

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael D. Lang,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-968
	:	(C.P.C. No. 10 CV 5589)
City of Columbus Division of Power and	:	
Water et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	
	:	

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D E C I S I O N

Rendered on May 8, 2012

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*Beggs Caudill, LLC, Danny L. Caudill and Greg R. Mansell,*  
for appellant.

*Richard C. Pfeiffer, Jr., City Attorney, and Natalia S. Harris,*  
for appellees.

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiff-appellant, Michael D. Lang, appeals the summary judgment decision of the Franklin County Court of Common Pleas. For the following reasons, we affirm the decision of the trial court granting summary judgment.

{¶ 2} Lang brings the following assignments of error:

1. The trial court erred in its determination that no genuine issue of material fact existed regarding whether Lang and his female counterpart performed equal work under similar working conditions.

2. The trial court erred in its determination that no genuine issue of material fact existed regarding whether Defendant-Appellee's affirmative defenses were pretext for discrimination.

3. The trial court erred in its determination that no genuine issue of material fact existed regarding whether background circumstances existed supporting the suspicion that Defendant-Appellee was the unusual employer who discriminates against the majority.

4. The trial court erred in its determination that no genuine issue of material fact existed regarding whether Defendant-Appellee treated similarly situated female employees more favorably than Lang.

{¶ 3} Lang is employed by defendant-appellee, City of Columbus Division of Power and Water (hereinafter "the City"), as an Engineer-In-Training I ("EIT I") in the Division of Power and Water. Lang worked in the design group within the Distribution/Engineering section. Cindi Fitzpatrick was also classified as an EIT I within the Division of Power and Water and worked in the Operations and Maintenance Support group within the Distribution/Engineering section.

{¶ 4} Lang and Fitzpatrick were the only employees classified as EIT I. The requirements for an EIT I employee are a Bachelor of Science in Engineering, a valid driver's license, and a valid Engineer Intern Certificate by the end of the one-year probationary period. The EIT I position is described as being responsible for performing entry-level practical engineering work.

{¶ 5} Lang was hired on February 5, 2007 at a rate of \$21.50 an hour. Robert Arnold and Danella Pettenski were involved in hiring Lang. (Arnold affidavit.) Lang's pay rate was increased to \$22.36 an hour on August 12, 2007 and \$23.14 an hour on December 27, 2009. The design group is primarily responsible for reviewing design drawings for new construction within the Distribution/Engineering section.

{¶ 6} Lang's regular job duties consist of monitoring the chlorination process, plan review, permit review, and preparing reports. The vast majority, nearly 95 percent, of Lang's job is performed in an office setting with him going into the field once or twice a month. Michael D. Lang's Nov. 10th, 2010 deposition 97-99 (hereinafter Lang Depo.

\_\_\_\_); (Haemmerle affidavit). Lang's immediate supervisor was Brian Haemmerle. Haemmerle deposition 31 (hereinafter Haemmerle Depo. \_\_\_\_). Lang has no supervisory authority. (Haemmerle's affidavit; Pettenski affidavit) Lang Depo. 88.

{¶ 7} Fitzpatrick was hired September 8, 2008 at a rate of \$22.72 an hour, she was hired by Danella Pettenski and Steve Gooding. Gooding is Fitzpatrick's immediate supervisor. (Gooding affidavit.) Fitzpatrick worked in the Operations and Maintenance Support group which provides all field related services to the Distribution/Engineering section. (Gooding affidavit.) Fitzpatrick is the back-up supervisor for the Operations and Maintenance Support group which includes interviewing new candidates, giving hiring recommendations, and approving overtime and leave slips in Gooding's absence. (Gooding affidavit.) Fitzpatrick Depo. 64-69. Her job duties include pitometer testing, pump testing, meter reading testing, C-Factor testing, inspecting the painting and maintenance of the City's elevated water storage tanks, leak detection, and water consumption measurement. Lang does not perform any of these tasks as part of his job. Lang Depo. 278-81. Fitzpatrick also performs booster station pump testing. Fitzpatrick Depo. 51.

{¶ 8} Lang filed an action on April 12, 2010. He claimed discrimination under Ohio's equal pay act, alleging he was paid a lower wage than Fitzpatrick in violation of R.C. 4111.17. Lang also claimed that he was treated differently because of his gender and was retaliated against for complaining of wage discrimination in violation of R.C. 4112.02 and 4112.99. Lang believes he was discriminated against, evidenced by the difference in the wages between himself and Fitzpatrick. He also complains that Fitzpatrick received large amounts of overtime while he received virtually none, and that he was not promoted to an Engineering I position when he obtained his Professional Engineer license in October 2008.

{¶ 9} Both Lang and the City moved for summary judgment. The trial court granted the City's motion for summary judgment as to all of Lang's claims. Lang timely appealed the decision.

{¶ 10} As to Lang's contention that summary judgment was improperly granted, Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

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

{¶ 11} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65-66 (1978). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record \* \* \* which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Once the moving party meets its initial burden, the non-moving party must then produce competent evidence showing that there is a genuine issue for trial. *Id.* Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992).

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

{¶ 13} Further, a genuine issue of material fact is not created by the contradictory evidence submitted from a nonmoving party in a summary judgment motion absent some sufficient explanation of the contradiction. The Ohio Supreme Court explained in *Byrd v.*

*Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, the effect of seemingly contradictory testimony on summary judgment motions.

{¶ 14} When an inconsistent affidavit is presented in support of, or in opposition to, a motion for summary judgment, a trial court must consider whether the affidavit contradicts or merely supplements the affiant's earlier sworn testimony. A movant's contradictory affidavit will prevent summary judgment in that party's favor. A nonmoving party's contradictory affidavit must sufficiently explain the contradiction before a genuine issue of material fact is created. While *Byrd*, at ¶ 29, addressed an affidavit that contradicted a prior deposition, the logic of this rule can extend to two inconsistent depositions offered by the same party.

{¶ 15} Lang offered two depositions to be considered in deciding if summary judgment was appropriate. There are discrepancies between the two. We stand in the shoes of the trial court and look to see if these discrepancies are contradictions or merely supplemental in nature.

{¶ 16} The first assignment of error argues that the trial court erred in its determination that no genuine issue of material fact existed regarding whether Lang and Fitzpatrick performed equal work under similar working conditions.

{¶ 17} Lang brought a claim under R.C. 4111.17(A), which provides:

No employer, including the state and political subdivisions therefore, shall discriminate in the payment of wages on the basis of race, color, religion, sex, age, national origin, or ancestry by paying wages to any employee at a rate less than the rate at which the employer pays wages to another employee for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar conditions.

{¶ 18} Claims brought pursuant to R.C. 4111.17 are subject to the standards as applied to claims under the Federal Equal Pay Act. *Creech v. Ohio Cas. Ins. Co.*, 944 F.Supp. 1347, 1353 (S.D. Ohio 1996). Courts, when interpreting statutes, are required to give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which agency Congress has delegated the responsibility of implementing the congressional command. *Jones Metal Prods. Co. v. Walker*, 29 Ohio St.2d 173, 181 (1972).

{¶ 19} The Code of Federal Regulations lays out separate tests for the terms "equal skill, effort, and responsibility," each of which must be met for the equal pay standard to apply. 29 C.F.R. 1620.14. Resolution of a claim under the Equal Pay Act depends not on job titles or classifications, but on actual job requirements and performance. 29 C.F.R. 1620.13(e). Precise equivalence is not required. Rather, there need be only substantial equality of skill, effort, responsibility and working conditions. *Conti v. Universal Ent., Inc., Universal Tubular Sys., Inc.*, 50 Fed.Appx. 690 (6th Cir.2002). In determining whether there is substantial equality in these respects in a given case, it is necessary to make an overall comparison of the work, not its individual segments. *Id.*

{¶ 20} First, the skills test looks at factors such as experience, training, education, and ability. 29 C.F.R. 1620.15. The only comparison of skills that should be made in a prima facie case is a comparison of skills required by a job, not by comparing the skills and qualifications of the individual employees holding these jobs. *Ambrose v. Summit Polymers, Inc.*, 172 Fed.Appx. 103, 106 (6th Cir.2006). A skills test requires an examination of the job duties to look for relevant factors.

{¶ 21} Lang's regular primary job duties consist of monitoring the chlorination process and reviewing of non-city of Columbus plans. Lang also conducts permit review and prepares reports. While Lang argues that he has more experience than Fitzpatrick, it is the experience required to perform the duties of two different positions that must be compared.

{¶ 22} Fitzpatrick's position requires different skills for her to perform different duties. She uses a pitometer to conduct meter tests, booster station pump tests and C-Factor test. She also obtains water consumption measurements which can only be learned through apprenticeship training. Fitzpatrick Depo. 51-54. Training and certification is necessary to conduct work of the backflow group. Confined space training is needed to conduct some of the meter testing and to inspect some of the water tanks. Fall protection training is needed because Fitzpatrick's job requires climbing 120-foot water tanks. Vehicular traffic training is also needed because the job duties require working in traffic on a daily basis. Fitzpatrick Depo. 72; (Gooding affidavit).

{¶ 23} While, in viewing the evidence most favorably for appellant, the experience levels required of the two positions is the same, some of the duties of Fitzpatrick's position

require additional training that Lang's position does not. Further, the primary duties of each position are not similar. Lang and Fitzpatrick are not in positions that require equal skills.

{¶ 24} Second, equal effort must also be found to establish an Equal Payment Act case. Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job. Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue, are to be considered in determining the effort required by the job. The definition of "effort" encompasses the total requirements of a job. 29 C.F.R. 1620.16. The equal pay standard does not apply when the effort required in job performance is "substantially different," even when the jobs are equal in all other respects. The occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort. *Id.*

{¶ 25} There is a physical component to Fitzpatrick's job that requires working outside, working in traffic, climbing 120-foot water towers, going into underground vaults, and setting up testing and safety equipment. (Gooding affidavit); Fitzpatrick Depo. 71. Fitzpatrick's department is responsible for all the field-related services. This necessitates an element of danger from working in traffic, climbing towers, and entering vaults and other spaces where there is a possibility of being exposed to dangerous gases or a lack of oxygen. Fitzpatrick Depo. 72-73. Lang's job, in contrast, is performed almost entirely in an office and does not carry a major physical component or the same elements of danger. Lang Depo. 97-99; (Haemmerle's affidavit). The effort required of Fitzpatrick's job is substantially different from Lang's job.

{¶ 26} Third, the equal pay standard applies to jobs the performance of which requires equal responsibility. Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. 29 C.F.R. 1620.17.

{¶ 27} Fitzpatrick has considerably more supervisory responsibilities than Lang. Fitzpatrick is the back-up supervisor for the Operations and Maintenance Support group. Her duties include assisting Gooding in managing the group on a daily basis, acting as supervisor in Gooding's absence, assisting in interviews and making hiring recommendations for the group. Fitzpatrick also manages and acts as lead crew member

for the backflow group. Fitzpatrick was hired with the intention of replacing Gooding, when he retires. She also manages the demolition of some City of Columbus buildings. Fitzpatrick Depo. 55. Thus, her involvement with the different management responsibilities of the Operations and Maintenance Support group and training by Gooding with the goal of having Fitzpatrick being the responsible engineer for the field services gives her more supervisory responsibility than Lang. Pettenski Depo. 35-36. The case at bar is similar to the example given in the federal regulations.

{¶ 28} The federal rules give an example when there are dissimilar supervisory responsibilities:

There are many situations where one employee of a group performing jobs which are equal in other respects is required from time to time to assume supervisory duties for reasons such as the absence of the regular supervisor. Suppose, for instance, that it is the employer's practice to pay a higher wage rate to such a "relief" supervisor with the understanding that during the intervals in which the employee performs supervisory duties the employee is in training for a supervisory position. In such a situation, payment of the higher rate to the employee might well be based solely on the additional responsibility required to perform the job and the equal pay provisions would not require the same rates to be paid to an employee of the opposite sex in the group who does not have an equal responsibility.

29 C.F.R. 1620.17(b)(1). This example is substantially similar to the job responsibilities of Fitzpatrick in which she clearly is responsible as supervisor in Gooding's absence.

{¶ 29} Lang, in contrast, does not have supervisory authority. (Pettenski affidavit.) There are inconsistencies between Lang's depositions on this issue and they do not create an issue of material fact. Lang states in his November 10, 2010 deposition, at 89, 99 and 178-79:

Q. Do you have any supervisory responsibilities as part of your current position?

A. Not that I would consider supervisory, no.

\* \* \*

Q. So then let me just ask you this way. Would it be fair to say that -- you said in the field that you supervise people in the field?

A. Well, I mean I supervise the process more than the people.

Q. Okay.

A. If I would direct them, I would give them technical, you know, direction or technical advice. I'm not their immediate supervisor, so they could probably just tell me to jump in the lake, but they are -- you know, from my expertise and my observation.

\* \* \*

Q. So how would you know whether or not you require more or less supervision than anyone else in the department?

A. Well, I have the power of observation. The office is very small. I pretty much know what's going on with other people as much as myself.

Q. Okay. But you are not a supervisor?

A. No.

Q. Correct? No, you are not a supervisor?

A. No, I am not a supervisor.

This is in contradiction to Lang's deposition given on December 29, 2010:

Q. [Mr. Mansell, attorney for Lang] Are you capable of scheduling and supervising employees?

Ms. Harris [attorney for the City] Objection.

A. Yes, I am.

Q. Do you currently do this?

A. Yes, I do.

Q. Can you describe how you do this?

A. Well, I definitely -- I schedule the chlorination process with the technicians and basically organize the work that they do.

\* \* \*

Q. Can you provide me with the names of the persons that you supervise?

A. There's numerous people. Andy Lucas is one of the main ones.

Q. Who?

A. Andy Lucas. I mean there's numerous other people. I also have to supervise the work of the contractors.

Lang's December 29, 2010 Depo. 18-19, 27.

{¶ 30} In pages 26 through 31, Lang explains what he considers to be his supervisory duties. Lang's testimony of his supervisory duties in his second deposition could, at best, be described as evaluations of work performed. Lang can recommend discipline and overtime, but he does not conduct performance evaluations or authorize payments for overtime.

{¶ 31} These contradictions from a party's own deposition do not create a genuine issue of material fact. *Byrd*, 110 Ohio St.3d at ¶ 29. Lang has failed to sufficiently explain why he clearly states twice in this November 10 deposition that he is not a supervisor. Clearly the job responsibilities of Lang and Fitzpatrick differ greatly.

{¶ 32} Lang has failed to establish a prima facie case under R.C. 4111.17(A). Lang's and Fitzpatrick's jobs do not require equal skills, effort, and responsibility. In viewing the evidence in a light most favorable to Lang, we find that his and Fitzpatrick's jobs cannot be considered equal work.

{¶ 33} The first assignment of error is overruled.

{¶ 34} Lang's second assignment of error asserts that the trial court erred in its determination that no genuine issue of material fact existed regarding whether the City's affirmative defenses were a pretext for discrimination.

{¶ 35} Reasonable minds can only come to one conclusion, that Lang has failed to establish a prima facie case of wage discrimination. As a result, the City has no need to present an affirmative defense for a claim Lang has failed to establish.

{¶ 36} The second assignment of error is overruled.

{¶ 37} The third assignment of error asserts that the trial court erred in determining that no genuine issue of material fact existed regarding whether background circumstances existed supporting the suspicion that the City was the unusual employer who discriminates against the majority.

{¶ 38} In order to prevail on a reverse gender discrimination claim, a plaintiff must establish: (1) background circumstance to support the suspicion that the defendant is the unusual employer who discriminates against the majority; and (2) that the defendant treated employees who were similarly situated, but members of the protected group, more favorably. *Bodgas v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-466, 2009-Ohio-6327, ¶ 31.

{¶ 39} Lang argues the Division of Power and Water is the unusual employer who discriminates against males. Lang points to Fitzpatrick, to manager Danella Pettenski, and to human resource person Tamirah Jackson arguing that these women demonstrate the "composition of the workforce." Simply stating that these three women in the department are female is not proof that the Division of Power and Water discriminates against males, especially where there is evidence that males have been highly involved in the management of Lang and Fitzpatrick.

{¶ 40} Pettenski was not solely responsible for Fitzpatrick's starting salary recommendation. Robert Arnold interviewed and also made a recommendation towards Lang's starting salary. (Pettenski affidavit; Arnold affidavit.) Pettenski was also not responsible for the assignment of overtime that Lang claims is evidence of discrimination. Gooding was responsible for the assignment of Fitzpatrick's overtime. Two of Lang's supervisors, Arnold and Haemmerle, both did not recommend that Lang be promoted to Engineer I position when he obtained his Professional Engineer License in 2008. (Arnold affidavit; Haemmerle affidavit.)

{¶ 41} A nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Gibson v. Shelly Co.*, S.D. Ohio No. 2:05-cv-

888, 2006 WL 3591932 \*1 (Dec. 11, 2006). In responding to a summary judgment motion, the nonmoving party cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir.1989).

{¶ 42} Lang has failed to present affirmative evidence to establish the background circumstances to support the suspicion that the City's Division of Power and Water is the unusual employer who discriminates against the majority. Moreover, the trial court does not have the duty to search the entire record to establish that it is bereft of a genuine issue of material fact. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact, bare assertions simply are not enough to make a prima facie case of discrimination. *Gibson* at \*1.

{¶ 43} The third assignment of error is overruled.

{¶ 44} The fourth assignment of error asserts that the trial court erred in its determination that no genuine issue of material fact existed regarding whether the City treated a similarly situated female employee more favorably than Lang. Because Lang has not established a prima facie case of reverse discrimination by failing to establish that the City is an unusual employer who discriminates against the majority, we need not examine whether the City treated a similarly situated female employee more favorably than Lang.

{¶ 45} The fourth assignment of error is overruled.

{¶ 46} Having overruled all four assignments of error, we affirm the decision granting summary judgment by the Franklin County Court of Common Pleas.

*Judgment affirmed.*

FRENCH and DORRIAN, JJ., concur.

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