

IN THE SUPREME COURT OF OHIO

ORIGINAL

DAN W. VOSSMAN,

Plaintiff-Appellant,

vs.

AIRNET SYSTEMS, INC., *et al.*,

Defendants-Appellees.

13-1949

On Appeal From the
Franklin County Court of
Appeals, Tenth Appellate
District

Court of Appeals
Case No. 12AP-971

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT DAN W. VOSSMAN

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR
GREAT GENERAL INTEREST**

The holding of the lower court in this case endorses the concept of retribution against an employee defending himself against untruthful allegations. Under the holding of the court of appeals, an employer is justified in terminating an employee accused of wrongdoing who defends himself during an investigation. The court goes even further by holding that it is permissible to allow employees not accused of wrongdoing to discuss an ongoing investigation, but muzzle the accused. This Court should not sanction an employer's policy of silencing those accused, while allowing the accuser and all others to talk freely about an internal investigation.

Frequently, companies have policies that require employees involved in internal investigations to refrain from discussing the investigation with anyone until after the process is completed. Such a policy, if applied evenly, is theoretically designed to protect the integrity of the investigation. However, such a policy could also constitute an unreasonable restraint on the right of employees to defend against untrue allegations. Such a policy has been found to run afoul of Section 7 of the NLRA. *Banner Health d/b/a Banner Estrella Medical Center*, 358 NLRB 93 (2012). Such a policy of confidentiality is particularly unreasonable where, as here, it is applied only to the employee accused of wrongdoing. In the present case, the company professed to have such a policy, although it was not in writing, terminated the accused employee for violating such policy, yet took no action against the other employees who discussed the investigation, including the employee making the allegations. Plaintiff argued that such a decision was pretext for age discrimination where the employees who were not disciplined in any way were substantially younger than plaintiff. The lower court found that the younger pilots who discussed the investigation were not comparable to plaintiff because they were not the subject of

an ongoing investigation. Decision at P30. Thus, the lower courts are saying that it is permissible to deny the accused the right to defend himself and then fire him for discussing the investigation, while allowing the accuser and other employees to talk freely without repercussion. Ohio law should remain consistent with federal law as to this important right to defend oneself from untrue allegations that could lead to discharge.

At the pretext stage of an age discrimination analysis, courts are to look at whether an employer applied company policy differently in disciplining similarly-situated employees. It is the trier of fact who should determine whether individuals are similarly situated when there is a dispute between the parties on the issue. Some courts correctly recognize the jury's role in deciding these issues. However, all too often, judges, such as was done here, are adopting one side of the contested facts in these cases by deciding issues of fact and credibility in an effort to dismiss employees' claims before they are properly decided by a jury.

It is of great public and general interest that the rights of employees to defend themselves to protect their jobs not be eviscerated by a lower court holding which allow all other employees, including the accuser, to discuss the allegations and the investigation, while silencing the accused. The summary judgment mechanism should not be used to take away the right to a jury determination of contested issues of material fact in discrimination, as well as, all other cases.

STATEMENT OF THE CASE AND FACTS

This is an age discrimination case filed on behalf of a 49-year-old Learjet pilot who had been employed by AirNet for over 20 years. AirNet received a complaint about Vossman from one of his co-pilots on February 21, 2011 alleging two incidents of unsafe flying by Vossman on December 26, 2010 and February 14, 2011. Before talking to Vossman, defendants solicited complaints from two other pilots. AirNet then met with Vossman on March 9, 2011 and

suspended him pending an investigation. He was given no direction at that time about the supposed confidential nature of the investigation.

Thereafter, defendants attempted to solicit from other employees any acts of wrongdoing on the part of Vossman. Meanwhile, Vossman, on the advice of counsel, began to contact his fellow pilots in an effort to combat the untruthful allegations being lodged against him. Although AirNet had no written policy that required employees to keep the allegations confidential in a situation such as this, according to the official company Personnel Action Form, Vossman was eventually terminated for “sharing of information [in] direct violation of company policy [which] states that such violations are grounds for termination of employment.” Vossman’s coworkers began sending messages to management in support of his flying abilities and safety. So many emails were sent, that the person in charge of the investigation commented in an email that they were quickly getting into a “damned if you do, damned if you don’t situation” as there was no way to objectively prove or disprove the allegations made against Vossman.

Two days after the initial meeting with Vossman, human resources called him and asked him not to speak to any other employees. HR did not threaten disciplinary actions for talking to others and did not cite to a company policy. Additionally, HR did not give any explanation as to why he should not talk to other employees. Defendants allege that Vossman talked to two more employees after he was told not to. Defendant Schaner testified in his Affidavit for summary judgment that a pilot named Ronk did not know of the investigation until Vossman called him Friday evening, after Vossman talked to human resources. In fact, Ronk sent Schaner an email in support of Vossman on Friday morning at 11:14. Thus, Schaner was not being truthful when he claimed that Ronk was first contacted by Vossman Friday evening, because Schaner knew that he

had received an email Friday morning from Ronk clearly stating he was aware of the investigation. Vossman testified that nearly everyone knew of the investigation by the time he was told not to talk and that he did not speak to anyone new, to whom he had not previously spoken, after Friday afternoon. Defendants used Vossman's efforts to defend himself against false allegations as a pretextual basis for termination.

Although Vossman admits that, if the allegations listed in Blackburn's complaint were true, in that a pilot intentionally activated the stick shaker, this would be a violation of AirNet policy, Vossman denies that he ever intentionally violated any AirNet safety procedure. Moreover, Vossman denies that he received a stick shaker actuation on either of the flights detailed in the complaint. Vossman was terminated on March 17, 2011, at age 49, allegedly for talking to other employees during the investigation against a (non-existent) company policy, however, substantially younger employees who also discussed the investigation suffered no harm. No safety issue was used as a basis for termination.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: An employee accused of wrongdoing by the employer should have the right to defend against the allegations and terminating the employee for mounting a defense does not constitute a legitimate business justification.

Pursuant to Ohio law, "a plaintiff may establish pretext by demonstrating that an employer applied company policy differently in disciplining similarly-situated employees." *Wigglesworth v. Mettler Toledo Int'l, Inc.*, 10th Dist. No. 09AP-411, 2010-Ohio-1019; *see also Russell v. UPS*, 110 Ohio App.3d 95, 102, 673 N.E.2d 659 (10th Dist. 1996). The United States Supreme Court has addressed the issue of comparable treatment at the pretext stage specifically as follows:

On remand, respondent [employee] must * * * be afforded a fair opportunity to show that petitioners' stated reason for respondent's rejection was in fact pretext. *Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' [by respondent] were nevertheless retained or rehired.*" (Emphasis added.)

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

This Court follows *McDonnell Douglas* and federal case law which interprets Title VII has been found applicable to cases involving R.C. 4112. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. OCRC*, 66 Ohio St.2d 192, 421 N.E.2d 128 (1981). In the instant case, Blackburn, McGeorge, and Troy all discussed the investigation while it was ongoing. Furthermore, McGeorge knew, from his conversation with plaintiff, that the investigation was supposed to remain confidential. Although McGeorge could have halted any further conversations with an admonition that the investigation was supposed to remain confidential, McGeorge, Troy, and Blackburn all continued to discuss the investigation. While McGeorge left the company immediately after Vossman was terminated, Troy and Blackburn remained employed by defendants. However, neither Blackburn nor Troy, both substantially younger than Vossman, suffered any form of discipline for their violation of the alleged non-written confidentiality policy. Vossman was the only one being told not to talk and was thus, treated differently in the terms and conditions of his employment.

In any event, defendants' alleged basis for Vossman's termination should not be a sufficient basis to motivate a discharge. It has been found to be improper to prohibit an employee from discussing an ongoing investigation with other employees, unless the employer first shows a legitimate business justification that outweighs an employee's rights under Section 7 of the National Labor Relations Act ("NLRA"). *Banner Estrella Med. Ctr.*, 358 NLRB No. 93,

2012 NLRB LEXIS 466 (N.L.R.B. July 30, 2012) (employer violated the NLRA Section 8(a)(1) by asking employee to refrain from discussing an internal investigation while employer conducted investigation into the matter).¹ There is no sound reason for Ohio law to vary from federal law on this important issue.

Thus, the sole basis for plaintiff's discharge would amount to an unfair labor practice under the NLRA. As a public policy matter, plaintiff should not have been prohibited from talking to other employees during the investigation or terminated for doing so. In this case, a co-worker complained about plaintiff's safety on two flights and accused him of violating FAA regulations and company policies. Plaintiff knew that he did not do what he was being accused of doing. Plaintiff was placed on leave and told an investigation would be conducted. Initially, plaintiff was not told the investigation was confidential, so he spoke to other long-term employees who had flown with him many times over the years about the allegations. When defendants began receiving letters of support from plaintiff's co-workers, defendants told plaintiff not to communicate with anyone during the investigation. Knowing the allegations could not be proven with objective evidence, defendants then terminated plaintiff's employment for speaking to his co-workers during the investigation. Under *Banner Estrella* and the cases on

¹ Although, as a pilot, Vossman is covered by the Railway Labor Act, where the RLA does not provide a clear answer to a particular problem, a court may look to the NLRA for assistance in construing the RLA. *Burlington N. R.R. Co. v. Bhd. of Maintenance of Way Employees*, 481 U.S. 429, 448, 107 S.Ct. 1841, 95 L.Ed.2d 381 (1987). In addition, the courts in Ohio can look to regulations and cases interpreting the federal laws for guidance in the interpretation of Ohio law. *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.*, 61 Ohio St.3d 607, 575 N.E.2d 1164 (1991). For example, Ohio has adopted the criteria and standards for overtime exemptions established by the FLSA. R.C. 124.18(A).

which it relies, public policy would not support such a termination. As a policy matter, the fact that the termination itself violates the NLRA highlights the pretextual nature of the discharge. Employees should not be penalized for defending themselves against untrue allegations.

Proposition of Law No. 2: Once an Employee Establishes a Prima Facie Case of Age Discrimination By Showing That He Was Replaced by Someone Substantially Younger, He Does Not Need to Meet the “Similarly Situated” Standard Set Forth in *Ercegovich* and *Kroh* in the Pretext Stage of the Analysis.

A plaintiff may demonstrate pretext by showing that the employer’s proffered explanation (1) had no basis in fact; (2) did not actually motivate the employer; or (3) was insufficient to motivate the employer. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994). The first type of proof of pretext allows a plaintiff to create an inference of discrimination by demonstrating that the alleged conduct never happened or is factually false. *Manzer*, 29 F.3d at 1082. Here, Vossman showed that he was terminated for a policy that did not actually exist. The second method of proving pretext consists of a demonstration that “an illegal motivation was more likely than [the reasons] offered by the defendant.” *Id.* The third type of proof consists of evidence that other employees outside the protected class were treated more favorably than the plaintiff. *Id.* Vossman utilizes the last two methods with respect to his disparate discipline under the alleged confidentiality policy.

In demonstrating pretext, a plaintiff may point to more than one basis from which the jury could reject the employer’s stated reasons for its actions. In considering a dispositive motion, it is improper to dissect evidence of pretext or view each piece of evidence supporting a finding of pretext in isolation. Rather, evidence which demonstrates pretext must be viewed cumulatively. *Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 56-57 (2nd Cir. 1998). “To require * * * that each piece of circumstantial evidence ‘standing alone’ be sufficient to support a finding of

discrimination is to render meaningless the indirect method of proof and invite the pretexts that can render the [the civil rights laws] a nullity.” *Futrell v. J.I. Case*, 38 F.3d 342, 350 (7th Cir. 1994), citing *Grafenhain v. Pabst Brewing Co.*, 827 F.2d 13, 20 (7th Cir. 1987). Accordingly, the sum total evidence of pretext, combined with elements of the prima facie case, may “suffice to show intentional discrimination, and no additional proof of discrimination is required.” *Wixson v. Dowagiac Nursing Home*, 87 F.3d 164, 170 (6th Cir. 1996).

That Vossman was treated “differently” or “less favorably” than other younger employees who violated the confidentiality policy is a universally accepted method of proving discrimination. *Int’l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 335, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Simply put, where a plaintiff alleging age discrimination is treated more harshly than a younger counterpart, discrimination may be inferred.

In *Sutherland v. Nationwide Gen. Ins. Co.*, 96 Ohio App. 3d 793, 645 N.E.2d 1338 (1994), the court held that where the plaintiff demonstrated that she was treated differently than those outside the protected class, “substantial evidence was presented upon which reasonable minds could differ as to whether plaintiff suffered discrimination.” *Id.* at 806. In order to demonstrate pretext by this method, Vossman only had to point to evidence in the record demonstrating that he was treated differently than “similarly situated” fellow employees who were substantially younger. *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 659 (6th Cir. 1999).

Outside of his age at the time of the discipline, there is no meaningful distinction to merit the more severe discipline meted out to Vossman. Indeed, the evidence shows that all of the employees involved in the investigation talked, including the employee lodging the allegations against Vossman. This evidence of dissimilar treatment under the supposed policy, standing alone, is sufficient to create a genuine issue of fact, thereby rendering summary judgment

improper. See *Harrison v. Metro. Gov't of Nashville and Davidson Cty, Tenn.*, 80 F.3d 1107, 1116 (6th Cir. 1996) (where white employees had multiple driving record infractions, black employee created an issue of fact as to the seriousness of the comparable violations and disparate discipline). Similarly, in *Bucher v. Sibcy Cline, Inc.*, 137 Ohio App.3d 230, 738 N.E.2d 435 (2000), the First District reversed where the plaintiff alleged that she was discriminated against in part because of her age and was able to identify at least one comparably situated younger employee who received more favorable treatment than she. The court held that reasonable minds could differ as to the real reason for the plaintiff's termination where others from outside the protected class had engaged in similar conduct as the plaintiff, but were not terminated. The court further held that this evidence, in conjunction with the plaintiff's otherwise spotless personnel file, was sufficient to demonstrate pretext.

The Eighth District, in *Ahern v. Ameritech Corp.*, 137 Ohio App.3d 754, 739 N.E.2d 1184 (2000), *jurisdiction denied* 90 Ohio St.3d 1413 (2000), similarly held that a plaintiff who shows dissimilar discipline of a younger employee for violations of comparable seriousness establishes pretext and, therefore, raises a question of fact as to the ultimate issue of discrimination. In *Ahern*, the plaintiff was terminated for violating Ameritech's Code of Business Conduct by using a company car at the same time that he was being reimbursed for a portion of his personal vehicle lease. *Id.* at 764. The plaintiff in that case had engaged in that conduct on a regular basis. Some evidence was introduced at trial that one substantially younger employee had similarly violated the policy on at least one occasion. *Id.* at 771. In affirming the jury's age discrimination verdict, the court held that pretext was in part demonstrated by the fact that the younger employee was not disciplined in the same fashion as the plaintiff for his breach

of the policy. The inference of pretext also was bolstered by the plaintiff's 32 years of unblemished employment.

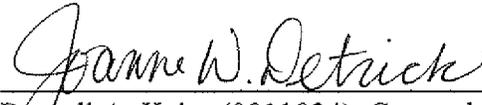
It is not the courts' role to determine whether the case involves two apples in determining the similarity of the individuals or if the individuals are an apple or orange; those decisions are left to the trier of facts. Whether Vossman and the younger employees engaged in comparable violations of company policy is a factual issue which should be determined by the jury. Further, in comparing employment discipline decisions, precise equivalence in culpability between employees should not be required. *See, Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 659 (6th Cir. 1999) ("In comparing employment discipline decisions, 'the precise equivalence in culpability between employees' is not required.); *Harrison v. Metropolitan Govt. of Nashville and Davidson County*, 80 F.3d 1107, 1115 (6th Cir. 1996) (citation omitted). Rather, the individual must simply show that the employees were engaged in misconduct of comparable seriousness. *Id.*

Here, the individuals were similarly situated and the alleged misconduct of the employees was identical. The ultimate question "is whether other employees who engaged in conduct of comparable seriousness were "nevertheless retained." *Clayton v. Meijer, Inc.*, 281 F.3d 605, 611 (6th Cir. 2002). Other employees engaged in conduct of comparable seriousness and were nevertheless retained. If there was a legitimate reason to keep the investigation confidential then that reason should have been applied to all employees involved in the investigation, not just the accused.

Vossman was similarly situated to all of the other individuals who were involved in the investigation and yet they were treated in a substantially different manner. The law is clear that these are similarly situated individuals whose treatment allows Vossman to raise a genuine issue of material fact as to the pretextual nature of the decision to terminate only the older employee.

CONCLUSION

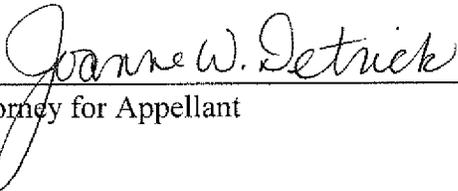
For the foregoing reasons, this Court should certify the record and hear this case on its merits.



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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant has been sent this 12th day of December, 2013, via first class U.S. Mail, postage prepaid, to counsel for Appellees, David Campbell, Vorys, Sater, Seymour and Pease L.L.P., 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008.



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APPENDIX

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Dan W. Vossman,	:	
	:	
Plaintiff-Appellant,	:	No. 12AP-971
	:	(C.P.C. No. 11CV-7360)
v.	:	
	:	(REGULAR CALENDAR)
AirNet Systems, Inc. et al.,	:	
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on October 22, 2013

Law Offices of Russell A. Kelm, Russell A. Kelm, and Joanne W. Detrick, for appellant.

Vorys, Sater, Seymour and Pease LLP, David A. Campbell, G. Ross Bridgman, and Gregory C. Scheiderer, for appellees.

APPEAL from the Franklin County Court of Common Pleas

MCCORMAC, J.

{¶ 1} Plaintiff-appellant, Dan W. Vossman, appeals from a decision of the Franklin County Court of Common Pleas granting summary judgment to defendants-appellees, AirNet Systems, Inc. ("AirNet"), Tom Schaner, and Quinn Hamon (collectively "defendants"), on plaintiff's age discrimination claim under R.C. Chapter 4112. Because the evidence does not demonstrate a genuine issue of material fact for trial, we affirm.

I. Facts and Procedural History

{¶ 2} Plaintiff worked for AirNet as a pilot instructor and check airman for 17 years, during which time he instructed AirNet's pilots on aircraft operations and Federal Aviation Administration regulations. Beginning in 2008, plaintiff worked as a pilot, holding the title of Learjet Captain, until his termination on March 17, 2011. At the time of his termination, plaintiff was 49 years old and had been working for AirNet for over 20 years.

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{¶ 3} AirNet terminated plaintiff's employment after Amy Blackburn, an AirNet pilot, on February 21, 2011 informed Quinn Hamon, AirNet's chief pilot, she was uncomfortable flying with plaintiff based upon his performance in two incidents. Blackburn alleged that plaintiff in both incidents intentionally decreased the speed of the aircraft to a point at which additional loss of speed would render the aircraft unable to sustain flight, triggering an onboard warning mechanism. Upon request, Blackburn submitted on March 14, 2011 a revised complaint detailing additional facts regarding the incidents.

{¶ 4} On March 2, 2011, Hamon and Chad Moyer, AirNet's director of safety, informed Thomas Schaner, AirNet's director of operations, of Blackburn's concerns. Based on Blackburn's complaint, Schaner and Kim Miller, AirNet's director of human resources, began an investigation into the incidents as required by AirNet policy. AirNet policy expressly prohibited reckless flight operations by pilots; pilots found to violate this policy were subject to discharge.

{¶ 5} On March 9, 2011, Schaner and Miller met with plaintiff to discuss the complaint; although Schaner and Miller did not inform plaintiff of the identity of the complaining party or the nature of the complaint, plaintiff correctly identified the flights at issue. Because plaintiff's admissions partly corroborated the allegations in Blackburn's complaint, Schaner suspended plaintiff with pay until the completion of the investigation.

{¶ 6} Schaner then attempted to solicit statements from other pilots who had recently flown with plaintiff in order to verify the allegations in Blackburn's complaint. Before Schaner was able to complete this process, however, plaintiff contacted other AirNet pilots, advising them of the circumstances of the investigation and encouraging them to submit favorable statements on his behalf. At Schaner's request, Miller instructed plaintiff on March 12, 2011 to cease all communication with other AirNet employees regarding any topic connected to the investigation. Following his conversation with Miller, plaintiff discussed the investigation with other AirNet pilots, including Keith McGeorge and Bill Ronk. Upon discovering that plaintiff continued to discuss the investigation, Schaner reviewed the situation with Miller and terminated plaintiff's employment.

{¶ 7} Plaintiff filed his complaint on June 15, 2011, alleging age discrimination in violation of R.C. Chapter 4112. Defendants filed on July 12, 2011 a motion to dismiss,

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asserting plaintiff failed to state a claim upon which relief could be granted pursuant to Civ.R. 12(B)(6). The trial court denied defendants' motion to dismiss on September 22, 2011.

{¶ 8} On May 15, 2012, defendants filed a motion for leave to file an amended answer, pursuant to Civ.R. 15(A), in order to assert an additional affirmative defense. The trial court granted on May 24, 2012 defendants' motion for leave to file an amended answer. Plaintiff filed on May 25, 2012 both a memorandum in opposition to defendants' motion for leave to file an amended answer and a motion for sanctions under R.C. 2323.51 and Civ.R. 11, asserting that defendants' motion for leave to file an amended answer constituted frivolous conduct. On July 17, 2012, the trial court denied plaintiff's motion for sanctions.

{¶ 9} Defendants filed a motion for summary judgment on July 30, 2012. After the parties fully briefed the issues, the trial court granted the motion for summary judgment on October 19, 2012.

II. Assignments of Error

{¶ 10} Plaintiff appeals, assigning the following two errors:

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S AGE DISCRIMINATION CLAIM.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANTS' MOTION TO AMEND THEIR ANSWER TO ASSERT A FRIVOLOUS AFFIRMATIVE DEFENSE OF AFTER ACQUIRED EVIDENCE AND IN DENYING PLAINTIFF'S MOTION FOR SANCTIONS.

III. First Assignment of Error – Age Discrimination Claim

{¶ 11} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds viewing the evidence most strongly in favor of the nonmoving party could reach but one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997).

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{¶ 12} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a genuine issue of material fact by pointing to specific evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). If the moving party fails to satisfy its initial burden, the court must deny the motion for summary judgment; however, if the moving party satisfies its initial burden, summary judgment is appropriate unless the nonmoving party responds, by affidavit or as otherwise provided under Civ.R. 56, with specific facts demonstrating a genuine issue exists for trial. *Id*; *Hall v. Ohio State Univ. College of Humanities*, 10th Dist. No. 11AP-1068, 2012-Ohio-5036, ¶ 12, citing *Henkle v. Henkle*, 75 Ohio App.3d 732, 735 (12th Dist.1991).

{¶ 13} "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346 (1993), citing *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356 (1992). "Even the inferences to be drawn from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the party opposing the motion." *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341 (1993).

{¶ 14} Plaintiff argues the trial court erred in granting summary judgment because he submitted indirect evidence demonstrating a genuine issue of material fact as to whether defendants discriminated on the basis of age in violation of R.C. Chapter 4112. R.C. 4112.14(A) generally prohibits discriminatory employment practices, including discrimination on the basis of age. *See Meyer v. United Parcel Serv., Inc.*, 122 Ohio St.3d 104, 2009-Ohio-2463, ¶ 9. R.C. 4112.02(N) provides a right to file an age discrimination action: "An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights."

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A. *McDonnell Douglas Burden - Shifting Framework*

{¶ 15} "To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent" and may establish such intent through either direct or indirect methods of proof. *Ricker v. John Deere Ins. Co.*, 133 Ohio App.3d 759, 766 (10th Dist.1998), citing *Mauzy v. Kelly Serus., Inc.*, 75 Ohio St.3d 578, 583 (1996). Absent direct evidence of age discrimination, a plaintiff may indirectly establish discriminatory intent using the analysis promulgated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as adopted by Supreme Court of Ohio in *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146 (1983), and modified in *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723.

1. The Prima Facie Case

{¶ 16} Under the test as revised in *Coryell*, a plaintiff must demonstrate that he or she: "(1) was a member of the statutorily protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by, or the discharge permitted the retention of, a person of substantially younger age." *Coryell* at paragraph one of the syllabus, modifying and explaining *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501 (1991), syllabus. Alternatively, a plaintiff can establish the fourth prong by demonstrating that a "comparable non-protected person was treated better." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir.1992); *Clark v. Dublin*, 10th Dist. No. 01AP-458, 2002-Ohio-1440. Establishing a prima facie case "creates a presumption that the employer unlawfully discriminated against the employee." *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 11, quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

2. The Employer's Burden of Production

{¶ 17} If a plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for discharging the employee. *Caldwell v. Ohio State Univ.*, 10th Dist. No. 01AP-997, 2002-Ohio-2393, ¶ 61, quoting *Burdine* at 253. The employer meets its burden of production by submitting admissible evidence that "taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action," and in doing so rebuts the presumption of discrimination that the prima facie case establishes. (Emphasis sic.) *Williams* at ¶ 12, quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993).

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3. Pretext

{¶ 18} Finally, if the employer meets its burden of production, a plaintiff must prove by a preponderance of the evidence that the employer's legitimate, nondiscriminatory reason was merely a pretext for unlawful discrimination. *Barker* at 148. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Ohio Univ. v. Ohio Civ. Rights Comm.*, 175 Ohio App.3d 414, 2008-Ohio-1034, ¶ 67 (4th Dist.), quoting *Burdine* at 253. "[A] reason cannot be proved to be 'a pretext for discrimination' unless 'plaintiff demonstrates 'both that the reason was false, and that discrimination was the real reason.'" (Emphasis sic.) *Williams* at ¶ 14, quoting *St. Mary's Honor* at 515.

B. *Plaintiff Established Prima Facie Case*

{¶ 19} The trial court concluded plaintiff established a prima facie case, finding plaintiff "was over the age of 40 at the time of termination, he was terminated from his employment, he was ostensibly qualified for the position, having served in that capacity for a number of years, and AirNet ultimately hired a person under the age of 40 for the job." (R. 128, Decision and Entry, at 7.) Defendants contend plaintiff failed to establish the prima facie case for three reasons: (1) the replacement pilot had 20 years of experience, (2) the replacement pilot was not substantially younger, and (3) plaintiff was not replaced until 3 months after his suspension.

{¶ 20} Defendants' arguments lack merit. First, defendants' assertion that plaintiff's replacement had 20 years of experience, although supported by the record, has no salience as to whether plaintiff established the prima facie case. Because plaintiff was a pilot for over 30 years and worked for AirNet for over 20 years, he was qualified for his position.

{¶ 21} Second, defendants contend plaintiff's replacement was not substantially younger because he was 39 years old at the time of the replacement. When determining whether a replacement is substantially younger, a trial court is vested with significant discretion since "the term 'substantially younger' cannot be absolutely defined and must be determined under the particular circumstances of the case." *Dautartas v. Abbott Laboratories*, 10th Dist. No. 11AP-706, 2012-Ohio-1709, ¶ 39, citing *Coryell* at paragraph two of the syllabus. Here, defendants filled plaintiff's position with a pilot who was 11 years younger than plaintiff. Considering the circumstances of the case, we cannot find

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the trial court erred in determining plaintiff's replacement was substantially younger. *See Grosjean v. First Energy Corp.*, 349 F.3d 332, 336 (6th Cir.2003) ("Age differences of ten or more years have generally been held to be sufficiently substantial to meet the requirement of the fourth part of age discrimination prima facie case."); *Gross v. Illinois Tool Works, Inc.*, S.D. Ohio No. C-1-06-205 (Aug. 27, 2008) (noting replacements six and one-half years and ten years younger than the plaintiff may be considered substantially younger for purposes of the prima facie case); *Blizzard v. Marion Technical College*, N.D. Ohio 3:09CV1643 (Mar. 30, 2011), *aff'd*, 698 F.3d 275 (6th Cir.2012), *cert. denied*, 133 S. Ct. 2359 (2013).

{¶ 22} Finally, defendants argue plaintiff failed to establish the fourth element because there was a three-month lapse of time between plaintiff's termination and the hiring of the replacement. Defendants provide reference to no cases holding that such a short interval of time destroys the inference of discrimination arising from replacement by a substantially younger worker. In this instance, the three-month interval between plaintiff's termination and the hiring of a substantially younger worker to fill his duties raises a genuine issue of material fact as to whether plaintiff was replaced. *See Gross* (concluding prima facie case established where replacement hired "less than three months" after plaintiff's termination); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 941-42 (6th Cir.1987) (finding prima facie case weakened but potentially established where employee was terminated during a reduction in force and replaced following a three-month interval). *Compare Lilley v. BTM Corp.*, 958 F.2d 746, 752 (6th Cir.1992) (declining to find replacement where employee terminated following a "downturn in the market" for the employer's products, employee's duties were assumed by his coworkers, and a nine-month interval separated employee's termination from the hiring of a new employee).

{¶ 23} Therefore, because plaintiff demonstrated defendants replaced him with a substantially younger person, we find plaintiff established a prima facie case of age discrimination.

C. Defendants Articulated a Legitimate, Nondiscriminatory Reason for Terminating Plaintiff's Employment

{¶ 24} Defendants assert they terminated plaintiff because he violated a known directive. In order to conduct an unbiased investigation of Blackburn's allegations,

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defendants ordered plaintiff to cease communicating with other AirNet employees regarding the complaint. Despite instructions to the contrary, it is undisputed that plaintiff continued communicating with other employees regarding the continuing investigation.

{¶ 25} Plaintiff does not contest that defendants established a legitimate, nondiscriminatory reason by "clearly set[ting] forth, through the introduction of admissible evidence, the reasons for the plaintiff's [termination]." *Burdine* at 255.

D. Plaintiff Did Not Establish Defendants' Reason Was Pretextual

{¶ 26} The final step in the *McDonnell Douglas* analysis is whether plaintiff established defendants' legitimate nondiscriminatory reason was pretext for unlawful discrimination because of age.

{¶ 27} In order to establish that defendants' reason was pretext, plaintiff must prove either " '(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge.' " *Sweet v. Abbott Foods, Inc.*, 10th Dist. No. 04AP-1145, 2005-Ohio-6880, ¶ 34, quoting *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994). *Knepper v. Ohio State Univ.*, 10th Dist. No. 10AP-1155, 2011-Ohio-6054, ¶ 12 (stating "[a] reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason"). The ultimate burden rests with the plaintiff to present evidence that demonstrates discrimination was the real reason for the termination. *Dautartas* at ¶ 31 (stating " '[t]he ultimate inquiry in an employment-based age discrimination case is whether an employer took adverse action "because of" age; that age was the "reason" that the employer decided to act' "), quoting *Miller v. Potash Corp. of Saskatchewan, Inc.*, 3d Dist. No. 1-09-58, 2010-Ohio-4291, ¶ 21.

{¶ 28} Plaintiff contends defendants' reason was insufficient to motivate his discharge under the third prong of *Manzer* since similarly-situated employees received more favorable treatment despite engaging in the same conduct. To establish that defendants' legitimate, nondiscriminatory reason was insufficient, plaintiff must present "evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff." *Id.* at 1084.

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{¶ 29} To demonstrate that a coworker is similarly-situated, "the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in 'all of the relevant aspects.'" (Emphasis sic.) *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998), quoting *Pierce v. Commonwealth Life Ins. Co.*, 825 F.Supp 783, 802 (E.D.Ky.1993). Courts must determine the relevant factors based upon the particular circumstances of the case. *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 348 (6th Cir.2012); *Jackson v. FedEx Corporate Servs., Inc.*, 518 F.3d 388, 394 (6th Cir.2008). In cases alleging a "discriminatory disciplinary action resulting in the termination of the plaintiff's employment[,] * * * 'the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" *Ercegovich* at 352, quoting *Mitchell* at 583. See also *Pierce* at 802; *Bucher v. Sibcy Cline, Inc.*, 137 Ohio App.3d 230, 243 (1st Dist.2000).

{¶ 30} Plaintiff specifically claims that AirNet did not equally enforce a policy that investigations were to be confidential because other employees also discussed the investigation as it was ongoing, but were not terminated. However, AirNet did not claim to have a policy that investigations were to be confidential. Rather, Schaner and Miller instructed plaintiff to cease discussing the complaint because, by actively recruiting other employees to lobby on his behalf to management, he was disrupting the ongoing investigation into the truth of Blackburn's complaint. Although plaintiff notes that other pilots also discussed the investigation with one another, he does not contend that any of the alleged comparables were the subject of an ongoing investigation. Further, plaintiff stated he was unaware of any pilot who was asked to maintain confidentiality and then breached that agreement.

{¶ 31} Because other employees did not engage in the same conduct without differentiating or mitigating circumstances, plaintiff has failed to demonstrate that the alleged comparators were similarly situated. See *Ercegovich* at 352. Therefore, plaintiff did not establish that defendants' legitimate, nondiscriminatory reason was insufficient to motivate discharge.

{¶ 32} Plaintiff additionally asserts defendants' reason was pretext because he alleges it is an unfair labor practice under the National Labor Relations Act ("NLRA") for

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an employer to prohibit an employee from discussing an ongoing investigation with coworkers. Regardless of whether the NLRA proscribes such activity, this court does not have jurisdiction to consider the question. See *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959); *Indep. Elec. Contrs. of Greater Cincinnati, Inc. v. Hamilton Cty. Div. of Pub. Works*, 101 Ohio App.3d 580, 583 (1st Dist.1995). As a result, plaintiff's claim that defendants violated the NLRA does not give rise to a finding of pretext.

{¶ 33} In conclusion, plaintiff cannot establish that defendants' legitimate nondiscriminatory reason was pretext for discrimination based on age. Plaintiff also failed to present evidence that discrimination was the "but for" cause for defendants' decision. See *Gross* at 180; *Coryell* at ¶ 18; *Dautartas* at ¶ 31. Accordingly, plaintiff's first assignment of error is overruled.

IV. Second Assignment of Error

{¶ 34} In his second assignment of error, plaintiff asserts the trial court erred by granting defendants' motion for leave to file an amended answer and denying plaintiff's motion for sanctions.

{¶ 35} Defendants submitted a motion for leave to file an amended answer in order to assert an additional affirmative defense based on after-acquired evidence. Keith McGeorge, another AirNet pilot, stated that he received a text message from plaintiff following his termination which McGeorge found to be threatening. In his deposition testimony, plaintiff confirmed that, following his termination, he sent a text message to McGeorge. Plaintiff additionally confirmed that AirNet policy prohibited threats to coworkers. Based on plaintiff's testimony, combined with statements from McGeorge, defendants contended that the defense was applicable to plaintiff's conduct following his termination because defendants would have terminated plaintiff for engaging in such conduct had plaintiff not already been terminated.

A. Motion for Leave to File an Amended Answer

{¶ 36} Because "the language of Civ.R. 15(A) favors a liberal amendment policy[,] * * * a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *Simmons v. Am. Pacific Ents., L.L.C.*, 164 Ohio App.3d 763, 2005-Ohio-6957, ¶ 9 (10th Dist.), quoting *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6 (1984). Prejudice to an opposing party is the most critical factor to be

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considered in determining whether to grant leave to amend. *Simmons* at ¶ 9, citing *Frayser Seed, Inc. v. Century 21 Fertilizer & Farm Chems., Inc.*, 51 Ohio App.3d 158, 165 (3rd Dist.1988).

{¶ 37} We review a trial court's decision on a motion to amend under an abuse-of-discretion standard. *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illuminating Co.*, 60 Ohio St.3d 120, 122 (1991); *Fouad v. Velie*, 10th Dist. No. 01AP-283 (Nov. 8, 2001). An abuse of discretion connotes more than an error of law or judgment; it suggests the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 38} Whereas plaintiff contends that defendants' motion to amend based on after-acquired evidence was contrary to law, plaintiff does not assert the trial court acted unreasonably, arbitrarily, or unconscionably in granting defendants' motion to file an amended answer. *See Lopez-Ruiz v. Botta*, 10th Dist. No. 11AP-577, 2012-Ohio-718, ¶ 13 ("Under the abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court."), citing *Holcomb v. Holcomb*, 44 Ohio St.3d 128, 131 (1989). Plaintiff does not demonstrate prejudice resulting from the granting of the motion. *See Simmons* at ¶ 9. Therefore, the trial court did not err in granting defendants leave to file an amended answer.

B. Motion for Sanctions

{¶ 39} Civ.R. 11 provides: "The signature of an attorney * * * constitutes a certificate by the attorney * * * that the attorney * * * has read the document; that to the best of the attorney's * * * knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." An attempt to seek sanctions under Civ.R. 11 requires the trial court to consider "whether the attorney signing the document has read the pleading, harbors good grounds to support it to the best of his or her knowledge, information, and belief, and did not file it for purposes of delay." *Judd v. Meszaroz*, 10th Dist. No. 10AP-1189, 2011-Ohio-4983, ¶ 21, citing *Ceol v. Zion Industries, Inc.*, 81 Ohio App.3d 286, 291 (9th Dist.1992). If the court finds a willful violation of the rule, it may award the opposing party its attorney fees and expenses. Civ.R. 11.

{¶ 40} Pursuant to R.C. 2323.51, a court may "award * * * court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with a civil action or appeal * * * to any party to the civil action or appeal who was adversely affected by

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frivolous conduct." R.C. 2323.51(B)(1). "Conduct" includes "[t]he filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, * * * or the taking of any other action in connection with a civil action." R.C. 2323.51(A)(1)(a). "Frivolous conduct" is conduct that (1) obviously serves merely to harass or maliciously injure another party to the civil action; (2) is not warranted under existing law and cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law; or (3) consists of allegations or other factual contentions that have no evidentiary support or are not likely to have evidentiary support after a reasonable opportunity for further investigation. R.C. 2323.51(A)(2)(a).

{¶ 41} "No single standard of review applies in R.C. 2323.51 cases; the inquiry is one of mixed questions of law and fact." *Judd* at ¶ 18, citing *Wiltberger v. Davis*, 110 Ohio App.3d 46, 51 (10th Dist.1996). Initially, the court must conduct a factual inquiry to determine whether the party's conduct was frivolous. *Judd* at ¶ 18. "Review of a trial court's factual determinations involves some degree of deference, and we will not disturb a trial court's findings of fact where the record contains competent, credible evidence to support such findings." *Id.*, citing *Wiltberger* at 52.

{¶ 42} " 'A determination that conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law requires a legal analysis.' " *Stuller v. Price*, 10th Dist. No. 03AP-30, 2003-Ohio-6826, ¶ 14, quoting *Sain v. Roo*, 10th Dist. No. 01AP-360 (Oct. 23, 2001). *See also Riston v. Butler*, 149 Ohio App.3d 390, 2002-Ohio-2308, ¶ 20-21 (1st Dist.); *Judd* at ¶ 19. We review pure questions of law under a de novo standard. *Id.* at ¶ 19.

{¶ 43} Here, plaintiff argues that defendants' assertion of an after-acquired evidence defense in their amended answer was without legal merit. In response to plaintiff's motion for sanctions, defendants asserted that an after-acquired evidence affirmative defense is appropriate where the employer discovered wrongdoing on the part of the terminated employee following termination. In support of this position, defendants provided reference to *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), which stated that employers could rely upon after-acquired evidence of wrongdoing to limit an award of damages where the employer establishes that "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds

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alone if the employer had known of it at the time of the discharge." *Id.* at 362-63. As defendants provided adequate support for the amended answer to demonstrate that it was warranted under existing law or could be supported by a good-faith argument for an extension, modification, or reversal of existing law, we cannot find their action was without legal merit.

{¶ 44} Under the circumstances of this case, defendants did not engage in frivolous conduct under R.C. 2323.51 nor violate Civ.R. 11 in asserting an after-acquired evidence defense based on plaintiff's conduct following his termination. *Callahan v. Akron Gen. Med. Ctr.*, 9th Dist. No. 24434, 2009-Ohio-5148, ¶ 25, 30. As a result, the trial court did not err in denying plaintiff's motion for sanctions. Accordingly, plaintiff's second assignment of error is overruled.

V. Disposition

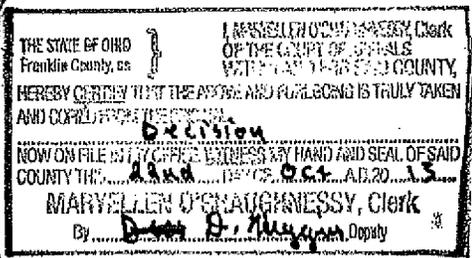
{¶ 45} Having overruled plaintiff's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dan W. Vossman,	:	
	:	
Plaintiff-Appellant,	:	No. 12AP-971
	:	(C.P.C. No. 11CV-7360)
v.	:	
	:	(REGULAR CALENDAR)
AirNet Systems, Inc. et al.,	:	
	:	
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on October 22, 2013, plaintiff's two assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs assessed to plaintiff.

McCORMAC, CONNOR & DORRIAN, JJ.

By John W. McCormac
Judge John W. McCormac

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

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