

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

NANCY KOWACH,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2010-T-0033
OHIO PRESBYTERIAN RETIREMENT	:	
SERVICES, d.b.a., LAKE VISTA,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 02323.

Judgment: Affirmed.

Raymond J. Masek, 183 West Market Street, #300, Warren, OH 44481-1022 (For Plaintiff-Appellant).

Meghan E. Hill and Traci Martinez, Squire, Sanders & Dempsey, L.L.P., 2000 Huntington Center, 41 South High Street, Columbus, OH 43215-6197 (For Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Nancy Kowach appeals from a judgment of the Trumbull County Court of Common Pleas which granted summary judgment in favor of her former employer Ohio Presbyterian Retirement Services (“OPRS”). Ms. Kowach filed the instant complaint claiming age and sex discrimination after being discharged from her job at OPRS. For the following reasons, we affirm.

{¶2} **Substantive Facts and Procedural History**

{¶3} OPRS, a non-profit corporation, operates several continuing care retirement facilities in Ohio. Ms. Kowach began working for OPRS in July of 2000. She initially worked part time at its Park Vista facility as a special events coordinator. Beginning in the summer 2001, she worked at its Lake Vista facility as a full-time sales associate, a position she held until her discharge in 2008. Her job duty consisted primarily of selling OPRS-operated villas. The job description for the position included making 20 sales calls a day and booking 20 appointments each week. She was also responsible for certain organizational duties such as advertising, budgets, and acting as a church liaison.

{¶4} Ms. Kowach received generally positive reviews for her job performance other than her ability to meet the sales quota. In her 2003 to 2004 performance review, her supervisor noted “OPRS daily sales goals need to be met to insure attaining census goals.” In her 2005 to 2006 review, her supervisor noted the need for Ms. Kowach to increase her sales number. OPRS then gave her specific sales goals to meet for 2007 – to sell five villas or apartments by July of 2007 and to sell or “waitlist” another eight units in the second half of the year.

{¶5} In April 2008, her new supervisor conducted a performance review for 2007 and met with her to discuss her job performance. He informed her she failed to meet the sales goals set for the year. She was consequently placed on a 60-day probationary period and given three sales goals to meet during the period – to make 50 sales calls per week, sell two villas, and create a five-person waiting list.

{¶6} Ms. Kowach was unable to meet the sales goals during the probationary period and was discharged on June 23, 2008. She was 64 years old at the time. Her position was subsequently filled by a 55-year-old female.

{¶7} Ms. Kowach then filed the instant complaint against OPRS, claiming sex and age discrimination. Her claim of discrimination was not based on OPRS's hiring of her replacement nine years her junior, but rather, on OPRS's hiring of 28-year-old Tony Berardi at a higher pay rate *three years prior to her discharge*. She claims the hiring of Mr. Berardi at a higher rate despite her experience and seniority constitutes evidence of age and sex discrimination.

{¶8} The evidence reflects OPRS hired Mr. Berardi for a similar sales associate position in August 2005 at its Lake Vista facility. When Ms. Kowach discovered his pay rate was higher than hers despite her seniority, she complained immediately to OPRS. OPRS's human resources department investigated the matter and determined the two employees were not comparable in their education or experience. Mr. Berardi held a bachelor degree while Ms. Kowach held none; he had a previous higher-level position involving supervising employees; and he was recruited to OPRS due to significant contacts he had with hospitals. OPRS also determined that Ms. Kowach's total compensation package was actually greater than Mr. Berardi's despite his higher base salary. Ms. Kowach made no further complaints regarding her pay. In 2006, Mr. Berardi was promoted to an administrator/case manager position in the nursing home section of Lake Vista. Ms. Kowach did not request consideration for that position.

{¶9} In response to Ms. Kowach's suit, OPRS filed a motion for summary judgment. The trial court granted summary judgment, holding that she failed to

establish a prima facie case of discrimination. The trial court found that the hiring of Mr. Berardi three years prior to Ms. Kowach's termination is irrelevant to her prima facie case of age or sex discrimination.

{¶10} Ms. Kowach now appeals, raising the following assignment of error for our review:

{¶11} "The trial court erred to the prejudice of appellant in its granting of appellee's summary judgment motion on the grounds that there is no relationship between the at-issue hiring and (appellant's) present complaint that she was fired as a result (of) some type of discrimination."

{¶12} Standard of Review

{¶13} This court reviews de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." *Id.*, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶14} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the

trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

{¶15} Ms. Kowach frames the issue to be resolved in this appeal as whether "evidence of unequal treatment in pay [can] be evidentiary in a Title VII action for discrimination as incorporated in R.C. 4112." She argues she has alleged a "pattern" of age/sex discrimination under R.C. 4112, the evidence of discrimination being the hiring of a 28-year-old male, 31 years her junior, at a higher rate despite her eight years of experience in a similar position. She claims the trial court erred in determining that there was no relationship between his hiring at a higher base pay and her discharge three years later.

{¶16} **Law and Analysis**

{¶17} R.C. 4112.02(A) sets forth the applicable discrimination provision under the Ohio Civil Rights Act. R.C. 4112.02(A) states:

{¶18} “It shall be an unlawful discriminatory practice *** [f]or any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry 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.”

{¶19} Age Discrimination

{¶20} R.C. 4112.14 prohibits age-motivated hiring and firing. *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 147. R.C. 4112.14(A) states:

{¶21} “(A) No 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.”

{¶22} Regarding the age discrimination claim under R.C. Chapter 4112, the Supreme Court of Ohio has adopted the three-part analytical framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, a case involving claims of racial discrimination under Title VII of the Civil Rights Act of 1964, Section 2000, et seq., Title 42, U.S. Code. See *Barker* at 147.

{¶23} Under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case of discrimination. *Barker* at 147-148. After the plaintiff establishes a prima facie case, “[d]efendant-employer may then overcome the presumption inherent in the prima facie case by propounding a legitimate, nondiscriminatory reason for

plaintiff's discharge.” Id. at paragraph one of the syllabus. “Finally, plaintiff must be allowed to show that the rationale set forth by defendant was only a pretext for unlawful discrimination.” Id.

{¶24} Furthermore, a plaintiff-employee may prove a claim of employer discrimination pursuant to R.C. 4112.02 by direct or indirect circumstantial evidence. *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125, 128-129. “[A] plaintiff may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that the employer more likely than not was motivated by discriminatory intent.” *Mauzy v. Kelly Servs.* (1996), 75 Ohio St.3d 578, paragraph one of syllabus.

{¶25} Alternatively, a plaintiff may indirectly establish a prima facie case of age discrimination by presenting evidence of the following: “(1) that he or she was a member of the statutorily protected class, (2) that he or she was discharged, (3) that he or she was qualified for the position, and (4) that he or she was replaced by, or that the discharge permitted the retention of, a person not belonging to the protected class.” *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, syllabus; *Mazzitti v. Garden City Group, Inc.*, 10th Dist. No. 06AP-850, 2007-Ohio-3285, ¶15.

{¶26} In *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, the Supreme Court of Ohio modified the last element of a prima facie case of age discrimination. The element now refers to a “substantially younger” person instead of a person outside of the protected class. The court stated in *Coryell*, syllabus:

{¶27} “Absent direct evidence of age discrimination, in order to establish a prima facie case of a violation of R.C. 4112.14(A) in an employment discharge action, a

plaintiff-employee 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.”¹

{¶28} Having reviewed the applicable law, we now turn to the age discrimination claim at hand. Ms. Kowach met the first two prongs of a prima facie case. Putting aside for the moment the question of whether she was “qualified” for her position, we are perplexed by the evidence she put forth in support of the fourth element. She was replaced by a 55-year-old female, also a member of the protected class. Instead of arguing her replacement was “substantially younger,” she attempted to establish her prima facie case with evidence of OPRS’s hiring of a 28-year-old male *three years prior* to her discharge. She was not “replaced” by Mr. Berardi; neither did her discharge “permit his retention”, as he was transferred to a different position two years before her discharge. Allowing the use of evidence of the hiring of a younger person three years *preceding* an employee’s discharge to establish the “replacement-by” element would distort this element beyond recognition.

{¶29} Regarding the third element – whether Ms. Kowach was “qualified” for the job, OPRS alleges, and the trial court found, that she was not qualified because she

1. We note that Ms. Kowach cites the federal case of *Manzer v. Diamond Shamrock Chems. Co.* (6th Cir. 1994), 29 F.3d 1078, for the evidentiary requirement for a prima facie case of age discrimination. The Sixth Circuit stated in that case that a plaintiff “must first establish a prima facie case of discrimination by introducing evidence sufficient to support a finding that (1) plaintiff was a member of the protected class, (2) plaintiff suffered an adverse employment action, (3) plaintiff was qualified for the position either lost or not gained, and (4) a person not of the protected class replaced, or was selected over, the plaintiff.” *Id.* at 1081, citing *McDonnell Douglas* at 802. Thus, the four-part requirement is substantially similar to the standard enunciated by the Supreme Court of Ohio. We observe, however, when citing *Manzer*, both at the proceedings below and on appeal, Ms. Kowach *misstated* the fourth element as “the position was filled by someone outside of the protected class or by someone significantly younger *or she was treated*

failed to meet the sales goal. Ms. Kowach, on the other hand, contends she could not meet the sales goal due to the unprecedented collapse of the housing market in the recent years. It is unnecessary, however, for us to determine whether she satisfies this element, because her failure to establish the “replacement-by” element is fatal to her prima facie case.

{¶30} Ms. Kowach’s failure to establish a prima facie case of age discrimination ends our inquiry in this appeal. We need not proceed to the next two parts of the *McDonald Douglas* analysis, i.e., whether OPRS overcame the presumption inherent in the prima facie case by propounding a legitimate, nondiscriminatory reason for Ms. Kowach’s discharge, and whether she produced evidence to show that the rationale set forth by OPRS was only a pretext for unlawful discrimination.

{¶31} Regarding her sex discrimination claim, Ms. Kowach made bare allegations of discrimination on the basis of her gender without producing any evidence at the trial court. Having reviewed the record and applicable law, we conclude the trial court properly granted summary judgment in favor of OPRS regarding Ms. Kowach’s complaint of age and sex discrimination. The assignment of error is without merit.

{¶32} The judgment of the Trumbull County Court of Common Pleas is affirmed.

COLLEEN MARY O’TOOLE, J.,

TIMOTHY P. CANNON, J.,

concur.

less favorably than a similarly situated employee outside of her protected class.” (Emphasis added.) Ms. Kowach *expanded* the fourth element by adding the italicized language, without any authority in support.