

Specifically, the OCRC is seeking to convert Ohio's pregnancy discrimination law into a leave of absence law. Viewed in context, the OCRC's current attempt to rewrite Ohio's anti-discrimination law to require *preferential* treatment is perplexing because it is inconsistent with the plain language of Chapter 4112 which requires *equal* treatment; it is at odds with the example of a valid leave policy provided in Ohio Adm. Code 4112-5-05(G)(5); it is contrary to the *Johnson* decision in 2001; and it is in circumvention of JCARR's rejection of the agency's proposed rule in 2007.

For the reasons stated herein, the judgment of the Licking County Court of Appeals, Fifth Appellate District should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. C. Pivonka', written over a horizontal line.

ROBERT C. PIVONKA (0067311)
COUNSEL FOR AMICUS CURIAE,
OHIO HEALTH CARE ASSOCIATION

CERTIFICATE OF SERVICE

I certify that a copy of this Merits Brief of Amicus Curiae, Ohio Health Care Association, has been served upon the following persons, by Federal Express overnight delivery on this 24th day of September, 2009:

Jan E. Hensel
Dinsmore & Shohl LLP
191 W. Nationwide Blvd., Suite 300
Columbus, OH 43215
Counsel for Appellant, Nursing Care Management of America, Inc.
d/b/a Pataskala Oaks Care Center

Patrick M. Dull
Assistant Attorney General
30 East Broad Street, 15th Floor
Columbus, OH 43215-3428
Counsel for Appellee, Ohio Civil Rights Commission



ROBERT C. PIVONKA (0067311)
COUNSEL FOR AMICUS CURIAE,
OHIO HEALTH CARE ASSOCIATION

IN THE SUPREME COURT OF OHIO

NURSING CARE MANAGEMENT	:	CASE NO. 2009-0756
OF AMERICA, INC. D/B/A	:	
PATASKALA OAKS CARE	:	
CENTER	:	
Appellant	:	On Appeal from the
	:	Court of Appeals of
	:	Licking County, Ohio
	:	Fifth Appellate District
vs.	:	
	:	Court of Appeals
OHIO CIVIL RIGHTS	:	Case No. 08CA0030
COMMISSION	:	
	:	
Appellee	:	

APPENDIX TO MERIT BRIEF OF AMICUS CURIAE,
OHIO HEALTH CARE ASSOCIATION

Carol Rolf (0038356)
Robert C. Pivonka (0067311)
(COUNSEL OF RECORD)
Rolf & Goffman Co., L.P.A.
30100 Chagrin Blvd., Suite 350
Cleveland, OH 44124-5705
Phone: 216-514-1100
Fax: 216-514-0030
Email: pivonka@rolfgoffman.com

COUNSEL FOR AMICUS CURIAE, OHIO
HEALTH CARE ASSOCIATION

Patrick M. Dull (0064783)
(COUNSEL OF RECORD)
Assistant Attorney General
30 East Broad Street, 15th Floor
Columbus, OH 43215-3428
Phone: 614-466-7900
Fax: 614-466-2437
Email: pdull@ag.state.oh.us

COUNSEL FOR APPELLEE,
OHIO CIVIL RIGHTS COMMISSION

Jan E. Hensel (0040785)
(COUNSEL OF RECORD)
Dinsmore & Shohl LLP
191 W. Nationwide Blvd., Suite 300
Columbus, OH 43215
Phone: 614-227-4267
Fax: 614-221-8590
Email: jhensel@dinslaw.com

Patricia Gavigan (0081258)
Dinsmore & Shohl LLP
255 E. 5th Street, Suite 1900
Cincinnati, OH 45202
Phone: 513-977-8200
Fax: 513-977-8141
Email: pgavigan@dinslaw.com

COUNSEL FOR APPELLANT, NURSING
CARE MANAGEMENT OF
AMERICA, INC. D/B/A PATASKALA
OAKS CARE CENTER

APPENDIX TABLE OF CONTENTS

Page

UNREPORTED CASES

<i>Coleman v. ARC Automotive, Inc.</i> (C.A.6, 2007), 255 Fed. Appx. 948, 2007 U.S.App. LEXIS 26618	1
<i>Frazier v. The Practice Mgt. Resource Group, Inc.</i> (June 27, 1995), Franklin App. No. 95APE01-46, 1995 Ohio App. LEXIS 2750	11
<i>Johnson v. Watkins Motor Lines, Inc.</i> (Oct. 3, 2001), 2001 Ohio Civil Rights Comm. LEXIS 10.....	20
<i>Tessmer v. Nationwide Life Ins. Co.</i> (Sept. 30, 1999), Franklin App. No. 98AP-1278, 1999 Ohio App. LEXIS 4633.....	26

LEXSEE 255 FED APPX 948

**TERRI Q. COLEMAN, Plaintiff-Appellant, v. ARC AUTOMOTIVE,
INC., Defendant-Appellee.**

No. 07-5169

**UNITED STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT**

**07a0795n.06; 255 Fed. Appx. 948; 2007 U.S. App. LEXIS 26618; 2007
FED App. 0795N (6th Cir.); 102 Fair Empl. Prac. Cas. (BNA) 177**

November 14, 2007, Filed

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: [**1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.
Coleman v. ARC Auto., Inc., 2007 U.S. Dist. LEXIS 7503 (E.D. Tenn., Jan. 31, 2007)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee brought suit under Title VII of the Civil Rights Act of 1964 alleging that defendant employer discriminated against her

on the basis of sex and race, subjected her to a hostile work environment, and retaliated against her. The U.S. District Court for the Eastern District of Tennessee granted summary judgment to the employer, concluding that she failed to establish a prima facie case with respect to all claims. She appealed.

OVERVIEW: The employee's Title VII discrimination claim failed because she presented no evidence the employer subjected her to an adverse employment action. Her retaliation claim failed because she did not establish a materially adverse employment action and a causal connection between her protected activity and the alleged adverse employment action. As evidence of adverse action, she pointed to a \$ 76 pay discrepancy, her loss of certain benefits, pervasive monitoring and gate guard checks, and certain comments made by the employer's personnel. Her retaliation claim failed because she had not made a showing sufficient to establish that the employer subjected her to a materially adverse employment action and, second, she

did not establish that a causal connection existed between her protected activity and the alleged adverse employment action. Her hostile work environment claim failed because, first, she failed to establish a genuine issue of material fact as to whether the employer subjected her to an unreasonably abusive or offensive work environment and, second, she did not establish a genuine issue of material fact as to whether the employer undertook action based on her race or sex.

OUTCOME: The judgment of the district court was affirmed.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > General Overview

[HN1] *Fed. R. Civ. P. 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Proof > Burdens of Proof > Employee Burdens

Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Burdens of Proof > Employee Burdens

[HN2] When a plaintiff has not presented direct evidence of discriminatory animus, she must establish a prima facie case of race or sex discrimination by showing that she (1) is a member of a protected class, (2) was subjected to an adverse employment action, (3) was qualified, and (4) was treated differently than similarly situated white and/or male employees. Under the adverse

employment action prong, she must demonstrate that she experienced a materially adverse change in the terms and conditions of her employment.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Proof > Circumstantial & Direct Evidence

Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Circumstantial & Direct Evidence

[HN3] Direct evidence is that evidence which, if believed, requires the conclusion that race or sex was a motivating factor in the employer's action.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Proof > Burdens of Proof > Employee Burdens

Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Burdens of Proof > Employee Burdens

[HN4] A materially adverse change in the terms and conditions of employment might be indicated by a termination of employment, a demotion evidenced by a decrease in salary or wage, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Labor & Employment Law > Discrimination > Retaliation > Elements > General Overview

Labor & Employment Law > Discrimination > Retaliation > Elements > Adverse Employment Actions

[HN5] When a plaintiff has offered no direct evidence of retaliation, she must show that (1) she was engaged in activity protected by Title VII of the Civil Rights Act of 1964, (2) the employer knew of the activity, (3) the employer subsequently took a materially

adverse employment action, and (4) a causal connection exists between the protected activity and the adverse employment action. In the retaliation context, an adverse employment action is one that a reasonable employee would find materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Labor & Employment Law > Discrimination > Harassment > Racial Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment

[HN6] To succeed on a hostile work environment claim, a plaintiff must establish that the conduct at issue was severe or pervasive. The alleged conduct must constitute an unreasonably abusive or offensive work-related environment or adversely affect the reasonable employee's ability to do his or her job. She must also demonstrate that the alleged harassment was based on her sex or race.

COUNSEL: For TERRI Q. COLEMAN, Plaintiff - Appellant: Mark A. Brown, Barbara W. Clark, Clark, Brown & Waters, Knoxville, TN.

For ARC AUTOMOTIVE, INC., Defendant - Appellee: Steven R. Semler, Ogletree, Deakins, Nash, Smoak & Stewart, Washington, DC; Jonathan O. Harris, Ogletree, Deakins, Nash, Smoak & Stewart, Nashville, TN.

JUDGES: Before: MERRITT, ROGERS, and McKEAGUE, Circuit Judges.

OPINION BY: ROGERS

OPINION

[*948]

ROGERS, Circuit Judge. Plaintiff brought suit under Title VII alleging that her employer discriminated against her on the basis of sex and race, subjected her to a hostile work environment, and retaliated against her. The district court granted summary judgment to the employer, concluding that plaintiff failed to establish a *prima facie* case with respect to all claims. Because plaintiff has failed to make a showing sufficient to establish the existence of elements essential to each of her claims, we affirm.

I.

Plaintiff Terri Q. Coleman is an African-American female who has been employed by Defendant ARC Automotive, Inc. ("ARC") as a general machine operator for over 12 years. During that time, Coleman was a member of the Union of [**2] Needletrades, Industrial and Textile Employees AFL-CIO Local 906 ("Union"). On April 24, 2004, Coleman was elected to serve as plant president for the Union. Less than one year later, the Union removed Coleman as president and expelled her after finding that Coleman had engaged in activity disloyal to the Union. Nevertheless, [*949] Coleman continued to perform her regular job as general machine operator for ARC.

Coleman admits that she was not subjected to sex or race discrimination prior to being elected Union president. It was not until after she became president, Coleman alleges, that ARC and its employees and agents subjected her to acts of retaliation, harassment, intimidation, and disparate and unfair treatment. Coleman also claims that ARC retaliated against her by, among other things, delaying her receipt of overtime pay and denying her benefits under the Family and Medical Leave Act (FMLA). According

to Coleman, ARC retaliated because she assisted other employees with Title VII issues and because she filed a complaint against ARC with the United States Equal Employment Opportunity Commission ("EEOC").

Coleman points to several instances of conduct to support her claims. First, Coleman's [**3] predecessor as Union president was an African-American male named Jacob Grant. Coleman asserts that she was subjected to humiliation when ARC employees Robin Whyte, Senior Plant Manager, and Darryl Bunch, referred to her as the "Anointed One" and the "new little Jacob" when they first introduced Coleman as Union president to other employees. Additionally, Coleman contends that, after she was elected Union president, Whyte told Grant that "they do not need anyone like Terri Coleman as Union President."

Second, Coleman alleges that during her time as Union president, she was subjected to continuous surveillance from supervisors and guards, who were instructed to report Coleman's contact with employees. Coleman points to the affidavit of Larry Daniels, a security guard at ARC, who stated that he received special instructions to monitor Coleman and was never given similar instructions regarding any other employee or Union representative. Coleman admits that supervisors never directly told her that they had been instructed to monitor her.

Third, Coleman contends that, under orders from Jackie Theg, ARC's Director of Human Resources, Coleman and her vice president were stopped and informed [**4] that both individuals could not attend a meeting on behalf of an employee facing disciplinary action. It is undisputed, however, that ultimately both Coleman and the vice president were allowed to attend the meeting.

Fourth, Coleman alleges that ARC management subjected her to automatic stops

at guard gates and that management included a photograph of Coleman in a notebook that contained photographs of employees who had previously been terminated by ARC. Coleman admits that the stops only occurred when she entered the company premises on Union business, not when she reported for her normal work shift. She further admits that she waited no more than a few minutes at the guard gate at any given time. It is also undisputed that the Collective Bargaining Agreement ("CBA") between the Union and ARC provided that Union representatives consult with ARC human resources personnel before entering company facilities during business hours. ARC human resources director Theg testified that other Union presidents--including the current president, who is a white male--have complied with the same check-in procedures required of Coleman. Terry Gallman, who served as Union vice president under Coleman, [**5] stated in an affidavit that, to his knowledge, no other Union representative or officer that worked for ARC had ever been subjected to the same procedures.

Fifth, Coleman asserts that on one occasion, after she had been removed as Union president, ARC paid her \$ 76 less than she had earned. When Coleman sought a [*950] remedy for the discrepancy, she was improperly informed by an ARC employee that she needed to file a grievance. Coleman admits that, shortly thereafter, another ARC employee corrected the error and Coleman received the outstanding amount owed to her three business days after she discovered the discrepancy.

Sixth, Coleman contends that she was improperly denied benefits under the FMLA. Coleman argues that ARC requested re-certification of her FMLA status even though re-certification was not required. Coleman admits, however, that ARC requested re-certification only after Coleman, upset over the pay discrepancy described earlier, left

work in the middle of a shift, stating to her supervisor: "It's FMLA, I'm going to have to leave." Coleman further admits that her FMLA status lapsed after she presented re-certification papers to her doctor and her doctor did not sign the papers. [**6] Theg testified in her deposition that any supervisor who believes an employee is abusing FMLA benefits may request re-certification.¹

1 Coleman also claims in both her appellate brief and her memorandum in opposition to summary judgment that, at some point, Theg refused to accept a grievance filed on behalf of Coleman because Theg did not agree with the language used in the grievance. Coleman points to no evidence in the record to substantiate this claim.

In addition, the record indicates that during Coleman's time as Union president, ARC management believed that Coleman had violated the CBA on several different occasions. For example, on November 30, 2004, Theg wrote a letter to Kathy Mays, a Union representative, stating that Coleman had persistently violated the CBA by interfering with employees during working hours. In the letter, Theg reported calls from managers at two ARC plants complaining that Coleman was interfering with production by handing out letters and carrying on conversations with employees during working hours. Theg also stated in her deposition that "people were coming to me, supervisors, product team managers. . . . [b]ecause [Coleman] was being abusive with her [**7] rights as a union president. And was being disruptive and just not following the contractual agreement." Additionally, the record indicates that, at one point, Theg escorted Coleman out of a plant because Coleman was engaging in disruptive behavior and had failed to notify the company that she was on the premises. Coleman stated that Theg told her "that was [Theg's] last time

telling [Coleman] not to be on the property without having permission" and that Theg did not make any racial or sexual comments at that time. In her deposition, Theg stated that she escorted Coleman out of the plant because Coleman "was disrupting production" and that "when [union presidents] are [on company premises] on an off shift, they have to allow notification."

Coleman first complained of racial and sexual discrimination at ARC on September 30, 2005, when she filed a "Charge of Discrimination" with the EEOC. On February 8, 2005, the EEOC issued a determination stating that it was unable to conclude that a violation of Title VII occurred. After Coleman requested reconsideration, the EEOC sent a letter to Coleman dated April 7, 2006, stating: "There are no indications that further investigation would disclose [**8] a violation under Title VII The result of the investigation, including witness statements, indicated that the actions taken had everything to do with union activity and nothing to do with a Title VII violation." On May 8, 2006, Coleman commenced the instant action in federal district court. On January 31, 2007, the district court granted summary judgment to ARC, reasoning that Coleman had failed to establish a [*951] *prima facie* case for her claims against ARC.

II.

Because Coleman has failed to make a showing sufficient to establish the existence of elements essential to her claims against ARC, we affirm. [HN1] "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Coleman has provided no direct

evidence of discriminatory animus or retaliation and thus bears the burden of establishing a *prima facie* case for each of her claims. Summary judgment was appropriate because Coleman has not made a showing sufficient [**9] to establish the existence of elements essential to her claims and on which she will bear the burden of proof at trial.

A.

Coleman's discrimination claim fails because Coleman has presented no evidence that ARC subjected her to an adverse employment action. [HN2] Because Coleman has not presented direct evidence of discriminatory animus,² she must establish a *prima facie* case of race or sex discrimination by showing that she (1) is a member of a protected class, (2) was subjected to an adverse employment action, (3) was qualified, and (4) was treated differently than similarly situated white and/or male employees. *McClain v. NorthWest Cmty. Corr. Ctr. Judicial Corr. Bd.*, 440 F.3d 320, 332 (6th Cir. 2006). Under the adverse employment action prong, Coleman must demonstrate that she experienced a "materially adverse change in the terms and conditions of [her] employment." See *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461 (6th Cir. 2000) (quoting *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999)).

2 Coleman contends that "statements made by management regarding Ms. Coleman's election as Local 906 Union President is [sic] direct proof of racial and sexual animus against her." [**10] The incidents Coleman refers to--namely, that she was introduced as the "Anointed One" and the "new little Jacob" after she won election as Union president--do not provide direct evidence of racial or sexual animus. See, e.g., *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003)

[HN3] ("Direct evidence is that evidence which, if believed, *requires* the conclusion that [race or sex] was a motivating factor in the employer's action.") (emphasis in original). Similarly, the statement allegedly made by an ARC manager that "they do not need anyone like Terri Coleman as Union President" fails to establish direct evidence of animus on the basis of sex or race.

As evidence of adverse action, Coleman points to the \$ 76 pay discrepancy, her loss of FMLA benefits, pervasive monitoring and gate guard checks, and certain comments made by ARC personnel. Coleman contends that these activities "undermined and served to deprive [her] of her position as the first female African-American and [sic] Union President." The conduct that Coleman complains of, however, is not sufficient to establish a genuine issue of material fact as to whether ARC subjected her to an adverse employment action. This [**11] court has stated that,

[a] materially [HN4] adverse change [in the terms and conditions of employment] might be indicated by a termination of employment, a demotion evidenced by a decrease in salary or wage, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

[*952] See *Bowman*, 220 F.3d at 461-62 (quoting *Hollins*, 188 F.3d at 662). Here, Coleman admits that she was never terminated, suspended, demoted, docked pay, or moved to a less desirable shift. Nevertheless, Coleman argues that actions

taken by ARC qualify as adverse employment actions because they are "unique to [her] particular situation" as the first female African-American Union president. This argument lacks merit.

First, Coleman admits that she obtained relief from the \$ 76 pay discrepancy only three days after reporting it. A three-day deprivation of \$ 76 cannot reasonably be considered a materially adverse change in the terms and conditions of Coleman's employment. The same is true of Coleman's loss of FMLA benefits. ARC's human resources director Theg testified that any supervisor could request FMLA re-certification [**12] if the supervisor suspected that an employee was abusing his or her FMLA status. The record is clear that Coleman's supervisor requested FMLA re-certification only after Coleman abruptly left work mid-shift, telling her supervisor that "[i]t's FMLA, I'm going to have to leave." Coleman offers no evidence to suggest that the re-certification request was improper and admits that her FMLA status lapsed only after she failed to obtain her doctor's signature on the re-certification papers. Presumably, had Coleman obtained her doctor's signature, her FMLA benefits would have continued in effect.

Second, the targeted surveillance and gate guard stops alleged by Coleman do not qualify as adverse employment actions. Coleman testified that the stops lasted no longer than a few minutes and admitted that supervisors never directly told her that she was being monitored. Coleman points to the affidavit of one gate guard who claimed that he was instructed to monitor Coleman. She also points to the affidavit of her Union vice president who claimed that Coleman received special treatment. But these affidavits fail to make a showing sufficient to establish that Coleman's employment at ARC was materially [**13] altered by monitoring and gate checks. Indeed, it is undisputed that these

activities never occurred when Coleman arrived for her normal shift work.

Third, Coleman lost her position as Union president solely as the result of Union action. Record evidence indicates that the Union, not ARC, held the hearing that resulted in Coleman's ouster as Union president. The record also indicates that Coleman was removed from the presidency for reasons independent of any action taken by ARC management. Coleman offers no evidence to support her contention that ARC management influenced her removal. Rather, the record indicates that ARC allowed Coleman to perform her job as a general machine operator generally unimpeded before, during, and after her Union presidency.

In sum, Coleman's discrimination claim fails because Coleman has not made a showing sufficient to establish that ARC subjected her to an adverse employment action.

B.

Coleman also asserts that ARC retaliated against her for engaging in activity protected by Title VII. This claim fails because, first, Coleman has not made a showing sufficient to establish that ARC subjected her to a materially adverse employment action and, second, Coleman [**14] has not established that a causal connection exists between her protected activity and the adverse employment action she alleges. [HN5] Because Coleman has offered no direct evidence of retaliation, Coleman must show that (1) she was engaged in activity protected by Title VII, (2) the employer knew of the activity, (3) the employer subsequently took a materially adverse employment [*953] action, and (4) a causal connection exists between the protected activity and the adverse employment action. *See Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003). In the retaliation context, an adverse

employment action is one that "a reasonable employee would [find] . . . materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006) (citations and quotations omitted).

Coleman contends that ARC retaliated against her because she was active and aggressive as Union president in pursuing and protecting employee rights under Title VII and because she filed a complaint against ARC with the EEOC. As evidence of retaliatory conduct, Coleman [**15] again points to automatic stops at guard gates, comments made by management, the \$ 76 pay discrepancy, and her loss of FMLA benefits. ARC took these actions, Coleman argues, to dissuade her from assisting or participating in Title VII proceedings.

As a preliminary matter, most of the conduct Coleman complains of occurred before she filed the EEOC charge, and thus cannot be used to support a retaliation claim with respect to the EEOC complaint. The only post-EEOC complaint conduct that Coleman alleges is the pay discrepancy and loss of FMLA status. But, as explained in Part II.A., *supra*, the loss of FMLA benefits occurred only after Coleman's doctor failed to sign the re-certification papers and the \$ 76 pay discrepancy lasted only three days. It cannot reasonably be argued that these circumstances would have dissuaded a reasonable worker from asserting Title VII protections. Coleman has therefore failed to provide any evidence of an adverse employment action to support her claim that she was retaliated against for filing the EEOC complaint. Further, the remaining conduct that Coleman complains of cannot be considered materially adverse to Coleman on the record in this case. Coleman [**16] offers scant evidence of monitoring and admits that the gate guard stops lasted

only minutes. Moreover, the comments that Coleman attributes to certain ARC personnel simply would not have dissuaded a reasonable employee from asserting Title VII protections.³

3 Coleman alleges that two ARC employees deemed Coleman the "Anointed One" and the "new little Jacob" when introducing Coleman as Union president to fellow employees. Additionally, one ARC manager allegedly told the outgoing Union president that "they do not need anyone like Terri Coleman as Union President."

Finally, even if ARC's conduct could be considered materially adverse to Coleman, Coleman has not made a showing sufficient to establish a causal connection between her Title VII activity and the adverse employment action she alleges of ARC. In addition to the EEOC complaint, Coleman contends that ARC retaliated against her for actively pursuing Title VII protections for employees. But Coleman has offered no evidence from which to infer that ARC engaged in conduct based on Coleman's Title VII activities as Union president. In fact, the record does not shed light upon a single instance where Coleman assisted an employee with [**17] a Title VII issue. The topic was not covered in Coleman's deposition and, on appeal, Coleman points only to Theg's statement that Coleman spoke loudly at a meeting related to insurance benefits. Coleman's conduct at an insurance meeting, however, provides no insight into her Title VII activities as Union president.

Because Coleman has failed to make a showing sufficient to establish both a materially [*954] adverse employment action and a causal connection between that action and her protected activity, she has failed to meet her burden on summary judgment.

C.

Lastly, Coleman claims that ARC subjected her to a hostile work environment. This claim fails because, first, Coleman has failed to establish a genuine issue of material fact as to whether ARC subjected her to an unreasonably abusive or offensive work environment and, second, Coleman has failed to establish a genuine issue of material fact as to whether ARC undertook action based on Coleman's race or sex. [HN6] To succeed on a hostile work environment claim, Coleman must establish that the conduct at issue was "severe or pervasive." *Allen v. Michigan Dep't of Corrections*, 165 F.3d 405, 410 (6th Cir. 1999). "The alleged conduct [must] constitute[] [**18] an unreasonably abusive or offensive work-related environment or adversely affect[] the reasonable employee's ability to do his or her job." *Id.* (quoting *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988)). Coleman must also demonstrate that the alleged harassment was based on her sex or race. *Michael v. Caterpillar Fin. Services Corp.*, 496 F.3d 584, 600 (6th Cir. 2007).

As evidence of a hostile work environment, Coleman once again points to comments made by ARC management, automatic stops at guard gates, targeted surveillance, the \$ 76 pay discrepancy, and her loss of FMLA status. Additionally, Coleman claims that she suffered embarrassment and humiliation when she was initially prevented from attending an employee disciplinary hearing. The conduct Coleman complains of, however, fails to establish that a genuine issue of material fact exists as to whether ARC subjected Coleman to "severe or pervasive" conduct.

As noted above, ARC quickly fixed Coleman's pay discrepancy and Coleman lost her FMLA status only after her doctor failed to sign re-certification papers. It is also undisputed that Coleman ultimately did attend

the employee disciplinary meeting after initially being [**19] stopped at the door. Further, the comments that Coleman attributes to management were not abusive or offensive in quality, nor does the record contain evidence suggesting that the monitoring of Coleman or the gate guard stops inhibited Coleman's ability to do her job. Indeed, Coleman testified that the stops lasted no longer than a few minutes and that she was never directly told by a supervisor that she was being monitored. On one occasion, Coleman was escorted out of a plant when she was on Union business, but this incident does not rise to the level of "severe and pervasive" conduct and Coleman has not alleged that her freedom of movement was ever impeded when she was in the plant for her normal shift work. Coleman has therefore failed to establish a genuine issue of material fact as to whether the conduct she complains of "[constituted] an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to do his or her job." *Allen*, 165 F.3d at 410.

Concomitantly, Coleman has failed to establish that a genuine issue of material fact exists as to whether any action taken by ARC was taken on the basis of her race or gender. Coleman [**20] offers no evidence of racial or sexual comments made by ARC personnel. Moreover, Coleman fails to rebut significant evidence in the record that suggests that ARC's actions were the result of its belief that Coleman, as Union president, continuously engaged in conduct that disrupted production and violated the CBA. Thus, even if Coleman was treated differently or more unfairly than every other Union president, she has failed to [**955] establish that the difference in treatment was due to her being the first female African-American Union president. Rather, the record indicates that Coleman may have been treated differently because ARC

perceived her to be the first Union president to persistently violate the CBA.

In sum, Coleman has failed to meet her burden on summary judgment with respect to her hostile work environment claim.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

LEXSEE 1995 OHIO APP LEXIS 2750

Laura L. Frazier, Plaintiff-Appellant, v. The Practice Resource Management Group, Inc., and Daniel D. Mefford, Defendants-Appellees.

No. 95APE01-46 (REGULAR CALENDAR)

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1995 Ohio App. LEXIS 2750

June 27, 1995, Rendered On

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, an employee, sought review of an order by the Franklin County Court of Common Pleas (Ohio), which granted appellee employer's motion for JNOV. Appellant sought injunctive relief, as well as compensatory and punitive damages, for gender discrimination. Specifically, appellant alleged that appellee unlawfully terminated her employment when she became unable to work as a result of complications related to her pregnancy and childbirth.

OVERVIEW: The court stated that an employer was not required to have a policy allowing unlimited maternity leave. An employer was required only to have a reasonably adequate policy of maternity leave applied on the same terms and conditions as for other disabilities. At the core of the appeal was a finding by the trial court that jury responses to certain interrogatories were inconsistent and irreconcilable with a general verdict in favor of appellant. Based on that finding, the trial court granted appellee's JNOV motion and entered judgment in accord with the interrogatory responses. The court noted that the trial court's decision to enter judgment in accordance with the answers to the interrogatories could only be disturbed upon a finding that it abused its discretion. The court found the trial court's reasoning sound and could not say that it abused its discretion in granting JNOV as to the jury's award of compensatory damages. The court agreed with the trial court that punitive damages were inappropriate. The court concluded that the trial court acted well within its discretion in granting JNOV in accord with

the jury's responses to the special interrogatories.

OUTCOME: The court affirmed the decision of the trial court, which granted appellee's motion for JNOV.

LexisNexis(R) Headnotes

Labor & Employment Law > Discrimination > Actionable Discrimination

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > General Overview

[HN1] *Ohio Rev. Code Ann. § 4112.02(A)* provides that the following constitutes an unlawful discriminatory practice: For any employer, because of the sex of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Trials > Jury Trials > Verdicts > General Verdicts

[HN2] To render a judgment on special interrogatories, as against the general verdict, a trial court must conclude that the special findings are inconsistent and irreconcilable with the general verdict. The party challenging the general verdict bears the burden of showing that the two are irreconcilable and inconsistent. The court must make every reasonable attempt to harmonize a special finding with the general verdict.

Civil Procedure > Trials > Jury Trials > Verdicts > General Verdicts

Civil Procedure > Remedies > Damages > Punitive Damages

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Remedies > General Overview

[HN3] Under Ohio law, an award of punitive damages is available upon a finding of actual malice.

Civil Procedure > Remedies > Damages > Punitive Damages

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Remedies > General Overview

[HN4] Actual malice necessary for an award of punitive damages is that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

COUNSEL: Harris, McClellan, Binau & Cox, and Mark S. Coco, for appellant.

Campbell, Hornbeck, Chilcoat & Veatch, and Daniel F. Ryan, for appellees.

JUDGES: TYACK, J., PETREE and HOLMES, JJ., concur. Holmes, J., retired, of the Ohio Supreme Court, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OPINION BY: TYACK

OPINION

OPINION

TYACK, J.

On July 28, 1993, Laura L. Frazier filed a complaint in the Franklin County Court of Common Pleas, naming as defendants her former employer, The Practice Resource Management Group, Inc. ("PRMG"), and its

president, Daniel D. Mefford. Ms. Frazier sought injunctive relief, as well as compensatory and punitive damages, for alleged violations of Ohio law prohibiting discrimination on the basis of gender. Specifically, Ms. Frazier alleged that PRMG, through Mr. Mefford, unlawfully terminated her employment when she became physically unable to work as a result of complications related to her pregnancy and childbirth. More pertinent facts [*2] are set forth below in our discussion of the assignments of error.

The case proceeded to trial by jury. On August 9, 1994, the jury returned a general verdict in favor of Ms. Frazier and against PRMG, and in favor of Mr. Mefford personally. The jury awarded Ms. Frazier compensatory damages in the amount of \$ 3,550 and punitive damages in the amount of \$ 5,000.

On August 15, 1994, PRMG filed a motion for a judgment notwithstanding the verdict ("JNOV"), based upon the jury's responses to special interrogatories which allegedly were inconsistent and irreconcilable with the general verdict. Ms. Frazier filed a "motion for job reinstatement," seeking an order compelling PRMG to reinstate her to her former position.

In a decision dated November 7, 1994, the trial court granted PRMG's motion for JNOV. Following its determination of all issues adversely to Ms. Frazier, the court overruled her motion for reinstatement. On December 15, 1994, the court journalized its decisions in an entry granting judgment in favor of PRMG and overruling the motion for reinstatement. Ms. Frazier (hereinafter "appellant") has timely appealed, assigning three errors for our consideration:

"I. The [*3] Trial Court Erred In Granting Defendant-Appellee's Motion For Judgment Notwithstanding The Verdict.

"II. The Trial Court Erred By Failing To Order That Plaintiff-Appellant Be Reinstated To Her Job In Accordance With The Jury's Verdict.

"III. Assuming An Answer To The Interrogatories To The Jury Was Inconsistent With The Jury's Verdict, The Trial Court Erred By Failing To Order A New Trial."

All three assignments of error are interrelated and, therefore, will be addressed jointly. Preliminarily, we review the pertinent facts adduced at trial.

Appellant began working in the medical billing/accounting department of PRMG in March of 1991. Her supervisor was Bobbie Jo Fisher, the office manager and wife of Daniel Mefford, the company president.

Appellant became pregnant and expected her child to be born on October 20, 1992. However, on September 3, 1992, six weeks before her due date, appellant went to the hospital after experiencing premature labor contractions. Her labor was stopped with medication, and she was instructed to remain in bed to prevent premature labor. According to appellant, she phoned Ms. Fisher that day to inform her that she would [*4] be unable to work until after the child's birth. On September 24, 1992, appellant delivered to Ms. Fisher a letter from her doctor, admitted into evidence as plaintiff's exhibit #1, stating that appellant needed to be excused from work "due to complications, *** effective 9/3/92 until 6 weeks after delivery." (Tr. 11. Plaintiff's Exhibit #1.) During his testimony, Mr. Mefford acknowledged awareness of the substance of this letter. (Tr. 118.)

During the meeting with Ms. Fisher, appellant requested a letter from her verifying the date of her last paycheck so that appellant could seek "government assistance" to ease the financial strain while she was on unpaid leave from work. Ms. Fisher complied, and informed appellant that her position would only be held open until October 19, 1992, six weeks after she became unable to work on September 3, 1992 (and one day before her estimated due date). Appellant testified that Ms. Fisher told her that, in the event she did not return to work until after October 19, she would have to reapply for employment. Appellant identified plaintiff's exhibit #4 as a letter from Ms. Fisher dated September 24, 1992, which appellant received after her September [*5] 24 meeting with Ms. Fisher. A maternity leave application form was enclosed, which indicated that appellant's maternity leave commenced on September 7 and ended on October 19, 1992. The form was forwarded to appellant for her to sign and return. A prominent "NOTE" on the form indicates that "no maternity leave can exceed 42 calendar days."

Appellant testified that she received a telephone call from Mr. Mefford on October 9, 1992, during which he asked her when she would be returning to work. She still had not given birth to her baby. She reminded him of the substance of her doctor's excuse (that she would be unable to return to work until at least six weeks following the birth of her child). He indicated that PRMG's leave policy would not allow her to be off work for that long. According to appellant, Mr. Mefford ultimately agreed to hold her job open (extending her maternity leave to an unpaid "miscellaneous" leave after October 19) until December 1; however, he informed her that if she returned after October 19, she would be treated as a new employee. Conditions of this "new employee" status included having her health insurance cancelled, with reapplication ninety days later; decreasing [*6] her pay rate to that of a new employee; and, finally, termination, if she were

to "miss any time during the month of December." According to appellant, she was very disturbed by Mr. Mefford's offer but "really didn't give him a response." (Tr. 21-22.)

Mr. Mefford testified as to his recollection of the October 9 telephone conversation. He testified that appellant had been asked to return the leave forms (maternity and unpaid "miscellaneous" leave) five or six times, and that he asked her to return them immediately. According to Mr. Mefford, appellant agreed to the December 1 date; and, further, that "if she came back *subsequent to* that date," she would have to reapply as a new employee. He acknowledged discussing the above conditions, but he indicated that they would only be imposed if appellant returned *after* December 1. (Tr. 120-121.)

Appellant gave birth to her daughter, Chelsea, on October 12, 1992.

According to appellant, on October 27, 1992, she received a phone call from Ms. Fisher, who asked when appellant would return to work. Appellant advised her that she would return when she was physically able and that she was not physically able as of that date, two weeks [*7] following the birth of her child. They discussed the conditions imposed by Mr. Mefford; Ms. Fisher told appellant to think the situation over and call her back in a few days.

According to appellant, she received a call from Mr. Mefford shortly after her conversation with Ms. Fisher on October 27. Appellant testified that Mr. Mefford "hollered" at her that she had broken her promise and that she was fired. He also said that he would retroactively cancel her insurance, effective September 1. (Tr. 25.)

Daniel Mefford denied firing appellant during the October 27, 1992 telephone conversation. According to Mr. Mefford, he was told by Ms. Fisher that appellant indicated to her that she would not be returning to work. When he asked appellant about this, she

admitted saying it to Ms. Fisher. When he told her that she needed to think about the situation, she wavered, indicating that she might not come back. (Tr. 127-128.) He acknowledged that he told her that she "might" be fired. He acknowledged having the locks changed on the office doors the day after their conversation. On November 9, 1992, he received in the mail appellant's office keys. On November 10, 1992, he cancelled her insurance. [*8] Shortly thereafter, he placed a newspaper advertisement seeking an employee to fill her position. Mr. Mefford never attempted to contact appellant after receiving her keys in the mail, as he construed her action as tantamount to a resignation. (Tr. 125-126.)

Susan Biggert, appellant's coworker called as a defense witness, testified that appellant told her that she wanted to stay at home with her children and that she did not know whether or not she wanted to return to work. (Tr. 56-57.)

Appellant received a release from her physician indicating that she would be able to return to work on November 30, 1992. On December 7, 1992, she sent a letter, dated November 27, 1992, to PRMG indicating her desire to return to work. Along with the letter, she mailed the release, and leave forms now completed with the November 30 date. She testified that she had not returned the forms earlier because she had been unsure as to when she would be physically able to work. (Tr. 34-38.) In a return letter dated December 8, 1992, admitted into evidence as plaintiff's exhibit #10, Mr. Mefford responded to appellant's letter:

"Dear Laura:

"Your letter regarding resuming work with us [*9] came as quite a shock. While you were an excellent worker while you were

employed here, I must direct your attention to our personnel handbook which states that maternity benefits are available to employees who have two years of uninterrupted employment with our firm. However, as you know I offered to extend miscellaneous leave to you without pay provided you requested this leave in writing indicating a return to work date acceptable to all parties. As of our last conversation, you were still not able to give me this. In fact, you indicated that you may not come back to work at all. Now attached to your letter are the unapproved requests which we asked you to complete almost three months ago. ***

" *** Since you have abandoned your employment position you are not eligible for retroactive approval of time off. We will deny any unemployment benefits based on the above."

The present lawsuit ensued. Appellant's claim against her former employer and its president was brought pursuant to *R.C. 4112.02*, which generally prohibits unlawful discriminatory practices. Specifically, [HN1] *R.C. 4112.02(A)* provides that the following constitutes an unlawful discriminatory practice: [*10]

"For any employer, because of the *** sex *** of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly

or indirectly related to employment."

R.C. 4112.99 establishes a private right of action for violation of the above section. The Ohio Supreme Court has held that "federal case law interpreting Title VII of the Civil Rights Act of 1964, *Section 2000e et seq., Title 42 U.S.Code*, is generally applicable to cases involving alleged violations of *R.C. Chapter 4112.*" *Plumbers & Steamfitters Comm. v. Ohio Civil Rights Comm. (1981), 66 Ohio St.2d 192, 196, 421 N.E.2d 128.*

As a threshold matter, the trial court undertook a thorough review and analysis of relevant federal case law and concluded, as do we, that an employer need not have a policy allowing *unlimited* maternity leave; an employer is required only to have a reasonably adequate policy of maternity leave which should be applied on the same terms and conditions as for other disabilities. See *Abraham v. Graphic Arts Internatl. Union (D.C.Cir.1981), [*11] 212 U.S. App. D.C. 412, 660 F.2d 811; Holthaus v. Compton & Sons, Inc. (C.A.8, 1975), 514 F.2d 651.* As the trial court noted, citing *Armstrong v. Flowers Hosp. Inc. (M.D.Ala.1993), 812 F.Supp. 1183,* the Pregnancy Discrimination Act, *Section 2000e, Title 42 U.S.Code*, "does not require accommodation of pregnant women which amounts to preferential treatment." (Decision at 4.)

At the core of this appeal is the finding by the trial court that jury responses to certain interrogatories were inconsistent and irreconcilable with the general verdict in favor of appellant; based upon that finding, the trial court granted defendants' JNOV motion and entered judgment in accord with the interrogatory responses. Specifically, the jury responded to interrogatories as follows:

"1. Was Laura Frazier fired from her job at [PRMG] due to her inability to work as a result of her pregnancy?

"YES NO X

"2. Was Laura Frazier terminated from her job at [PRMG] for any reason other than, or, in addition to her inability to work due to her pregnancy?

"YES X NO

"3. Did Laura Frazier exercise reasonable diligence in seeking [*12] other suitable employment?

"YES NO X

"4. On what date do you find that Laura Frazier was terminated from her employment with [PRMG] if you have found in favor of Plaintiff?

"ANSWER: 10/31/92

"5. Do you find that Daniel Mefford acted in a state of mind characterized by hatred, ill will or revenge toward Laura Frazier?

"YES NO X "

Civ.R. 49 governs the practice of submitting special interrogatories to the jury. In *Shoemaker v. Crawford* (1991), 78 Ohio App.3d 53, 60, 603 N.E.2d 1114, this court addressed the alternatives available to a trial court in the event that responses to special interrogatories are inconsistent with the general verdict:

" *** If the jury's answers to the special interrogatories are inconsistent with its general verdict, then the court may enter judgment in accordance with the special interrogatories, return the jury for further deliberations, or order a new trial.

"[HN2] To render a judgment on special interrogatories, as against the general verdict, the trial court must conclude that the special findings are inconsistent and irreconcilable with the [*13] general verdict. *Otte v. Dayton Power & Light Co.* (1988), 37 Ohio St.3d 33, 523 N.E.2d 835 *** . The party challenging the general verdict bears the burden of showing that the two are irreconcilable and inconsistent. *Becker v. BancOhio Natl. Bank* (1985), 17 Ohio St.3d 158, 478 N.E.2d 776 *** . The court must make every reasonable attempt to harmonize a special finding with the general verdict. *Klever v. Reid Brothers Express, Inc.* (1949), 151 Ohio St. 467, 86 N.E.2d 608 *** ." (Emphasis added.)

Thus, case law mandates that a party moving for JNOV, under these or other circumstances, bears a heavy burden in attempting to set aside a jury verdict. However, we are also mindful that the trial court's decision to enter judgment in accordance with the answers to the interrogatories may only be disturbed upon a finding that it abused its discretion. *Tasin v. SIFCO Industries, Inc.* (1990), 50 Ohio St.3d 102, 553 N.E.2d 257, paragraph one of the syllabus.

In its comprehensive decision granting JNOV, the trial court concluded that the interrogatory responses were inconsistent and irreconcilable with the general verdict based upon the following reasoning:

"The [*14] evidence was uncontroverted that plaintiff left work on September 3, 1992 and was placed on maternity leave of six weeks duration. Further, it was not controverted that any conditions which would be placed on her return were for the period after that initial six weeks had expired. Therefore, if plaintiff was not terminated due to her pregnancy (Interrogatory 1) and was not terminated until October 31, 1992, (Interrogatory 4) and if the jury was properly instructed that no conditions could be placed upon maternity leave, then the answers to Interrogatories 1 and 3 are dispositive of the ultimate issues in the case. Plaintiff was not terminated due to her pregnancy and in any event, was not terminated until after her maternity leave and all other leave was exhausted." (Decision at 5-6.)

We find the court's reasoning sound and, accordingly, cannot say that it abused its discretion in granting JNOV as to the jury's award of compensatory damages. As PRMG points out, the jury's response to the first interrogatory (that appellant was *not* terminated due to her inability to work as a result of her pregnancy) simply cannot be reconciled with its general verdict and the instructions [*15] given the jury:

"Ohio law prohibits an employer from discharging an employee because of her inability to work during her pregnancy. If you find that the plaintiff was terminated due to her inability to work while she was disabled due to pregnancy, you must find for the plaintiff on her claim and may award her damages. If you find that the plaintiff was terminated for any other reason and that her pregnancy was not a determinative factor, then you must find for the defendants." (Tr. Vol. II, 73.)

The trial court similarly found that appellant was not entitled to the punitive damages of \$ 5,000 awarded by the jury in its general verdict. [HN3] Under Ohio law, an award of punitive damages is available upon a finding of actual malice. *Sutherland v. Nationwide Gen. Ins. Co.* (1994), 96 Ohio App.3d 793, 810, 645 N.E.2d 1338, citing *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473, 575 N.E.2d 416. In *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, the Supreme Court of Ohio defined "[HN4] actual malice," that necessary for an award of punitive damages, as:

"(1) that state of mind under which a person's conduct is characterized by hatred, [*16] ill will or a spirit of revenge, or (2) a conscious disregard for the rights

and safety of other persons that has a great probability of causing substantial harm." *Id.*, syllabus. (Emphasis *sic.*)

In disallowing the punitive damages awarded here, the trial court reasoned that since the ultimate issues in the case were decided against appellant, she was simply not entitled to punitive damages, the awarding of which is initially predicated upon a finding of liability against a defendant. Moreover, the general verdict granting punitive damages was deemed inconsistent and irreconcilable with the jury's response to the fifth interrogatory, in which the jury found that Mr. Mefford did not act with hatred, ill will, or revenge. Further, the record does not reveal, nor did appellant allege in her complaint, that any other corporate agent had the power to or caused her termination. We agree with the trial court's sound reasoning and find that punitive damages were indeed inappropriate.

Finally, appellant submits that defendants waived their right to challenge the verdict by failing to preserve the issue with a proper objection to the inconsistent interrogatory responses [*17] while the jury was still impaneled. The record reflects that a bench conference was conducted upon the judge's receiving and reviewing the verdict and interrogatory responses. Since the discussion was conducted out of the hearing of the court reporter, there is no record of it in the transcript. Therefore, the trial court conducted a hearing to determine whether or not defense counsel had lodged such an objection and ultimately concluded that an effective objection had been made. In its decision dated November 29, 1994, the trial court recollected that the discussion at the bench included the advisability of returning the jury for further deliberations. The judge concluded that further deliberations would be futile. Further, defense counsel indicated that a motion for JNOV

would be filed based upon the interrogatory responses. We agree with the trial court's finding that defense counsel effectively and adequately preserved the issue.

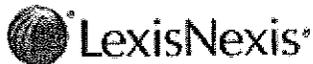
The trial court acted well within its discretion in granting JNOV in accord with the jury's responses to the special interrogatories. Accordingly, the assignments of error are overruled.

Having overruled the assignments of error, the judgment of the [*18] trial court is affirmed.

Judgment affirmed.

PETREE and HOLMES, JJ., concur.

Holmes, J., retired, of the Ohio Supreme Court, assigned to active duty under authority of *Section 6(C), Article IV, Ohio Constitution.*



LEXSEE 2001 OHIO CIVIL RIGHTS COMM LEXIS 10

CYNTHIA R. JOHNSON, Complainant
v.
WATKINS MOTOR LINES, INC., Respondent

Complaint # 8951
(COL) 71122099 (27314) 021400 22A - A0 - 3310

OHIO CIVIL RIGHTS COMMISSION

2001 Ohio Civil Rights Comm. LEXIS 10

October 3, 2001

[*1] Appearances: BETTY D. MONTGOMERY, ATTORNEY GENERAL.

Patrick M. Dull, Esq., Assistant Attorney General, Civil Rights Section, State Office Tower, 15th Floor, 30 East Broad Street, Columbus, OH 43215-3428, (614) 466-7900, Counsel for the Commission.

Katharine C. Weber, Esq., Cors & Bassett, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202-3502, (513) 852-8200, Counsel for Respondent.

PANEL: Franklin A. Martens, Esq., Chief Hearing Examiner, Ohio Civil Rights Commission, 1111 East Broad Street, Suite 301, Columbus, OH 43205-1379, (614) 466-6684.

OPINION: HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

INTRODUCTION AND PROCEDURAL HISTORY

Cynthia R. Johnson (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on February 14, 2000.

The Commission investigated the charge and found probable cause that Watkins Motor Lines, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on January 4, 2001.

The Complaint alleged that [*2] Respondent discharged Complainant because of her sex (pregnancy).

Respondent filed an Answer to the Complaint on February 7, 2001. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was waived, and the parties filed Written Stipulations of Fact on July 24, 2001. The Commission filed a brief in support of the Stipulations on July 26, 2001. Respondent filed its brief on August 5, 2001.

FINDINGS OF FACT

1. Complainant filed a sworn charge affidavit with the Commission on February 14, 2000.

2. The Commission determined on November 20, 2000 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a corporation doing business in Ohio. Respondent hired Complainant as a manifest (office) clerk on June 21, 1999. Complainant became pregnant shortly thereafter. Her delivery date was the first week of February 2000.

5. Complainant began experiencing [*3] complications related to her pregnancy in November 1999. Complainant's physician placed her on complete bed rest from November 18, 1999 to December 6, 1999. In early December 1999, Complainant's physician placed her on complete bed rest for the duration of her pregnancy.

6. Respondent has a general leave of absence policy that covers leaves of absence for short-term disability. Respondent treats requests for leaves of absence for reasons relating to pregnancy as requests for leaves of absence for short-term disability. The policy provides all leaves of absence are without pay and cannot exceed six months, except employees with ten or more years of full-time service can take leaves of absence up to one year. In order to be eligible for a leave of absence, an employee must be employed at least six months. n1

7. Pursuant to the above policy, after consultation with Respondent's Human Resources Department, it was decided that Complainant was subject to the policy and, therefore, was not eligible for a leave of absence. Respondent discharged Complainant, effective December 13, 1999, pursuant to its attendance policy. The policy provides that [*4] employees will be terminated if they are off work for more than 14 consecutive calendar days. Complainant was eligible for rehire.

8. Between November 1999 and July 17, 2001, Respondent received 114 requests for leaves of absence. Seventy-eight requests were from males and 19 requests were from females. Respondent approved 110 of these requests. Respondent denied four requests because the employees failed to meet the six-month length of service requirement.

9. Complainant was the only employee whose request was denied because of medical problems relating to pregnancy. The other three employees who did not meet the six-month length of service requirement had requested leaves for other health reasons. Two of the employees were male and two of the employees were female. Two of the 110 requests that were granted were for reasons relating to pregnancy.

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been [*5] accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited. n2

1. The Commission alleges that Respondent's leave of absence policy violates the Commission's Administrative Rules and has a disparate impact on females.

2. These allegations, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the . . . sex, . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The term "because of sex" for the purposes of R.C. 4112.02(A) includes, but it is not limited to, discrimination based upon pregnancy, pregnancy-related illnesses, [*6] childbirth, or related medical conditions. R.C. 4112.01(B). This section provides in pertinent part that:

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

4. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

5. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Federal case law is especially relevant in this case because R.C. 4112.01(B) reads "almost verbatim to the Pregnancy Discrimination Act" (PDA) of 1978. *Priest v. TFH-EB, Inc. d/b/a Electra Bore, Inc.*, 127 Ohio App. 3d 159, 711 N.E. 2d 1070, 1073 (Ohio App. 10th Dist. 1998); *See* 42 U.S.C. § 2000e(k). Thus, reliable, probative, and substantial evidence means evidence sufficient to support a finding of [*7] unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the PDA.

6. As further guidance, the Commission has adopted regulations on written and unwritten employment policies relating to pregnancy and childbirth. Ohio Administrative Code (Adm.Code) 4112-5-05(G).

7. Adm.Code 4112-5-05(G) provides, in pertinent part, that:

(5) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's

leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer's leave of absence policy . . .

(Emphasis added).

8. Ohio law does not require that pregnant employees be given preferential treatment. *Priest*, [*8] *supra* at 1074 ("Ohio courts implicitly, . . . and expressly recognize that an employer need not accommodate pregnant women to the extent that such accommodation amounts to preferential treatment.") (citations omitted). *See also Davidson v. Franciscan Health System of the Ohio Valley, Inc.*, 82 F.Supp. 2d 768, 774 (S.D. Ohio 2000) ("The case law and the statute are clear -- the PDA does not require that employers treat pregnant employees more favorably.") (citations omitted); *Dormeyer v. Comerica Bank of Illinois*, 223 F.3d 579, 583 (7th Cir. 2000) (PDA does not protect a pregnant employee from being discharged for absenteeism, even if absences are due to complications of pregnancy, unless absences of non-pregnant employees are overlooked).

9. Based on the foregoing, Respondent's policy is consistent with the Administrative Code and Ohio case law. Adm.Code 4112-5-05(G) is also consistent with Ohio law. R.C. 4112.02(B) contemplates that pregnant women should be treated the same as other employees for all employment-related purposes. Commission Rule 4112-5-05(G)(5) interprets this section of the Revised Code and applies it specifically to those situations where an employer has [*9] a minimum length of service requirement.

10. Respondent's policy is applied equally to males and females, and it provides a reasonable length of time for pregnancy leave. Normally, such leave would not exceed six months, the amount of unpaid leave that is provided for all employees who meet the length of service requirement and have less than ten years of service. Employees who have more than ten years of service can receive up to one year of unpaid leave. It would be hard to imagine any circumstances under which a pregnant employee would have to use one year of leave for medical reasons. n3

11. The Commission argues Adm. Code 4112-5-05(G)(2) is applicable. This section provides in pertinent part that:

(2) Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination . . .

12. The Commission's argument fails because Adm. Code 4112-5-05(G)(5) is a specific provision and thus takes precedence over the more general provision. [*10] *See R.C. 1.51.*

13. In addition Respondent has an employment policy that provides sufficient maternity leave. Therefore, Respondent's policy is in compliance with Adm. Code 4112-5-05(G)(2). n4

14. Federal courts, interpreting the PDA under similar circumstances, have upheld the employer's policy. In *Piraino v. International Orientation Resources*, 76 FEP Cases 518 (7th Cir.

1998), the employer had a policy that provided that employees were not eligible for leaves of absence until they had worked for the employer for one year. The employer discharged a pregnant employee pursuant to the policy. The Court held the policy did not violate the PDA. *See also Baxter, infra* at 744, fn. 3 (Court impliedly approved a six-month length of service requirement for eligibility for leave).

DISPARATE IMPACT CLAIM

15. The Commission also argues that Respondent's policy has a disparate impact on females. The Commission argues that the policy has an adverse impact because 100% of the pregnant females who have been employed less than six months and are absent over 14 days will be discharged. n5 While [*11] this is true, it is not a correct statement of the proof required to sustain a disparate impact claim.

16. In order to recover under the theory of disparate impact, the Commission must prove that a specific employment practice is neutral on its face and allegedly has a disproportionate impact. In this case, the Commission identifies the six-month length of service requirement as the allegedly unlawful policy.

17. However, in addition to identifying the policy, the Commission must prove that the policy "caused a significant disparate impact on a protected group . . ." *Davidson, supra* at 774. The statistical disparities must be "sufficiently substantial." *Stout v. Baxter Healthcare Corp.*, 107 F.Supp 2d 744, 746 (D.C. N.D. Miss. 2000). The Commission must provide "statistical evidence of systemic discrimination." *Davidson, supra* at 768, quoting from *Fannon v. A.A.P. St. Mary's Corp.*, 124 F.3d 197 (6th Cir. 1997).

18. Based on the standards of proof set out in the foregoing discussion, the evidence in this case showed that Respondent's policy over a period of a year and a half did not substantially impact pregnant females. Three pregnant females applied for leave [*12] and only one applicant (Complainant) was denied leave. One denial is not a significant impact on a protected group, nor is it statistical evidence of systemic discrimination. A sample size of three is too small to be statistically significant. *See Scheidecker v. Arvig Enterprises, Inc.*, 122 F.Supp. 2d 1031 (D. Minn. 2000) (sample size of four is too small to be statistically significant); *See also Mems v. City of St. Paul*, 224 F.3d 735, 740 (8th Cir. 2000) (Sample of three to seven is too small to establish disparate impact); *Lewis v. Aerospace Community Credit Union*, 114 F.3 745, 750 (8th Cir. 1997) (Sample size of three is too small to establish a statistical pattern).

19. Since the Commission was unable to prove that Respondent's policy violates the Commission's regulations or has a disparate impact on pregnant females, the Complaint must be dismissed.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint # 8951.

October 3, 2001

n1 The policy applied to leaves of absence for personal or medical reasons. Workers' Compensation leaves are exempted from the policy.

n2 Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

[*13]

n3 The amount of leave that is provided is more generous than is required by federal law. The Family Medical Leave Act (FMLA) provides that covered employers must offer twelve weeks annual unpaid leave for medical reasons, including pregnancy and pregnancy-related illnesses. This benefit only applies to employees who have been employed at least one year and worked 1,250 hours 29 U.S.C. Sec. 2601 et. seq. Thus, Congress recognized that an employer can condition a benefit on a reasonable length of service requirement.

n4 The rule refers to an "employment policy." Thus, the Commission recognized that Respondent does not need to have a separate maternity leave policy.

n5 If the Commission's argument was adopted, any policy that adversely affects a pregnant woman would automatically result in disparate impact since 100% of the pregnant women who were affected by the policy would be adversely affected. This would result in pregnant women being given a preference, which the PDA prohibits. *Baxter, supra* at 747.

LEXSEE 1999 OHIO APP LEXIS 4633

**Linda K. Tessmer, Plaintiff-Appellant, v. Nationwide Life Insurance
Co. et al., Defendants-Appellees.**

No. 98AP-1278

**COURT OF APPEALS OF OHIO, TENTH APPELLATE
DISTRICT, FRANKLIN COUNTY**

1999 Ohio App. LEXIS 4633

September 30, 1999, Rendered

PRIOR HISTORY: [*1] APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed in part; reversed in part and cause remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant challenged Franklin County Court of Common Pleas' (Ohio) decision granting appellees' motion for summary judgment on appellant's claims of age discrimination under Age Discrimination in Employment Act, 29 U.S.C.S. § 623 *et seq.*, gender discrimination under *Ohio Rev. Code Ann. § 4112.02*, and tortious interference with business opportunity.

OVERVIEW: Appellant asserted claims of age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C.S. § 623 *et seq.*, and gender discrimination in violation of *Ohio Rev. Code Ann. § 4112.02* against appellee employer, and a claim of tortious interference with a business opportunity against appellee supervisor. The

court found that appellee supervisor's employment decisions to abolish job-share arrangement, strip appellant of position and title, and others constituted material adverse changes in the conditions and terms of appellant's employment. The court concluded that appellee supervisor's statements about only hiring a man for the position established that the actions of appellee supervisor were more likely than not motivated by discriminatory intent and constituted direct evidence in this case. Appellee supervisor did not commit tortious interference with appellant's business opportunity because she did not act in her individual capacity and she did not personally benefit from the alleged interference.

OUTCOME: Judgment reversed in part; appellant provided sufficient evidence to establish a *prima facie* case of age and gender discrimination under the indirect method; appellee supervisor's statements constituted direct evidence of discrimination. Judgment affirmed in part; appellee supervisor did not tortiously interfere with appellant's business opportunity.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > Appropriateness

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality

[HN1] *Ohio R. Civ. P. 56(C)* provides that, before summary judgment may be granted, it must be determined that there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. A moving party cannot discharge its burden under *Ohio R. Civ. P. 56* simply by making conclusory assertions that the non-moving party has no evidence to prove its case. Rather, the moving party must point to some evidence that affirmatively demonstrates that the non-moving party has no evidence to support his or her claims. Additionally, all evidence and any doubts must be construed in favor of the non-moving party.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN2] An appellate court's review of summary judgment is de novo. Thus, the courts conduct an independent review of the record and stand in the shoes of the trial court.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > General Overview

[HN3] The burdens of proof and required elements in federal age discrimination cases and Ohio state gender discrimination cases are rooted in the same federal jurisprudence. Thus, the courts may properly look to federal case law when examining both state and federal claims.

Labor & Employment Law > Discrimination

[HN4] A plaintiff may establish a prima facie case of discrimination either directly or indirectly.

Labor & Employment Law > Discrimination > Age Discrimination > Coverage & Definitions > General Overview

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Proof > Burdens of Proof > Employee Burdens

[HN5] A plaintiff may indirectly establish a prima facie case of age and gender discrimination by showing that: (1) he or she was a member of a statutorily protected class; (2) he or she was subjected to an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by, or that the removal permitted the retention of, a person not belonging to the protected class.

Labor & Employment Law > Discrimination

[HN6] Whether an employment action gives rise to an adverse employment action is to be determined on a case-by-case basis.

Labor & Employment Law > Discrimination

[HN7] Generally, an adverse employment action is defined as a material adverse change in the terms and conditions of employment.

Labor & Employment Law > Discrimination

[HN8] A plaintiff may establish a prima facie case of discrimination with direct evidence. Direct evidence of discrimination refers to a method of proof, not a type of evidence. Direct evidence is evidence of any nature such as direct, circumstantial, or statistical evidence of discrimination that establishes that an adverse employment action was more likely than not motivated by discriminatory intent.

Evidence > Procedural Considerations > Circumstantial & Direct Evidence

Labor & Employment Law > Discrimination

[HN9] When relying on the direct evidence standard, a plaintiff may only use discriminatory statements to support his or her claim if there is a causal link or nexus between the discriminatory statement and the alleged prohibited act of discrimination. Comments that are vague, ambiguous or isolated do not support a finding of discrimination and cannot be used as direct evidence to establish that an adverse employment action was more likely than not motivated by discriminatory intent.

Evidence > Procedural Considerations > Circumstantial & Direct Evidence

Labor & Employment Law > Discrimination

[HN10] In analyzing discriminatory comments, courts shall consider whether the comments are made by a decision maker or by an agent within the scope of his or her employment, whether the comments are related to the decision making process and whether the comments are proximate in time to the act of discrimination. Discriminatory comments directed at or relating to the plaintiff have not been found to be vague, ambiguous or isolated and have been found to be sufficient, direct evidence in a discrimination case.

Torts > Business Torts > Commercial Interference > Business Relationships > General Overview

Torts > Business Torts > Commercial Interference > Prospective Advantage > General Overview

[HN11] Ohio recognizes the cause of action for tortious interference with a business relationship when the business relationship at issue is an employment relationship.

Torts > Business Torts > Commercial Interference > Employment Relationships > General Overview

Torts > Business Torts > Commercial Interference > Prospective Advantage > General Overview

[HN12] Tortious interference with an employment relationship occurs when one party to the relationship is induced to terminate the relationship by the malicious acts of a third person who is not a party to the relationship at issue.

Torts > Business Torts > Commercial Interference > Employment Relationships > General Overview

Torts > Business Torts > Commercial Interference > Prospective Advantage > General Overview

[HN13] An employee of a party to the relationship at issue is generally not seen as a third party. Thus, a tortious interference claim generally cannot be brought against an employee of a party to the relationship at issue. In order to maintain a tortious interference claim against an employee of the party to the relationship at issue, the evidence must demonstrate that the employee acted solely in his or her individual capacity. Moreover, a claim of tortious interference cannot be brought against an employee of a party to the relationship at issue unless the employee

personally benefits as a result of the interference.

COUNSEL: Mowery & Youell, Spencer M. Youell and Samuel N. Lillard, for appellant.

Bricker & Eckler, Donald R. Keller and James G. Petrie, for appellees.

JUDGES: KENNEDY, J., BRYANT and BOWMAN, JJ., concur.

OPINION BY: KENNEDY

OPINION

(REGULAR CALENDAR)

OPINION

KENNEDY, J.

Plaintiff-appellant, Linda K. Tessmer, appeals the decision of the Franklin County Court of Common Pleas granting a motion for summary judgment in favor of defendants-appellees, Nationwide Life Insurance Company ("Nationwide") and Heather Davidson ("Davidson").

Appellant, a forty-five-year-old female, has worked for various departments and divisions of Nationwide for over twenty years. In 1992, appellant was promoted to the position of Training and Service Development Manager ("service manager") for Nationwide. As service manager, appellant was responsible for developing, designing and implementing in-house training programs.

In 1993, appellant and Deborah Hohman ("Hohman"), a female employee over the age of forty, entered into a job-sharing program provided by Nationwide. Under the [*2] job-sharing program, two employees "share" one full-time position, with each splitting the day or the week, but collectively working a full week's time. By the end of 1994, the position held by appellant and Hohman was classified as an "F"

pay band position within Nationwide's compensation system, with an approximate minimum full-time salary of \$ 33,000 and a maximum salary of \$ 71,000.

In November 1994, Davidson became appellant's supervisor. Initially, appellant and Hohman reported directly to Davidson. In January 1995, Jim Dum ("Dum"), an employee in his early twenties, was transferred to Davidson's division. Davidson assigned Dum several of appellant's job duties, including her assignment regarding computer-based training. As well, in January 1995, Davidson informed appellant and Hohman that their position would be changed from service manager to training specialist. Initially, appellant held her new position as training specialist under the "F" pay band classification.

In April 1995, Davidson hired Richard Montgomery ("Montgomery"), a male in his twenties, as the new service manager. Montgomery became appellant's new immediate supervisor and assumed some of appellant's job [*3] responsibilities, including those relating to the department's annual budget. Thereafter, Davidson initiated a salary audit of appellant's new position as training specialist. As part of the audit process, appellant answered questionnaires concerning her new position. Davidson changed several of appellant's answers in the questionnaires. As a result of the audit, Nationwide downgraded appellant's position from the "F" pay band to a lower pay band "E," with a salary of approximately \$ 14,000 to a maximum of \$ 30,500 part-time. At the time of the change, appellant made in excess of \$ 30,000 part-time. Appellant appealed the pay band reclassification. Nationwide affirmed the reclassification. However, as noted below, appellant no longer held the training specialist position when the reclassification was affirmed.

In December 1995, Davidson told appellant and Hohman that their job-share arrangement was going to be terminated. However, appellant

was able to remain in Davidson's division and work part-time. Eventually, appellant left Davidson's division for another position in a different company within Nationwide.

Appellant filed this action as a result of the change in her position [*4] and job title from service manager to training specialist, the assigning of her job duties to younger males in their twenties, the initiating of a job audit that resulted in the training specialist position being reclassified into a lower pay band, and the abolishing of her job-share position. Appellant asserts claims of age discrimination in violation of *Section 623 et seq., Title 29, U.S.Code*, the Age Discrimination in Employment Act ("ADEA"), and gender discrimination in violation of *R.C. 4112.02* against Nationwide. As well, appellant asserts a claim of tortious interference with a business opportunity against Davidson. Other relevant facts in this case are discussed in the opinion below. Appellees filed a motion for summary judgment and the trial court granted the motion on all counts.

Appellant appeals, raising three assignments of error:

1. THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS THERE WAS A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER THE APPELLANT WAS SUBJECTED TO AN ADVERSE EMPLOYMENT ACTION.

2. THE TRIAL COURT ERRED IN HOLDING THAT THE APPELLANT PRESENTED NO GENUINE ISSUES OF MATERIAL FACT [*5] ESTABLISHING ANY DIRECT EVIDENCE OF DISCRIMINATION.

3. THE TRIAL COURT ERRED IN GRANTING THE APPELLEE DAVIDSON'S MOTION FOR SUMMARY JUDGMENT REGARDING APPELLANT'S CLAIM OF TORTIOUS INTERFERENCE AS THERE WAS A GENUINE ISSUE OF MATERIAL

FACT REGARDING WHETHER THE APPELLANT SUFFERED DAMAGES.

[HN1] *Civ.R. 56(C)* provides that, before summary judgment may be granted, it must be determined that there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co. (1992)*, 65 Ohio St. 3d 621, 629, 605 N.E.2d 936, citing *Harless v. Willis Day Warehousing Co. (1978)*, 54 Ohio St. 2d 64, 375 N.E.2d 46. A moving party cannot discharge its burden under *Civ.R. 56* simply by making conclusory assertions that the non-moving party has no evidence to prove its case. *Dresher v. Burt (1996)*, 75 Ohio St. 3d 280, 293, 662 N.E.2d 264. Rather, the moving party must point to some evidence that affirmatively demonstrates that the non-moving party has no evidence to support [*6] his or her claims. *Id.* Additionally, all evidence and any doubts must be construed in favor of the non-moving party. *Murphy v. Reynoldsburg (1992)*, 65 Ohio St. 3d 356, 359, 604 N.E.2d 138.

[HN2] An appellate court's review of summary judgment is *de novo*. *Koos v. Cent. Ohio Cellular, Inc. (1994)*, 94 Ohio App. 3d 579, 588, 641 N.E.2d 265; *Bard v. Society National Bank, nka KeyBank, 1998 Ohio App. LEXIS 4187* (Sept. 10, 1998), Franklin App. No. 97APE11-1497, unreported (1998 Opinions 4085, 4091). Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Bard*, at 4091; *Jones v. Shelly Co. (1995)*, 106 Ohio App. 3d 440, 445, 666 N.E.2d 316.

As noted above, appellant's discrimination case is based on a federal age discrimination claim and a state gender discrimination claim. [HN3] The burdens of proof and required elements in federal age discrimination cases and state gender discrimination cases are rooted in the same federal jurisprudence. *Civil Rights*

Comm. v. David Richard Ingram D.C., Inc. (1994), 69 Ohio St. 3d 89, 93, 630 N.E.2d 669; *Kohmescher v. Kroger Co.* (1991), 61 Ohio St. 3d 501, 504, 575 N.E.2d 439; [*7] *Mitchell v. Toledo Hospital (C.A.6, 1992)*, 964 F.2d 577, 582. Thus, we may properly look to federal case law when examining both of appellant's claims. See *Ingram*, at 93; see, also, *Kohmescher*, at 504. We also acknowledge that, because the claims are rooted in the same federal jurisprudence, appellant's claims of age and gender discrimination may be discussed together. [HN4] A plaintiff may establish a *prima facie* case of discrimination either directly or indirectly. *Gismondi v. M & T Mortgage Corp.*, 1999 Ohio App. LEXIS 1698 (Apr. 13, 1999), Franklin App. No. 98AP-584, unreported (1999 Opinions, 736).

Appellant's first assignment of error concerns whether she is able to establish a *prima facie* case of age and gender discrimination under the indirect method. [HN5] A plaintiff may indirectly establish a *prima facie* case of age and gender discrimination by showing that: (1) he or she was a member of a statutorily protected class; (2) he or she was subjected to an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by, or that the removal permitted the retention of, a person not belonging to the protected class. *Kohmescher*, [*8] at 504 (indicating that the above analysis applies to gender discrimination cases brought under R.C. 4112.02); *Mitchell*, at 582 (indicating that the above analysis applies to ADEA claims).

Appellant asserts in her first assignment of error that the trial court erred in concluding that appellant is unable to establish a *prima facie* case of age and gender discrimination under the indirect method because she did not suffer an adverse employment action. We agree.

[HN6] Whether an employment action gives rise to an adverse employment action is to be determined on a case-by-case basis. See

Zerilli v. New York City Transit Authority (E.D.N.Y. 1997), 973 F. Supp. 311, 324 (indicating that, because there are no bright line rules defining an adverse employment action, courts must pour over each case to determine whether the challenged employment action reaches the level of adverse); *Joiner v. Ohio Dept. of Transp. (S.D. Ohio 1996)*, 949 F. Supp. 562, 567 (noting that a court must look at the cumulative weight of all the evidence to determine whether an employment action is adverse). Therefore, we acknowledge that there is no set [*9] definition of "adverse employment action" and realize that cases on this subject are diverse. However, we are able to look to other cases for guidelines in determining whether appellant suffered an adverse employment action in this case.

[HN7] Generally, an adverse employment action is defined as a material adverse change in the terms and conditions of employment. *Kocsis v. Multi-Care Management, Inc. (C.A.6, 1996)*, 97 F.3d 876, 885. For example, courts have held that an adverse employment action is evidenced by either a termination of employment or a demotion demonstrated by a decrease in wage or salary or a material loss of benefits. *Id.* at 885; see, also, *Crady v. Liberty Nat. Bank & Trust Co. of Ind. (C.A.7, 1993)*, 993 F.2d 132, 136.

However, adverse employment actions are not limited to cases where there has been a termination of employment, loss of benefits or decrease in salary. See *Fortner v. State of Kansas (D. Kan. 1996)*, 934 F. Supp. 1252, 1266 (indicating that adverse employment actions are not limited to monetary considerations). For example, a job transfer resulting in a less distinguished title or significantly [*10] diminished responsibilities can constitute an adverse employment action. *Kocsis*, at 885, quoting *Crady*, at 136; see, also, *Fortner*, at 1266. As well, an employer's decision to transfer an employee to a different department, remove her from her management

position, place her under the supervision of the person who took her former management position, assign her less job responsibilities that do not comport with her qualifications and give her negative comments on surprise performance evaluations can be classified as adverse employment actions despite no loss of wages or benefits. *Fortner*, at 1266; see, also, *Collins v. State of Ill. (C.A.7, 1987)*, 830 F.2d 692, 704 (concluding that an employer's decision to remove an employee from her position as library consultant and place her in a position performing reference work where she no longer had her own office, was no longer allowed to have business cards, and was no longer listed in professional publications as a library consultant can be classified as an adverse employment action even though the transfer did not result in a reduction of pay or benefits).

In this case, appellant presents evidence to show [*11] that Davidson, a manager for Nationwide, abolished appellant's job-share arrangement. Under the job-sharing program, two employees "share" one full-time position, with each splitting the day or the week but collectively working a full week's time. For example, under the job-sharing arrangement, appellant would have the opportunity to work two days in one five-day workweek, while Hohman would work the other three days.

Additionally, appellant presents evidence demonstrating that she was stripped from her position and title as Training and Service Development Manager. Appellant hired Montgomery, a male in his twenties, as the new service manager. Appellant's new position and title was training and service specialist. Montgomery, who replaced appellant as service manager, became appellant's new immediate supervisor. Previously, appellant reported directly to Davidson.

As well, the evidence demonstrates that Davidson assigned appellant's job duties to younger male employees. Dum, an employee in

his twenties, assumed appellant's responsibilities regarding computer-based training. Montgomery assumed some of appellant's other duties, including those concerning the department's annual [*12] budget.

Moreover, the evidence shows that Davidson initiated a salary audit of appellant's new position as training specialist. As part of the audit process, appellant answered questionnaires concerning her new position. Davidson changed several of appellant's answers in the questionnaires. As a result of the audit, Nationwide downgraded appellant's position from the "F" pay band to a lower pay band "E," with a salary of approximately \$ 14,000 to a maximum of \$ 30,500 part-time. Appellant appealed the pay band reclassification. However, Nationwide affirmed the pay band reclassification. In analyzing the decision to reclassify the pay band for the training specialist position, we acknowledge that appellant was never actually placed in the lower pay band. However, appellant was never placed in the lower pay band because she no longer held the position as training specialist by the time the decision was affirmed by Nationwide. As noted below, appellant's discrimination claims should not be hindered because she chose to leave her position under Davidson. Thus, the relevant issue on this matter is that appellant was subjected to a decision that was going to place her in a lower pay band [*13] that would have essentially placed a lower ceiling on appellant's earning potential.

We find that the above employment decisions constitute material adverse changes in the conditions and terms of appellant's employment. Accordingly, we conclude that appellant was subjected to an adverse employment action by appellees. As such, we find that appellant provides sufficient evidence in support of the second prong of the indirect

standard outlined in *Kohmescher*. Therefore, we sustain appellant's first assignment of error.

In so concluding, we acknowledge that appellant applied for and received a transfer to another company within Nationwide. However, appellant's transfer does not change our conclusion that she was subjected to an adverse employment action by appellees. Rather, it can be argued that, by transferring out of Davidson's division, appellant was mitigating her damages.

Although we do not rule specifically on whether an alleged victim of employment discrimination must mitigate his or her damages, we recognize that courts have indicated that plaintiffs alleging to be victims of employment discrimination should not fail to take advantage of any corrective opportunities provided [*14] by the employer or to otherwise avoid harm stemming from the alleged discrimination. *Burlington Industries, Inc. v. Ellerth* (1998), 524 U.S. 742, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633; see, also, *Zerilli*, at 317 (recognizing that a victim of employment discrimination should not avoid opportunities to mitigate his or her damages). Therefore, appellant's discrimination claims should not be hindered because she chose to leave her position under Davidson. Indeed, even though appellant mitigated her damages from the alleged discrimination, she asserts that she has lost income and advancement opportunities as a result of appellees' alleged discriminatory actions.

Having concluded that appellant provides sufficient evidence in support of the second prong of the *Kohmescher* analysis, we next determine whether appellant satisfies the other three prongs in the analysis. Appellant asserts in her brief that there is sufficient evidence in support of the other three prongs set forth in *Kohmescher* for her to successfully establish a *prima facie* case of age and gender discrimination under the indirect method. We agree.

As noted above, in the first prong of the [*15] indirect method outlined in *Kohmescher*, appellant must show that she was a member of a statutorily protected class when she suffered the alleged discrimination. *Kohmescher*, at 504. Appellant, being a forty-five-year-old female employee, is and was, at all relevant times, within the statutorily protected class at the time she suffered the alleged discrimination. See *R.C. 4112.02*; see, also, *Section 623(A)(1), Title 29, U.S.Code*. Accordingly, we conclude that appellant satisfies the first prong of the *Kohmescher* analysis.

In the last two prongs of the four-part analysis outlined in *Kohmescher*, appellant must show that she was replaced by a person not belonging to a protected class and that she was qualified for the position. *Kohmescher*, at 504. The record shows that appellant was removed from her position as service manager. Montgomery replaced appellant as service manager. The evidence also establishes that many of appellant's duties as service manager were given to both Montgomery and Dum. Moreover, our independent review of the record shows that appellant produces evidence to demonstrate that she was imminently qualified for her position [*16] as service manager. Thus, we conclude that appellant presents sufficient evidence in support of the last two prongs of the *Kohmescher* analysis.

Therefore, because we determine that appellant provides sufficient evidence in support of the four prongs in *Kohmescher*, we conclude that appellant establishes a *prima facie* case of age and gender discrimination under the indirect method.

Appellant's second assignment of error concerns whether she produces any direct evidence of discrimination. Lisa Caudill, a former employee of Nationwide, indicates in an affidavit on behalf of appellant that Davidson told her that she did not like the fact that appellant was a part-time employee and, if possible, she would get rid of her. Caudill

asserts that Davidson told her that it was a problem to have appellant as a part-time employee and that a male employee would "straighten" the part-time employees out. Additionally, Caudill asserts that, in the process of hiring for the position eventually filled by Montgomery, Davidson told her that she would let appellant go through the interview process for the position, but that she was determined to have a male employee in her new position. Appellant [*17] asserts that she may use such statements as direct evidence to support her discrimination claims. We agree.

As noted above, [HN8] a plaintiff may establish a *prima facie* case of discrimination with direct evidence. *Gismondi*. Direct evidence of discrimination "refers to a method of proof, not a type of evidence." *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St. 3d 578, 664 N.E.2d 1272, paragraph one of the syllabus. Direct evidence is evidence of any nature such as direct, circumstantial, or statistical evidence of discrimination that establishes that an adverse employment action was more likely than not motivated by discriminatory intent. *Id.*; see, also, *Gismondi*.

[HN9] When relying on the direct evidence standard, a plaintiff may only use discriminatory statements to support his or her claim if there is a causal link or nexus between the discriminatory statement and the alleged prohibited act of discrimination. *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St. 3d 125, 130.¹, 672 N.E.2d 145 Comments that are vague, ambiguous or isolated do not support a finding of discrimination and cannot be used as direct evidence [*18] to establish that an adverse employment action was more likely than not motivated by discriminatory intent. *Byrnes*, at 130.

¹ We have previously acknowledged that the role of *Byrnes* in discrimination cases is uncertain because the opinion in *Byrnes* is fragmented, with three justices

concurring in the lead opinion, two justices concurring separately in the result, and two justices dissenting. *Smith v. E.G. Baldwin & Assoc., Inc.* (1997), 119 Ohio App. 3d 410, 417, 695 N.E.2d 349. We reaffirm our uncertainty about the role of *Byrnes* in discrimination cases in light of the Ohio Supreme Court's decision in *Petrilla v. Ajax Magnethermic Corp.* (1998), 82 Ohio St. 3d 61, 694 N.E.2d 67, which relies on *Mauzy*, not *Byrnes*.

[HN10] In analyzing discriminatory comments, courts should consider whether the comments were made by a decision maker or by an agent within the scope of his or her employment, whether the comments were related to the decision making process and whether [*19] the comments were proximate in time to the act of discrimination. *Cooley v. Carmike Cinemas, Inc.* (C.A.6, 1994), 25 F.3d 1325, 1330. Discriminatory comments directed at or relating to the plaintiff have not been found to be vague, ambiguous or isolated and have been found to be sufficient, direct evidence in a discrimination case. See, e.g., *Mauzy*, at 590 (indicating that because an employer's age related comments were directed at the plaintiff, the comments could be used as direct evidence in plaintiff's discrimination case); see, also, *Gismondi* (Bowman, J., dissenting) (indicating that age related comments specifically referring to the plaintiff should have been permitted as direct evidence in the discrimination case).

In this case, Davidson made the discriminatory statements asserted by Caudill when she was in a position to have influence over employment decisions concerning her division. The comments were directed at appellant and relate to Davidson's decision to remove appellant from her position as service manager. Additionally, the comments were made around the time that Davidson removed appellant from her position as service manager

and hired Montgomery [*20] as the new service manager. Thus, we conclude that the statements establish that the actions of Davidson were more likely than not motivated by discriminatory intent and constitute direct evidence in this case.

In so concluding, we reject appellees' contention that we may not rely on the affidavits submitted on behalf of appellant because the statements in the affidavits contradict her deposition testimony and merely assert conclusory allegations. We find nothing in the record to support appellees' contention that the statements are contradictory. Moreover, we disagree with the contention that the statements only assert conclusory allegations. The statements do not merely recite a bald assertion that Nationwide discriminated against appellant based on her gender and age; rather, the statements in the affidavits provide specific examples of appellees' conduct in support of appellant's discrimination claims.

Therefore, we conclude that appellant presents direct evidence to support her claims of gender and age discrimination. As such, we conclude that the trial court erred in concluding that appellant has presented no direct evidence of discrimination. Accordingly, we sustain appellant's [*21] second assignment of error.

In appellant's third assignment of error, she asserts that the trial court erred in granting Davidson's summary judgment motion regarding appellant's claim of tortious interference with a business opportunity. We disagree.

[HN11] Ohio recognizes the cause of action for tortious interference with a business relationship when the business relationship at issue is an employment relationship. *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St. 3d 415, 419, 650 N.E.2d 863. [HN12] Tortious interference with an employment relationship occurs when one party to the relationship is induced to terminate the

relationship by the malicious acts of a third person who is not a party to the relationship at issue. *Condon v. Body, Vickers & Daniels* (1994), 99 Ohio App. 3d 12, 22, 649 N.E.2d 1259. [HN13] An employee of a party to the relationship at issue is generally not seen as a third party. *Id.* Thus, a tortious interference claim generally cannot be brought against an employee of a party to the relationship at issue. *Id.* In order to maintain a tortious interference claim against an employee of the party to the relationship at issue, the evidence [*22] must demonstrate that the employee acted solely in his or her individual capacity. *Miller v. Wikel Mfg. Co.* (1989), 46 Ohio St. 3d 76, 78-79, 545 N.E.2d 76. Moreover, a claim of tortious interference cannot be brought against an employee of a party to the relationship at issue unless the employee personally benefits as a result of the interference. *Id.* at 79.

In this case, appellant asserts that Davidson interfered with the employment relationship between appellant and Nationwide. Appellant allegedly interfered with the employment relationship while she was employed by Nationwide. However, the record shows that Davidson did not act in her individual capacity but, rather, in her official capacity as manager when she allegedly interfered with the employment relationship in this case. Additionally, there is nothing in the record to support a finding that Davidson personally benefited from the alleged interference with the employment relationship between appellant and Nationwide. Accordingly, we conclude that the trial court did not err in granting Davidson's summary judgment motion and overrule appellant's third assignment of error.

In summary, we [*23] sustain appellant's first and second assignments of error and overrule appellant's third assignment of error. Therefore, the judgment of the trial court is affirmed in part and reversed in part, and this cause is remanded for further proceedings consistent with this opinion.

*Judgment affirmed in part; reversed in part
and cause remanded.*

BRYANT and BOWMAN, JJ., concur.