[Cite as *Freshour v. TK Constructors, Inc.*, 2011-Ohio-2163.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gabriel E. Freshour,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-28 (C.P.C. No. 07CVC-06-8145)
TK Constructors, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on May 5, 2011

Matan, Wright & Noble, and *Eugene L. Matan*, for appellant.

McFadden Winner Savage & Segerman, and *Mary Jane McFadden,* for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Gabriel E. Freshour ("appellant"), appeals the summary judgment granted by the Franklin County Court of Common Pleas in favor of defendant-appellee, TK Constructors, Inc. ("appellee" or "TK"), on appellant's age discrimination claim. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Appellant was born on March 3, 1944, was hired by TK in September 2005, and was terminated on March 25, 2007. Appellant was 63-years old at the time of the alleged discrimination.

{¶3} TK is in the home construction business. Under its business plan, TK has a limited number of model homes that can be modified and customized to meet a customer's needs. Usually, its customers already own real estate lots upon which they wish to build. If a potential customer does not already own a lot, however, TK assists such an individual in finding and purchasing one. TK also assists customers in applying for and obtaining the various permits required before commencing construction. This business plan generally results in cost savings, which TK passes on to its customers. As a result, TK's homes are generally less expensive than those of other residential builders.

{¶4} TK has model home centers, which potential customers can tour. During these tours, the sales staff show and explain the various options available to potential customers. TK's principal office is in Yorktown, Indiana, but it has model home centers scattered throughout the Midwest. It has a central Ohio presence, which consists of model home centers in Columbus and Washington Court House ("Columbus division").

{¶5} TK experienced growth in its business from 2001 through the end of 2005. As a result, TK expanded its work force to accommodate for this growth. Doug Gregg was hired as the Chief Operating Officer to manage this growth. As a company, TK had its largest year in terms of volume sales in 2006. However, the Columbus division failed to meet its sales and production goals in 2006 and failed to break even during that year. During the relevant time period, TK's Columbus division never earned a profit.

{¶6} In 2006, it became clear to TK that the home construction business was going to undergo a severe contraction. As a result, Mr. Gregg's responsibilities shifted towards assisting TK in managing the contraction of its work force.

{¶7} In late 2006, TK's Vice President of Sales and Marketing, Timothy Eakins, was asked to manage the sales staff in the Columbus division. At the time, the sales staff consisted of five employees: appellant, Jeff Elliott, Tony Witter, Staci Merritt, and appellant's wife, Denise Freshour. At this point, Barry Mulvany was the regional manager of production in the Columbus division. Based upon Mr. Mulvany's observations, in addition to feedback he received from appellant's co-workers, Mr. Mulvany believed that appellant, Mrs. Freshour, and Mr. Witter were not getting along as a cohesive sales team. According to Mr. Mulvany, appellant was the cause of the problem. Mr. Mulvany conveyed these beliefs to Mr. Eakins.

{¶8} Mr. Eakins also began receiving complaints from Mr. Witter and Mrs. Freshour that appellant was asking them to perform some of his responsibilities. Specifically, the complaints were that appellant was asking them for assistance in using TK's computer system.

{¶9} TK's computer system enabled its sales representatives to provide potential customers with an accurate price quote based upon any combination of options and specifications. TK noticed that a customer would be more likely to purchase a TK home if he or she was provided with an accurate price quote during his or her first visit. TK therefore valued a sales representative's ability to proficiently use the computer system and provide accurate price quotes to customers during an initial visit. Further, members of the sales staff were well aware of the importance TK placed upon using the computer system proficiently.

{¶10} In January 2007, Mr. Gregg was asked to evaluate the Columbus division. At the time, it appeared as though the slow sales that the Columbus division experienced

in 2006 were going to continue into 2007. In fact, the Columbus division had been TK's worst performer in terms of sales. Mr. Gregg was asked to determine whether this performance was attributable to the sales staff there, and if so, he was supposed to determine how to remedy that problem.

{¶11} After receiving this assignment, Mr. Gregg interviewed the members of the sales staff and drafted summaries of the interviews. He observed the interactions amongst the sales staff and potential customers. He also conducted mock sales with each member of the sales staff. During each mock sale, Mr. Gregg asked for a home with the same options and asked for a price quote. Mr. Elliott, Mr. Witter, and Mrs. Freshour all provided accurate price quotes at the conclusion of their mock sales. At the conclusion of appellant's, however, he did not provide Mr. Gregg with a price quote. Instead, it was not until the next day when appellant provided Mr. Gregg with one. In early March 2007, Mr. Gregg provided recommendations about his findings to Mr. Eakins and Mark Thurston, TK's president and principal owner. Specifically, he recommended that appellant and Ms. Meritt be terminated.

{¶12} On March 24, 2007, appellant and Mrs. Freshour were scheduled to show up for work at 10:00 a.m. Neither individual showed up at that time. Instead, Mrs. Freshour showed up at 12:00 p.m., and appellant never showed or called to explain his absence. When this information was conveyed to Mr. Thurston and Mr. Eakins, they decided to terminate appellant's employment immediately. Within the next day or two, Mr. Gregg and Mr. Mulvany met with appellant and Mrs. Freshour. It was during this meeting that appellant was terminated.

{¶13} As a result, appellant has filed suit alleging age discrimination. TK filed a motion for summary judgment which the trial court granted. Appellant has timely appealed and raises the following six assignments of error:

> ASSIGNMENT OF ERROR NO. I:
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> The Trial Court erred when it did not follow the proper standard of review for Defendant Motion for Summary Judgment when it construed the evidence in favor of the Defendant.
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> ASSIGNMENT OF ERROR NO. II:
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> The Trial Court erred in granting Defendant's Motion for Summary Judgment on Plaintiff's claim of age discrimination in that the Court failed to consider all of Plaintiff's evidence that he was replaced by a substantially younger employee.
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> ASSIGNMENT OF ERROR NO. III:
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> The Trial Court erred as a matter of law and to the prejudice of Plaintiff when it improperly considered evidence which occurred well after Plaintiff's termination that currently there is only one sales representative in the Columbus and Washington Court House locations to determine that a reduction-in-force occurred.
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> ASSIGNMENT OF ERROR NO. IV:
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> The Trial Court erred in granting Defendant's Motion for Summary Judgment on Plaintiff's claim of age discrimination by construing the evidence in favor of Defendant.
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> ASSIGNMENT OF ERROR NO. V:
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> The Trial Court erred by holding that Plaintiff did not make a *prima facie* showing for his age discrimination claim.
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> ASSIGNMENT OF ERROR NO. VI:
>
> The Trial Court erred by improperly weigh[ing] the evidence on summary judgment when it determined that this case was a reduction-in-force case when it construed the evidence in favor of Defendant even though Plaintiff produced evidence

> that Defendant was still advertising for sales positions in Columbus at the time of Plaintiff's Termination.

{¶14} All of these assignments of error challenge the trial court's decision to grant summary judgment to TK. As a result, they will be addressed together.

{¶15} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs.* (1997), 123 Ohio App.3d 158, 162. "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." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. Summary judgment is proper only when the party moving for summary judgment 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.* (1997), 78 Ohio St.3d 181, 183. Additionally, a moving party cannot discharge its burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id.

{¶16} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving

party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶17} In appellant's six assignments of error, he argues the trial court erred by granting summary judgment on his age discrimination claims. We disagree.

{¶18} Age discrimination may be demonstrated through either direct or indirect evidence. *Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125, 128-29, 1996-Ohio-307. "[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 v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265, paragraph one of the syllabus.

{¶19} In the absence of direct evidence, age discrimination claims are subject to a version of the burden shifting analysis set forth by the Supreme Court of the United States in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817. See *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, ¶9. Under *McDonnell Douglas*, a plaintiff must first present evidence from which a reasonable jury could conclude that there exists a prima facie case of discrimination. *Lindsay v. Yates* (C.A.6,

2009), 578 F.3d 407, 415, citing *Blair v. Henry Filters, Inc.* (C.A.6, 2007), 505 F.3d 517, 524. If the plaintiff meets this initial burden, the burden then shifts to the defendant to offer "evidence of a legitimate, nondiscriminatory reason for" the adverse action. Id. If the defendant meets its burden, the burden then shifts back to the plaintiff to demonstrate that the defendant's proffered reason was actually a pretext for unlawful discrimination. Id. When presented with a motion for summary judgment on such claims, a court must consider "whether there is sufficient evidence to create a genuine dispute at each stage of the *McDonnell Douglas* inquiry." *Cline v. Catholic Diocese of Toledo* (C.A.6, 2000), 206 F.3d 651, 661.

{¶20} In an employment discharge case, a plaintiff can establish a prima facie case of age discrimination by demonstrating that he: " '(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.' " *Woods v. Capital Univ.*, 10th Dist. No. 09AP-166, 2009-Ohio-5672, ¶55, quoting *Coryell*, paragraph one of the syllabus. The fourth element of the prima facie case is modified when an employee's discharge has resulted from a reduction in the employer's work force. *Kundtz v. AT & T Solutions, Inc.*, 10th Dist. No. 05AP-1045, 2007-Ohio-1462, ¶21, quoting *Dahl v. Battelle Memorial Inst.*, 10th Dist. No. 03AP-1028, 2004-Ohio-3884, ¶15. The fourth element, as modified, requires a plaintiff to also provide direct, circumstantial, or statistical evidence demonstrating that age was a factor in the discharge. Id.

{¶21} In the instant matter, appellant argues that no reduction in work force occurred. Alternatively, he argues his age, rather than a reduction in the work force, was

the reason for his discharge. As a result, we must first determine whether a reduction in work force occurred. We must then determine whether plaintiff has established his prima facie case of age discrimination.

{¶22} A reduction in work force occurs when at least one position from an employer's work force is eliminated. *Woods* at ¶56, citing *Barnes v. GenCorp Inc.* (C.A.6, 1990), 896 F.2d 1457, 1465; see also *Godfredson v. Hess & Clark, Inc*. (C.A.6, 1999), 173 F.3d 365, 372, quoting *Barnes* at 1465. When there has been a reduction in work force, the discharged employee is not replaced. Id. Therefore, central to determining whether there has been a reduction in work force is the issue of whether an employee has been replaced. *Woods* at ¶58, citing *Wilson v. Ohio Dept. of Job & Family Servs*. (C.A.6, 2006), 178 Fed.Appx. 457, 465.

{¶23} In the instant matter, TK demonstrated that no employee was hired to replace appellant. The affidavits and deposition testimony through the record demonstrate this fact. According to TK's March 2007 employee roster, appellant was one of seven salespeople employed by TK in its Columbus division. According to the June 2007 roster, however, that number had decreased to four. That number decreased again in the fall of 2007 with the resignations of two more salespeople from the Columbus division, Mrs. Freshour and Teresa Campbell.

{¶24} Appellant argues that there was no reduction in work force because TK posted advertisements for new salespeople and conducted interviews in February and March 2007. He also contends that TK hired someone to fill Ms. Merritt's position after she was terminated. However, these arguments have no bearing on the relevant issue, which regards whether appellant was, in fact, replaced. No replacements were hired as a

result of TK's advertisements and interviews. The reasoning underlying TK's decision process is immaterial to this portion of the analysis. Furthermore, whether TK hired someone to replace Ms. Merritt is similarly irrelevant to the issue of whether appellant was replaced.

{¶25} Appellant also suggests that Mrs. Campbell and Marlena Amyx replaced him because they were hired sometime in 2007 after his termination. Upon a closer examination, however, these suggestions do not raise genuine issues of material fact with regard to the issue of whether these individuals replaced appellant. TK employed Mrs. Campbell before appellant's discharge. Whether she was thereafter terminated and then rehired again is immaterial to the analysis of whether she replaced appellant because, again, a reduction in work force may result from the elimination of only one position. See *Woods* at ¶56, citing *Barnes* at 1465; see also *Godfredson* at 372, quoting *Barnes* at 1465. With respect to Ms. Amyx, she was hired to replace Mrs. Freshour and Mrs. Campbell after they resigned in the fall of 2007.

{¶26} As of April 2008, TK's entire work force had been reduced to approximately one-third of what it was during 2005.[1] At that time, and because of the continuing deterioration of the housing market, Mr. Elliott was the only remaining salesperson employed by TK in the Columbus division. As a result, he worked both the Columbus and Washington Court House model centers.

{¶27} Based upon the evidence in the record, TK clearly reduced its work force when it eliminated appellant's position by discharging him and not replacing him. The trial court did not err in reaching this same conclusion.

[1] For purposes of this appeal, appellant has failed to preserve any challenge to the relevancy of Mr. Eakins' April 28, 2008 affidavit. See *Huntington Natl. Bank v. Young* (Apr. 3, 1986), 10th Dist. No. 85AP-709.

{¶28} After finding that TK underwent a reduction in work force, we must next consider whether appellant has established a prima facie case for age discrimination. The thrust of the arguments focus on the fourth, modified element of appellant's prima facie case and whether he has provided additional evidence demonstrating that age was a factor in his discharge. *Kundtz* at ¶21, quoting *Dahl* at ¶15.

{¶29} A reduction in work force invariably entails the retention of some younger employees and the discharge of some older ones. *Wood* at ¶56, citing *Brocklehurst v. PPG Industries, Inc.* (C.A.6, 1997), 123 F.3d 890, 896. As a result, courts refuse to infer discrimination based upon these circumstances alone and instead require a plaintiff to " 'com[e] forward with additional evidence, be it direct, circumstantial, or statistical, to establish that age was a factor in the termination.' " *Woods* at ¶57, quoting *Kundtz* at ¶21, quoting *Dahl* at ¶15.

{¶30} In the instant matter, TK provided evidence demonstrating that the decision to terminate appellant had no relation to his age. According to the affidavits and deposition testimony, age was never even discussed during the decision-making process. On the other side, to meet the modified fourth element, appellant notes that Mr. Gregg made an age-related remark after reviewing resumes he received in response to the posted advertisements for sales positions. Mr. Gregg apparently stated that he wished the resumes indicated an applicant's age on them. However, this comment was far too remote to satisfy the modified fourth element of appellant's prima facie case. See *Cassel v. Schuster Electronics, Inc.*, 159 Ohio App.3d 224, 2004-Ohio-6276, ¶26 (affirming summary judgment when the context and timing of a comment expressing a desire to show a "younger face" in an office was too remote to satisfy the modified fourth element);

see also *Chandler v. Dunn Hardware, Inc.*, 168 Ohio App.3d 496, 2006-Ohio-4376, ¶5 (affirming summary judgment when comment indicating younger salesperson was hired because of his eagerness was so unrelated to employment decision that no reasonable juror could perceive the comment as direct evidence of age discrimination). Indeed, Mr. Gregg's remark had no relation to appellant, his age, or his termination. No reasonable juror could conclude that this remark shows that age was a factor in appellant's termination.

{¶31} Based upon the foregoing, we find that appellant has failed to present evidence demonstrating genuine issues of material fact at each stage of the *McDonnell Douglas* inquiry. *Cline* at 661. The trial court did not err in granting summary judgment in favor of TK. As a result, we overrule appellant's six assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and TYACK, JJ., concur.