[Cite as *Dautartas v. Abbott Laboratories*, 2012-Ohio-1709.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Madeleine J. Dautartas,	:	
Plaintiff-Appellant,	:	
		No. 11AP-706
v.	:	(C.P.C. No. 09CVH-11-16789)
Abbott Laboratories et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 17, 2012

Cooper & Elliott, LLC, Rex H. Elliott, Charles H. Cooper, Jr., *Bradley A. Strickling*, and *Adam P. Richards*, for appellant.

Vorys, Sater, Seymour and Pease, LLP, and *Lisa Pierce Reisz*; *Winston & Strawn LLP, Derek J. Sarafa*, and *William C. O'Neil*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiff-appellant, Madeleine J. Dautartas, appeals from a judgment of the Franklin County Court of Common Pleas that granted summary judgment in favor of defendants-appellees, Abbott Laboratories ("Abbott"), Oladunni Odugbesan ("Odugbesan"), and Diane Loiselle ("Loiselle") (collectively "appellees"), in this employment action alleging age discrimination, retaliation, invasion of privacy, and respondeat superior. For the following reasons, we affirm the judgment of the trial court.

{¶ 2} Appellant began her career with Abbott in 1985 after obtaining a Bachelor's degree in chemistry in 1980. Appellant experienced a relatively steady career progression throughout her tenure with Abbott, gaining strong technical knowledge of Abbott's systems and processes along the way. However, appellant's management style and difficulty working with others was the subject of some criticism by her subordinates, peers, and managers throughout her career.

{¶ 3} The events leading to the filing of the instant action began in early 2007. At that time, appellant was a quality assurance manager in Abbott's Nutrition International Division and reported to Dana Limpert. Appellant managed two direct reports, Mike Anastasakis and Margaret Baker. Anastasakis had previously worked for appellant and had experienced some difficulties with her management style. Accordingly, Anastasakis was hesitant to accept another position reporting to appellant; he ultimately agreed to do so because he wanted to gain experience working in Abbott's Nutrition International Division.

{¶ 4} Limpert was promoted in early 2007; as a result, her former position as director of healthy living product assurance became available. Limpert's supervisor, Loiselle, was the hiring manager for the position and sought both internal and external candidates with international experience, strong leadership capabilities, and traditional food product experience.

{¶ 5} Appellant was one of 40 applicants for the position. At the time, appellant was 50 years old. Two Abbott employees, appellant and Thomas Pfeiffer, and one outside candidate, Odugbesan, were selected as finalists. All three were interviewed by Loiselle and two senior Abbott executives, Jim Hughes and Mike Ferry. Following the interviews, Loiselle, Hughes, and Ferry each evaluated and ranked the candidates. All three interviewers ranked Odugbesan as the highest candidate and appellant as the lowest candidate. For her part, Loiselle felt that although appellant was technically qualified for the position, she lacked the requisite leadership qualities.

{¶ 6} Odugbesan was ultimately selected for the position. At the time, she was 48 years old and had a Bachelor's degree in chemistry, a Master's degree in civil engineering, a Master's degree in business administration, and was working toward a Ph.D. in organizational leadership. According to Loiselle, Odugbesan was chosen because she was

well-educated, well-traveled, well-spoken, and, most importantly, met all three criteria Loiselle sought—she had international experience, strong leadership skills, and traditional food product experience, having worked for Coca-Cola and Atkins Nutritionals.

{¶ 7} Sometime after Odugbesan accepted the job, Loiselle met with appellant and informed her that Odugbesan had been selected for the director position. According to Loiselle, appellant was demoralized by the news, lamenting that she would never again be promoted at Abbott and that her career was effectively over. Loiselle's response to appellant is at the crux of appellant's age discrimination claim. According to Loiselle, she responded, "Madeleine, I don't know how old you are, and I don't know when you plan to retire, but if being a director with Abbott is your primary goal, then there are things that we can do to work on your ability to get into that next position." (Loiselle Deposition, 36.) According to appellant, Loiselle asked her "how old she was and how long she wanted to keep working." (Appellant Deposition, 120-21.) Loiselle denied that she asked appellant about her age or her retirement plans.

{¶ 8} Odugbesan assumed the director position in April 2007. Appellant and Odugbesan initially got along very well. According to appellant, in May 2007, she told Odugbesan that Loiselle had asked her how old she was and when she intended to retire, and Odugbesan responded that Loiselle should not have made such a statement. For her part, Odugbesan recalled a conversation during which appellant averred in passing that Loiselle had mentioned something about when appellant planned to retire. Odugbesan could not remember when the conversation took place and denied that she told appellant that Loiselle should not have made the comment. Odugbesan did not report the conversation to anyone else at Abbott, as she did not perceive appellant's statement as an age discrimination complaint requiring report pursuant to Abbott policy.

{¶ 9} Appellant's relationship with Odugbesan began to deteriorate in early July 2007. On July 3, 2007, Odugbesan called appellant at home to discuss appellant's repeated refusal to provide Odugbesan with pertinent information concerning one of appellant's projects. According to Odugbesan, the two had a "difference of opinion" and engaged in "a not very pleasant dialogue." (Odugbesan Deposition, 46.) Appellant characterized this conversation as harassment which reduced her to tears.

{¶ 10} According to Odugbesan, appellant's job performance significantly worsened following the July 3, 2007 incident. Odugbesan observed four specific performance issues with appellant: (1) insubordination, (2) tardiness with assignments, (3) quality variance in projects, and (4) improper and ineffective management of her direct reports. Odugbesan's fourth concern was based, in part, upon a report from Anastasakis that appellant's inappropriate behavior and management style had so negatively affected his well-being that he was considering seeking other employment. Odugbesan reported her concerns about appellant to Loiselle, who advised her to continue working toward a more productive relationship with appellant. Loiselle also advised Odugbesan to contact Abbott's human resources department for objective advice about how to effectively manage appellant. Odugbesan thereafter contacted Melissa Feltz, an Abbott human resources manager, for assistance in addressing appellant's performance and behavioral issues. Feltz reported this conversation to Trisha Smith, an Abbott employee relations manager, and advised her that Odugbesan would likely contact her in the near future.

{¶ 11} In August 2007, Odugbesan altered appellant's job duties and reassigned appellant's direct reports as part of an Abbott reorganization. Appellant, believing the change in job duties to be related to her age rather than to the reorganization, met with Smith in mid-September 2007 to discuss work-related difficulties she was having with Odugbesan. During this meeting, appellant reported her version of Loiselle's comment about appellant's age and retirement eligibility. Smith understood appellant's statement about Loiselle's comment to be a report of possible age discrimination requiring investigation pursuant to Abbott's anti-discrimination policies. Smith informed appellant that she would immediately commence an investigation into appellant's allegations of age discrimination. According to Smith, appellant stated that she wanted Smith to wait until she could speak personally to Odugbesan.

{¶ 12} On the same day, Smith met with Odugbesan. Odugbesan provided Smith an overview of her concerns about appellant's performance and behavioral issues. According to Odugbesan, the two did not discuss Loiselle's alleged age comment or anything else related to appellant's age or her claim of discrimination. Smith and Odugbesan discussed several options for addressing appellant's performance and

behavioral issues, including placing her on a written Coaching and Counseling Plan ("CCP").

{¶ 13} On October 2, 2007, appellant again met with Smith and reiterated her belief that Odugbesan's problems with her performance stemmed from age discrimination. Smith discussed the serious nature of appellant's allegations and again informed appellant that she would institute an investigation. According to Smith, appellant stated that she did not want Smith to conduct an investigation and thereafter "recanted all of her complaints." (Smith Deposition, 97.) Because appellant had retracted her accusations, Smith believed no further investigation into appellant's age discrimination claim was warranted. Smith felt that at this juncture, the issue had resolved to restoring the working relationship between appellant and Odugbesan. Appellant denied that she withdrew her allegations of age discrimination, but admitted that she told Smith she did not know if she wanted Smith to proceed with an investigation. Appellant further admitted that she did not thereafter revive her age discrimination claim with Smith.

{¶ 14} In the meantime, Odugbesan again met with Smith to discuss appellant's performance and behavioral issues. As a result of those discussions, Odugbesan, Smith, Loiselle, and Feltz met on November 8, 2007 to discuss issuing appellant a written CCP. At that meeting, Smith informed Loiselle of appellant's claim that Loiselle inappropriately asked appellant about her age and retirement eligibility. Loiselle denied making the comment and averred that her discussion with appellant focused on assessing appellant's future career development.

{¶ 15} On November 13, 2007, Odugbesan, Smith, Feltz, and Loiselle met with appellant. Odugbesan presented her concerns and thereafter informed appellant that she would be moved to an individual contributor role with new job responsibilities, which did not include management of subordinates. Odugbesan also told appellant that she would be issued a written CCP. The CCP addressed appellant's "unacceptable" performance issues and behavioral traits and set forth expectations for improving those areas. The CCP subjected appellant to further disciplinary action up to and including termination for deviation from the CCP.

{¶ 16} Odugbesan was charged with presenting the CCP to appellant during a one-on-one meeting. Odugbesan arranged the meeting via Abbott's electronic calendaring system, which allows a meeting organizer to attach documents to the meeting notice. Odugbesan used this feature in arranging the meeting with appellant. When appellant received the meeting notice, she realized that it was not marked "private." After substantiating through two of her colleagues that the CCP was accessible through the electronic calendaring system, appellant complained to Abbott's Office of Ethics & Compliance. Within a few days, the calendar entry, including the attached CCP, was removed from the system.

{¶ 17} On November 27, 2007, Odugbesan formally delivered the written CCP to appellant during a one-on-one meeting. Appellant refused to sign the CCP because she disagreed with some of the statements included therein.

{¶ 18} In November 2009, appellant instituted this action in the trial court, alleging claims for age discrimination, retaliation, invasion of privacy, and respondeat superior. Abbott, Odugbesan, and Loiselle jointly moved for summary judgment pursuant to Civ.R. 56. Following briefing, the trial court granted judgment as a matter of law in favor of appellees and dismissed all the claims set forth in appellant's complaint.

{¶ 19} Appellant timely appeals, advancing three assignments of error:

1. The Trial Court erred when it granted summary judgment in favor of defendants on plaintiff's age discrimination claim.

2. The Trial Court erred when it granted summary judgment in favor of defendants on plaintiff's retaliation claim.

3. The Trial Court erred when it granted summary judgment in favor of defendants on plaintiff's invasion of privacy claim.

{¶ 20} Because all of appellant's assignments of error challenge the trial court's decision to grant summary judgment in favor of appellees, we first set forth the applicable standard of review for Civ.R. 56 proceedings. Appellate review of summary judgment is de novo. *Anderson v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). " 'When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an

independent review of the record and stands in the shoes of the trial court.' " *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516 (10th Dist.), ¶ 11, quoting *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997).

{¶ 21} Summary judgment is proper only when the moving party demonstrates that: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 22} In her first assignment of error, appellant contends that the trial court erred in granting summary judgment in favor of appellees on her age discrimination claim. We disagree.

{¶ 23} In relevant part, R.C. 4112.02(A) provides that "[i]t shall be an unlawful discriminatory practice * * * [f]or any employer, because of the * * * age * * * 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." Furthermore, "[n]o employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee." R.C. 4112.14(A).

{¶ 24} The Supreme Court of Ohio has held that "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) *et seq.*, Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm.*, 61 Ohio St.3d 607, 609-10 (1991). Thus, in interpreting Ohio's anti-discrimination statutes, Ohio courts may look to federal cases interpreting federal rights and age discrimination legislation in addition to Ohio case law. *Miller v. Potash Corp. of Saskatchewan, Inc.*, 3d Dist. No. 1-09-58, 2010-Ohio-4291, ¶ 16.

{¶ 25} "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 Servs., Inc.*, 75 Ohio St.3d 578, 583 (1996). "[A] plaintiff may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent." *Mauzy* at paragraph one of the syllabus. "Absent direct evidence of discrimination, Ohio courts resolve age discrimination claims using the evidentiary framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668." *Crase v. Shasta Beverages, Inc.*, 10th Dist. No. 11AP-519, 2012-Ohio-326, ¶ 11, citing *Wigglesworth v. Mettler Toledo Internatl., Inc.*, 10th Dist. No. 09AP-411, 2010-Ohio-1019, ¶ 16. Regardless of the method of proof utilized, the burden of persuasion remains at all times with the plaintiff. *Miller* at ¶ 18, citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

{¶ 26} Under the *McDonnell Douglas* evidentiary framework, the plaintiff must first establish a prima facie case of age discrimination. To do so, the plaintiff must demonstrate by a preponderance of the evidence: (1) that she was a member of the statutorily protected class, i.e., was at least 40 years old at the time of the discrimination, (2) that she suffered an adverse employment action, i.e., she was not promoted, despite applying for the position, (3) that she was qualified for the position, and (4) that the position was awarded to a person of substantially younger age. *See Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, paragraph one of the syllabus, modifying and explaining *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501 (1991), syllabus.

{¶ 27} If the plaintiff establishes a prima facie case, a presumption of age discrimination is created. The burden of production then shifts to the defendant-employer to overcome the presumption by coming forward with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. *Crase* at ¶ 11. If the employer articulates such a reason, the burden shifts back to the plaintiff to prove that the employer's stated reasons were not its true reasons, but merely a pretext for unlawful discrimination. *Id.* The plaintiff may prove pretext either by direct evidence that an impermissible animus motivated the adverse employment action or by discrediting the employer's rebuttal evidence. *Id.*

{¶ 28} To refute the employer's legitimate, nondiscriminatory reason offered to justify an adverse employment action and establish that the reason is merely a pretext, the plaintiff must demonstrate that the proferred reason "(1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Knepper v. The Ohio State Univ.*, 10th Dist. No. 10AP-1155, 2011-Ohio-6054, ¶ 12, citing *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir.2000). "Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against [her]." *Knepper* at ¶ 12, citing *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir.2003). "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." *Knepper* at ¶ 12, citing *St. Mary's Honor Ctr.* at 515.

{¶ 29} In granting summary judgment for appellees, the trial court determined that appellant failed to prove her age discrimination claim through the direct method of proof. The trial court further found that appellant failed to produce any evidence establishing the fourth prong of an indirect evidence claim, i.e., that appellant lost the promotion to director to a person of substantially younger age. Finally, the trial court found that even had appellant succeeded in presenting a prima facie case of age discrimination, she failed to demonstrate that appellees' failure to promote her to the director position was merely a pretext for unlawful discrimination.

{¶ 30} Appellant first contends the trial court applied the wrong legal standard in addressing her age discrimination claim. Specifically, appellant takes issue with the trial court's statement that "Abbott's alleged failure to promote [appellant] and removing subordinates from [appellant] could be unlawful if it is solely based on her age." (Decision, 8.)

{¶ 31} "When a plaintiff alleges disparate treatment discrimination, liability depends on whether the protected trait, i.e., age, actually motivated the employer's decision; that is, the plaintiff's age must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome." *Miller* at ¶ 17, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000). "The 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." *Miller* at ¶ 21, citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

{¶ 32} When viewed in the context of the trial court's entire analysis of appellant's age discrimination claim, we view the court's use of the term "solely" as clearly intended to convey that appellant could not prevail on her claim unless she established that appellees' decision not to promote her to the director position was motivated by her age, i.e., that her age was the reason she did not receive the promotion. While the trial court might arguably have expressed the appropriate standard somewhat inartfully, we cannot conclude that the trial court applied the wrong legal standard in addressing appellant's age discrimination claim.

{¶ 33} Appellant next contends the trial court erred in finding that she failed to prove her age discrimination claim through the direct method of proof. Appellant first argues that Loiselle's asking her "how old she was and how long she wanted to keep working" constitutes direct evidence of discrimination.

{¶ 34} As noted above, Loiselle denied that she asked appellant her age or retirement intentions. Loiselle testified that she told appellant, "I don't know how old you are, and I don't know when you plan to retire, but if being a director with Abbott is your primary goal, then there are things that we can do to work on your ability to get into that next position." (Loiselle Deposition, 36.) However, even assuming appellant's characterization of Loiselle's comment was accurate, the comment was insufficient to create a triable issue of fact.

{¶ 35} In order to make a noncircumstantial case under the direct method of proof, appellant had to present evidence that, if believed by a jury, would prove that appellees acted with discriminatory intent, i.e., it admitted or "nearly" admitted that its decision not to promote appellant was discriminatory. *Southworth v. N. Trust Secs.*, 195 Ohio App.3d 357, 2011-Ohio-3467 (8th Dist.), ¶ 4, citing *Nagle v. Calumet Park*, 554 F.3d 1106, 1114 (7th Cir.2009). "Direct evidence of discriminatory intent requires more than just conjecture—it should be evidence that can be interpreted as an acknowledgement of discriminatory intent by [the employee's] supervisors." *Southworth* at ¶ 4, citing *Hill v. Burrell Communications Group*, 67 F.3d 665, 667 (7th Cir.1995). "Under this standard, ' "only the most blatant remarks, whose intent could be nothing other than to discriminate

on the basis of age," will constitute direct evidence of discrimination.' " *Southworth* at ¶ 4, quoting *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1359 (11th Cir.1999), quoting *Earley v. Champion Internatl. Corp.*, 907 F.2d 1077, 1081-82 (11th Cir.1990).

{¶ 36} Appellant's own argument establishes that Loiselle did not know appellant's age at the time she made the decision to hire Odugbesan. In order for age-related comments to constitute direct proof of discrimination, there must be a nexus between the alleged comment or action and the prohibited act of discrimination. *See Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125, 130 (1996). "Absent some causal connection or link between an employer's discriminatory statements or conduct and a plaintiff-employee, there is no permissible inference that the employer was motivated by discriminatory animus to act against the plaintiff-employee." *Id.* Appellant's own deposition testimony establishes that Loiselle did not inquire about appellant's age or retirement intentions until after she made the decision to hire Odugbesan. Appellant has failed to establish how Loiselle discriminated against her on the basis of age in hiring Odugbesan when Loiselle was not aware of appellant's age until she inquired about it after she had already made the hiring decision.

{¶ 37} Appellant next contends that Abbott's succession planning forms, which track "retirement eligibility" for Abbott employees, provide direct evidence of age discrimination. However, Loiselle asserted that Abbott only considers retirement eligibility with respect to the need to replace employees and not with respect to future opportunities for current employees. Both Limpert and Odugbesan averred that retirement eligibility is not a factor in Abbott's succession planning. Appellant's conclusory statement that Abbott discriminates in promotional opportunities on the basis of age and retirement eligibility is supported only by her subjective belief, which does not qualify as direct evidence of an age discrimination claim. *Boggs v. The Scotts Co.,* 10th Dist. No. 04AP-425, 2005-Ohio-1264, ¶ 25 (a plaintiff's conclusory statements and subjective beliefs are insufficient to support a finding of discrimination). Accordingly, for the above stated reasons, the trial court did not err in finding that appellant failed to establish her age discrimination claim by the direct method of proof.

{¶ 38} We turn next to appellant's contention that the trial court erred in finding that she failed to establish her age discrimination claim through the indirect method of proof. To establish her age discrimination claim indirectly, appellant was required to establish, in the context of this case, that she was over the age of 40, that she applied for and was qualified for a job for which Abbott was seeking applications, that despite her qualifications appellant was rejected, and that after appellant was rejected, Abbott hired a person of substantially younger age. *Coryell*. The trial court concluded that appellant failed to satisfy the fourth prong of her prima facie case because Odugbesan, the person to whom appellant lost the promotion, was not substantially younger than appellant.

{¶ 39} The Supreme Court of Ohio has explained that the term "substantially younger" cannot be absolutely defined and must be determined under the particular circumstances of the case. *Id*. at paragraph two of the syllabus. A trial court is vested with significant discretion in determining the substantially younger factor. *Id*. at ¶ 24.

{¶ 40} Here, the trial court did not abuse its discretion in determining that Odugbesan was not substantially younger than appellant. Appellant does not dispute that at the time the hiring decision was made, appellant was 50 years old and Odugbesan was 48 years old.[1] In *Dean v. Chemineer, Inc.*, 2d Dist. No. 20378, 2004-Ohio-7254, the court of appeals affirmed a trial court's finding that the plaintiff could not satisfy the fourth element of a prima facie age discrimination claim where the plaintiff was 50 years old and the person who replaced the plaintiff was 48 years old—the precise age difference at issue here. *Id*. at ¶ 12. The *Dean* court upheld the trial court's grant of summary judgment in favor of the employer, affirming the trial court's finding that the plaintiff "being but only two years older than his replacement, could not show that he had been replaced by a person substantially younger than himself." *Id*.

{¶ 41} Other courts have held similarly. *See, e.g., Molnar v. Klammer*, 11th Dist. No. 2004 L 072 CA, 2005-Ohio-6905, ¶ 35-37 (eight-year age difference not substantial); *Temple v. Dayton*, 2d Dist. No. 20211, 2005-Ohio-57, ¶ 88 (age differences of one, two,

[1] Appellant argues that the trial court erred by considering the ages of appellant and Odugbesan at the time of their depositions in 2010 rather than their ages in 2007 when the hiring decision was made. The relevant consideration is the difference in age between the two candidates, which is the same regardless at what point in time that difference is measured. Accordingly, we find unavailing appellant's assertion that the trial court "committed reversible error when it misapplied the facts" in this manner. (Appellant's brief, 14.)

and nine years not substantial); *Grosjean v. First Energy Corp.*, 349 F.3d 332, 340 (6th Cir.2003) (age difference of six years or less not significant). Appellant points to no case where a court has held that a two-year age difference was "substantial" under the fourth prong of the *McDonnell Douglas* or *Coryell* analyses. Accordingly, the trial court did not err in finding that appellant failed to present a prima facie case of age discrimination through the indirect method of proof.

{¶ 42} Appellant's failure to establish a prima facie case of age discrimination through either direct or indirect methods of proof effectively ends our inquiry as a matter of law. Accordingly, we need not proceed to the next two parts of the *McDonnell Douglas* analysis, i.e., whether appellees overcame the presumption inherent in the prima facie case by propounding a legitimate, nondiscriminatory reason for appellant's failure to receive the promotion, and whether she produced evidence demonstrating that the rationale set forth by appellees was merely a pretext for unlawful discrimination.

{¶ 43} Lastly, we address appellant's contention that the trial court improperly granted summary judgment to appellees on adverse employment actions not raised in appellees' summary judgment motion. Appellant argues that the only adverse employment action raised in appellees' summary judgment motion was the hiring of Odugbesan for the director position in 2007 and, accordingly, such was the only issue upon which the trial court could have granted summary judgment on appellant's age discrimination claim. Appellant argues that her complaint contains allegations beyond those related to the 2007 director's position. Specifically, appellant alleges that the following statements included in her complaint constitute additional age discrimination claims: (1) a "pattern and practice" of age and retaliatory discrimination by Abbott (Complaint, ¶ 25), (2) "younger individuals * * * getting consideration for promotions before employees of [appellant's] age" (Complaint, ¶ 16), and (3) plaintiff being made "functionally ineligible for future promotions" (Complaint, ¶ 18). Appellant contends the trial court erred as a matter of law in granting summary judgment on these claims.

{¶ 44} A thorough review of appellant's complaint yields no support for her contention. The statements appellant cites which purportedly allege age discrimination beyond the allegations related to the 2007 director's position simply do not do so. The statement included in paragraph 16 of the complaint regarding younger employees being

considered for promotion over those in appellant's age range was part of the factual recitation regarding what appellant allegedly told Smith about Loiselle's age comment. These facts related to appellant's claim regarding the 2007 director's position. Similarly, the averment included in paragraph 18 of the complaint regarding appellant's ineligibility for future promotions was part of the factual recitation related to Odugbesan's actions following appellant's alleged reporting of the discriminatory action by Abbott. These facts related to appellant's retaliation claim. Finally, as to the assertion in paragraph 25 of the complaint regarding alleged "pattern[s] and practice[s]," appellant's counsel averred at oral argument that such related to appellant's retaliation claim.

{¶ 45} Moreover, a thorough reading of the trial court's decision does not support appellant's contention that the trial court granted summary judgment on any age discrimination claims other than appellees' failure to promote appellant to the director position in 2007. The trial court's discussion regarding appellant's failure to obtain promotions other than the director position in 2007 was part of the trial court's analysis related to whether appellees propounded a legitimate, nondiscriminatory reason for appellant's failure to receive the 2007 promotion, and whether appellant produced evidence demonstrating that the rationale set forth by appellees was merely a pretext for unlawful discrimination.

{¶ 46} Having thoroughly reviewed the record and applicable law, we conclude that the trial court properly granted summary judgment in favor of appellees on appellant's age discrimination claim. We therefore overrule the first assignment of error.

{¶ 47} In her second assignment of error, appellant asserts that the trial court erred in granting summary judgment in favor of appellees on her retaliation claim. We disagree.

{¶ 48} R.C. 4112.02(I) provides that it is an unlawful discriminatory practice "[f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code." Thus, R.C. 4112.02(I) prohibits discrimination under the following two circumstances: "(1) where an employee has opposed any unlawful discriminatory practice,

the 'opposition clause'; and (2) where an employee has made a charge, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code, the 'participation clause.' " *Coch v. Gem Indus., Inc.*, 6th Dist. No. L-04-1357, 2005-Ohio-3045, ¶ 29. "The distinction between the opposition and the participation clauses is significant because courts have generally granted less protection for opposition activities than for participation in enforcement proceedings." *Id.*, citing *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir.1989). Appellant's complaint sets forth an "opposition" clause retaliation claim, i.e., that appellees retaliated against her in response to her "opposition" to appellees' alleged unlawful discriminatory practices. (Complaint, ¶ 33.)

{¶ 49} To establish a prima facie case of retaliation pursuant to R.C. 4112.02(I), the plaintiff must demonstrate that: (1) the plaintiff engaged in a protected activity, (2) the employer knew the plaintiff engaged in the protected activity, (3) the employer subjected the plaintiff to an adverse employment action, and (4) a causal link existed between the protected activity and the adverse action. *Knepper* at ¶ 25, citing *Chandler v. Empire Chem., Inc.*, 99 Ohio App.3d 396 (9th Dist.1994). If the plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate reason for its action. *Knepper* at ¶ 25. If the employer meets its burden, the burden then shifts back to the plaintiff to demonstrate that the proferred reason was a pretext for retaliation. *Id.*

{¶ 50} In granting summary judgment for appellees, the trial court found that appellant established the first two elements of a prima facie retaliation claim through evidence that she complained to both Odugbesan and Smith about Loiselle's comment regarding appellant's age and retirement intentions. The trial court concluded, however, that appellant failed to establish the final two elements of a prima facie claim, i.e., that she suffered adverse employment actions following her complaint of discrimination and that the adverse actions were causally related to the complaint of discrimination.

{¶ 51} Appellant first contends the trial court erred in concluding that she did not suffer adverse employment actions following her report of discrimination. In her complaint, appellant alleged that "within two to three months" after reporting Loiselle's comment to Odugbesan in May 2007, Odugbesan began criticizing appellant's management style and relationships with others. (Complaint, ¶ 14.) She further alleged

that beginning in July 2007, Odugbesan began criticizing appellant's communication skills, cancelled a new position in appellant's group, increased appellant's workload, and gradually removed appellant's subordinates. (Complaint, ¶ 15, 17.) Appellant also alleged that in November 2007, she was relieved of her supervisory duties and placed on a CCP. (Complaint, ¶ 17.) Finally, appellant alleged that in January 2008, she did not receive a promotion and pay increase similar to one given to her peer, Pfeiffer. (Complaint, ¶ 21.) Appellant alleged that these events constituted adverse employment actions taken in response to her opposition to appellees' alleged unlawful discriminatory practices. (Complaint, ¶ 33.)

{¶ 52} In general, "an adverse employment action is a materially adverse change in the terms and conditions of the plaintiff's employment." *Canady v. Rekau & Rekau, Inc.*, 10th Dist. No. 09AP-32, 2009-Ohio-4974, ¶ 25, citing *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 593 (6th Cir.2007). Factors to consider in determining whether an employment action was materially adverse include termination, demotion evidenced by a decrease in salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices unique to a particular situation. *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 727 (10th Dist.1999.) "Not everything that makes an employee unhappy or resentful is an actionable adverse action." *Canady* at ¶ 25, citing *Primes v. Reno*, 190 F.3d 765, 767 (6th Cir.1999). "Employment actions that result in mere inconvenience or an alteration of job responsibilities are not disruptive enough to constitute adverse employment actions." *Canady* ¶ 25, citing *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir.2004).

{¶ 53} Assuming, without deciding, that the actions appellant complains about were significant enough to constitute adverse employment actions, we agree with the trial court that appellant failed to establish a causal connection between the adverse actions and her report of discrimination. Appellant reported Loiselle's comment to Odugbesan in May 2007. Appellant alleged that Odugbesan's retaliatory conduct did not begin until July 2007, a full two months after she complained to Odugbesan. The CCP was not issued until November 2007, which was six months after appellant reported Loiselle's comment to Odugbesan. Pfeiffer testified that he did not receive a grade increase until August 2008, which was approximately 15 months after appellant complained to Odugbesan.

The trial court held that the length of time between appellant's complaint and the adverse actions was too long to infer temporal proximity and a retaliatory motive.

{¶ 54} Close temporal proximity between the employer's knowledge of the protected activity and the adverse employment action may constitute evidence of a causal connection for purposes of satisfying a prima facie case of retaliation. *Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (noting that some cases have "accept[ed] mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality" but that they have only done so when the temporal proximity is "very close"). *See also Payton v. Receivables Outsourcing, Inc.*, 163 Ohio App.3d 722, 2005-Ohio-4987 (8th Dist.) (two-day interval between complaint of offending conduct and termination of employment sufficient evidence of causal connection); *Thatcher v. Goodwill Industries of Akron*, 117 Ohio App.3d 525, 535 (9th Dist.1997) (three-week interval between complaint of offending conduct and termination of employment sufficient).

{¶ 55} However, where some time elapses between the employer's discovery of a protected activity and the subsequent adverse employment action, the employee must produce other evidence of retaliatory conduct to establish causality. *Aycox v. Columbus Bd. of Edn.*, 10th Dist N0. 03AP-1285, 2005-Ohio-69, ¶ 21, citing *Kipp v. Missouri Hwy. & Transp. Comm.*, 280 F.3d 893, 897 (8th Cir.2002) (holding that an "interval of two months between complaint and adverse action 'so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff's] favor on the matter of causal link.' " *See also Ningard v. Shin Etsu Silicones*, 9th Dist. No. 24524, 2009-Ohio-3171, ¶ 17 (stating that mere temporal proximity does not suffice, "especially where the events are separated by more than a few days or weeks"); *Boggs* at ¶ 26 (additional evidence required after two-month interval); *Briner v. Natl. City Bank*, 8th Dist. No 64610 (Feb. 17, 1994) (additional evidence required after three-month interval); *Williams v. Philadelphia Housing Auth. Police Dept.*, 380 F.3d 751, 760 (3d Cir.2004) (concluding that, while the passage of days between the protected activity and the adverse action could prove a causal connection, the lapse of two months required the introduction of additional evidence of causality).

{¶ 56} Here, appellant first contends that the close temporal proximity of her protected activity (her complaint of discrimination to Odugbesan in May 2007) and the onset of the adverse employment actions (Odugbesan's criticism of appellant's job performance beginning in July 2007) establish the causal connection necessary to raise a prima facie case. However, as noted above, this court and others have held that a two-month interval between complaint and adverse action is insufficient as a matter of law to justify a finding of causal connection. *Boggs; Williams.*

{¶ 57} Appellant argues, alternatively, that in the event her temporal proximity argument fails, inaction by Smith following appellant's allegations of age discrimination provides additional evidence that she suffered adverse employment actions in retaliation for her report of discrimination. According to appellant, Smith retaliated against her in several ways: (1) by failing to assign appellant's investigation to a person without a conflict of interest, (2) by failing to engage in a proper investigation of appellant's complaint of discrimination, (3) in attempting to intimidate appellant into recanting her complaint of discrimination, and (4) in participating in the preparation and issuance of the CCP.

{¶ 58} As noted above, the evidence establishes that Smith learned of Odugbesan's problems with appellant's job performance shortly after the July 3, 2007 incident. In mid-September 2007, appellant approached Smith, reported Loiselle's comment, and asserted that Odugbesan's alteration of appellant's job duties was age-related. Smith told appellant she would immediately commence an investigation; however, appellant stated that she wanted to speak to Odugbesan personally before Smith did so. Appellant did not contact Smith again until early October 2007. During that meeting, appellant reiterated her belief that the actions taken against her resulted from age discrimination. When Smith told appellant she would commence an investigation, appellant told Smith that she was not sure if she wanted Smith to explore the situation. Appellant admitted that she did not contact Smith after the October 2007 meeting.

{¶ 59} Appellant's accusations about Smith's alleged failure to adequately investigate appellant's allegations of age discrimination and retaliatory conduct by Odugbesan are not supported by the record. Appellant's contention that Smith should have assigned the investigation to someone without a conflict of interest is based on appellant's subjective belief that Smith was incapable of performing her duty as a

professional employee relations manager to investigate both Odugbesan's concerns about appellant's performance issues and appellant's claims of age discrimination. No evidence establishes that Smith was in any way conflicted about the circumstances. Indeed, Smith testified that she had often advised both parties to an employment dispute and that her involvement with both appellant and Odugbesan did not violate any of Abbott's policies, procedures or practices. The evidence further fails to establish that Smith failed to properly investigate appellant's complaint. As noted above, Smith twice told appellant she would initiate an investigation, but appellant declined Smith's offer. In addition, no evidence establishes that Smith attempted to "intimidate" appellant into recanting her allegations of discrimination. With regard to Smith's participation in preparing and issuing the CCP, the evidence establishes that Smith did so only in her role as employee relations manager and only after consultation with Odugbesan, Loiselle, and Feltz.

{¶ 60} Finally, we find unavailing appellant's contention that direct evidence, in the form of Loiselle's comment about appellant's age and retirement intentions and Abbott's practice of considering retirement eligibility in its succession planning, established that a discriminatory reason likely motivated appellees' alleged retaliation. We have previously determined that this evidence did not establish age discrimination through the direct method of proof. For the same reasons, we find that this evidence did not constitute direct evidence of retaliatory intent.

{¶ 61} Here, in the absence of any direct proof of retaliatory intent and given the lapse of time between the purported protected activity and the adverse employment actions, appellant has failed to establish the necessary causal connection to support the fourth element of her prima facie case. Accordingly, the trial court properly granted summary judgment in favor of appellees on appellant's retaliation claim. We therefore overrule the second assignment of error.

{¶ 62} By her third assignment of error, appellant argues that the trial court erred in granting summary judgment in favor of appellees on her invasion of privacy claim. Again, we disagree.

{¶ 63} Until 2007, Ohio recognized three actionable types of invasion of privacy claims: "the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the

wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Housh v. Peth*, 165 Ohio St.3d 35 (1956), paragraph two of the syllabus. In 2007, the Supreme Court of Ohio recognized a fourth theory, the "false light" invasion of privacy theory. *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2471, syllabus.

{¶ 64} Appellant's claim for invasion of privacy involves Odugbesan's posting of appellant's CCP to Abbott's internal electronic calendaring system. Appellant argues that Odugbesan's action gave rise to both "publicity" and "false light" invasion of privacy claims.

{¶ 65} To establish an invasion of privacy through publicity, the plaintiff must prove five elements: (1) communication of the matter to the public at large or to so many persons that the matter is substantially certain to become one of public knowledge, (2) disclosure of facts concerning the individual's private life, (3) the matter publicized must be highly offensive and objectionable to a reasonable person of ordinary sensibilities, (4) the communication must be intentional, not negligent, and (5) the matter publicized is not of legitimate concern to the public. *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 166-67 (10th Dist.1985). Here, the trial court determined that the inadvertent posting of appellant's CCP on Abbott's calendaring system did not constitute a "publication" since it was not "substantially certain" that it could have been viewed by all Abbott employees. (Decision, 18.)

{¶ 66} Assuming arguendo that appellant established that the posting of the CCP was a communication to the public at large, appellant's publicity invasion of privacy claim still fails as a matter of law, as no evidence establishes the second and fourth elements of her claim. As to the second element, the CCP included only facts about appellant's professional life. This court has stated that "disclosure of facts or events about an individual's professional or business life * * * is not a disclosure of private facts for purposes of the publicity tort." *Huntington Ctr. Assocs. v. Schwartz, Warren & Ramirez*, 10th Dist. No. 00AP-35 (Sept. 26, 2000), citing *Fallang v. Hickey*, 12th Dist. No. CA86-11-163 (Aug. 31, 1987). With regard to the fourth element, no evidence establishes that Odugbesan intentionally attached the CCP to the meeting notice, other than appellant's subjective belief that Odugbesan did so. However, appellant admitted that she did not

know if Odugbesan was aware that other persons could view an attachment to a meeting notice on appellant's calendar.

{¶ 67} Appellant's "false light" invasion of privacy claim also fails as a matter of law. Under a false light theory, "[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Welling* at syllabus, adopting Restatement of the Law 2d, Torts, Section 652E (1997). To succeed under a false light theory, the information must be made public, i.e., "[communicated] to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Id.* at ¶ 53. In addition, the statement made must be untrue, and the misrepresentation must be serious enough to be highly offensive to a reasonable person. *Id.* at ¶ 52-54. Assuming arguendo that appellant established that the CCP was communicated to the public at large, appellant's claim still fails because she did not produce any evidence that any of the statements contained within the CCP were objectively untrue.

{¶ 68} For the foregoing reasons, we hold that the trial court did not err in granting summary judgment to appellees with regard to appellant's invasion of privacy claim under either the publicity theory or the false light theory. Accordingly, we overrule the third assignment of error.

{¶ 69} Having overruled appellant's three assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and TYACK, JJ., concur.

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