[Cite as *Alexander v. Columbus State Community College*, 2015-Ohio-2170.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

April L. Alexander,	:	
Plaintiff-Appellant,	:	
v.	:	No. 14AP-798 (Ct. of Cl. No. 2013-00507)
Columbus State Community College,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 4, 2015

William J. O'Malley, for appellant.

Michael DeWine, Attorney General, *Eric A. Walker* and *Frank S. Carson*, for appellee.

APPEAL from the Court of Claims of Ohio

HORTON, J.

{¶ 1} Plaintiff-appellant, April L. Alexander ("Alexander" or "plaintiff"), appeals from a judgment of the Court of Claims of Ohio granting the summary judgment motion of defendant-appellee, Columbus State Community College ("CSCC"). Because Alexander failed to establish either a breach of contract claim, or a prima facie case of age discrimination, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On August 30, 2013, Alexander filed a complaint in the Court of Claims of Ohio alleging breach of contract and age discrimination under R.C. 4112.14. Alexander was employed by CSCC for over eleven (11) years, from October 2001 until April 2013. During that time, Alexander was employed as an EEO/Employee Relations Program Coordinator, and starting in 2011, she also became the coordinator of CSCC's Title IX

program. Alexander was sixty-one (61) years old at the time of her discharge on April 8, 2013.

{¶ 3} The court also notes that Alexander appealed her termination to the State Personnel Board of Review ("SPBR") over the issue of whether she was a classified or unclassified employee. The Administrative Law Judge concluded that Alexander was an unclassified employee. The hearing was held on October 17 and 18 of 2013, and the transcript, in which Alexander, Deborah Heater ("Heater"), CSCC's Vice President of Human Resources, and others testified, is part of the record in this case.

{¶ 4} In January 2013, Heater became Alexander's direct supervisor. (Heater Affidavit, ¶ 2.) According to Heater, she was "tasked with evaluating the structure and function of the human resources department" and had the authority to "restructure the department and recommend termination of employees." (Heater Affidavit, ¶ 3.) Heater noted that there was an "uneven balance of workload" between the employees in the Employment Services section of Human Resources. (SPBR Tr. 253.) Heater's "evaluation found that there were not enough EEO and Title IX complaints to fulfill a full-time position that Alexander held," and for which she "earned $75,000 per year." (Heater Affidavit, ¶ 4.) Heater met with Alexander and told her to "start looking" for another job "because of what I knew the restructuring was going to be * * * for the department and there were some other issues with communication." (SPBR Tr. 303-04.) Heater decided to create the position of "diversity inclusion officer" and "eliminate Alexander's position as Program Coordinator." (Heater Affidavit, ¶ 4.) CSCC President David T. Harrison authorized her to terminate Alexander's employment. (Heater Affidavit, ¶ 5.) In addition, Heater states that Alexander was an unclassified "at-will" employee who was "terminated based on the legitimate business needs of CSCC." (Heater Affidavit, ¶ 5, 8.)

{¶ 5} According to Alexander, Heater met with her either on March 5, 2013 (SPBR Tr. 152, 156), or March 14, 2003 (Alexander Affidavit, ¶ 3), and told her to "start looking for another job" and informed her that a co-employee, Stephanie Demers ("Demers"), would be taking over her EEO duties, and several other employees would take over her Title IX duties. (Alexander Affidavit, ¶ 3.) Alexander testified that Heater also told her that "she knew I wasn't happy and she didn't think that I could help her * * * achieve her goals within H. R.," (SPBR Tr. 393), and that "it would be a good idea that

* * * because she was a new manager, she was able to decide who * * * she wanted to be on her staff, and I was not one of those people." (Alexander Depo., 20.)

{¶ 6} On April 8, 2013, Alexander was given a letter stating that her position with CSCC was being terminated. The letter states in pertinent part:

> This letter serves as official notification that you are being discharged from your position with Columbus State Community College (CSCC) effective April 8, 2013 pursuant to CSCC Policy No. 3-32. As an at-will employee at CSCC, you serve at the pleasure of the President. Both you and the college are free to end your employment for any reason or for no reason at all.
>
> Your separation is based on the misalignment of your role with the operational needs of the college relative to equal employment opportunity monitoring, anti-discrimination/ anti-harassment compliance, and affirmative action reporting. I will be moving compliance aspects of this position to another function within the HR Department. There is also an operational need to have visibility and engagement to establish Employee Diversity and Inclusion objectives. The college does not envision a role for you moving forward given our past discussions and working relationship.

(Plaintiff's exhibit A.)

{¶ 7} CSCC Policy and Procedures Manual Policy No. 3-32, which deals with disciplinary action, states in part that discipline is "typically" progressive in nature and will "generally" take the form of verbal warning, written warning, suspension without pay and termination. (Plaintiff's exhibit B, Policy No. 3-32(A)). However, the policy also states that "[i]n appropriate cases, the college reserves the right to move to immediate termination when warranted." (Plaintiff's exhibit B, Policy No. 3-32(A)). Policy 3-32(D) recites a non-exhaustive list of behaviors that may warrant immediate termination. Policy 3-32(H) states that "Full-Time Staff" members, as Alexander claims to be, may be terminated without going through the disciplinary process for violations of college policy and/or the law. Although Alexander's notice of discharge was "pursuant to CSCC Policy No. 3-32," both parties to this action acknowledge that Alexander was not terminated for disciplinary reasons. (Heater Affidavit, ¶ 5; Alexander Depo., 18-19, 28-29.)

{¶ 8} The termination letter clarifies that CSCC's position is Alexander was an "at-will" employee who serves at the pleasure of CSCC's President. The second paragraph briefly states Heater's reasoning for the termination of Alexander, and how duties will be reassigned, and ends by stating that "[t]he college does not envision a role for you moving forward given our past discussions and working relationship." (Plaintiff's exhibit A.)

{¶ 9} On July 21, 2014, CSCC filed a motion for summary judgment. On August 15, 2014, Alexander filed a memorandum contra in opposition to CSCC's motion for summary judgment. On September 12, 2014, the Court of Claims granted CSCC's motion for summary judgment. The court found that Alexander was an at-will employee and that no contract, express or implied, existed between her and CSCC and consequently, her breach of contract claim failed as a matter of law. (Decision, 4.) The court also found that Alexander failed to present sufficient evidence to support a prima facie case of age discrimination. (Decision, 6.) The court further found that, even if Alexander had satisfied her prima facie case, CSCC had presented a legitimate, nondiscriminatory reason for the termination. (Decision, 6.) The court concluded that Alexander failed to present any evidence demonstrating that CSCC's proffered reason was a pretext for discrimination. (Decision, 6-7.)

II. ASSIGNMENTS OF ERROR

{¶ 10} Alexander appeals, assigning the following errors:

> [I.] The Court of Claims erred when it determined that no reasonable factfinder could find that Ms. Alexander established all of the elements of a breach of contract claim.
>
> [II.] The Court of Claims erred when it determined that no reasonable factfinder could find that Ms. Alexander established all of [the] elements of a prima facie age discrimination case.
>
> [III.] The Court of Claims erred when it determined that no reasonable factfinder could determine that Defendant's proffered reason for terminating Ms. Alexander's employment was pretext for discrimination.

III. STANDARD OF REVIEW

{¶ 11} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). "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.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist. 1995).

{¶ 12} 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.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 13} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears 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*, 75 Ohio St.3d 280, 293 (1996). 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.*

IV. FIRST ASSIGNMENT OF ERROR – NO BREACH OF CONTRACT

{¶ 14} Alexander argues in her first assignment of error that the trial court erred when it determined that no reasonable factfinder could find that she established all of the elements of a breach of contract claim.

{¶ 15} Alexander's breach of contract claim is based upon her assertion that CSCC's personnel policies are contractual obligations that CSCC was bound to follow prior to terminating her employment.

{¶ 16} Generally, a contract is "defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.* (N.D.Ohio 1976), 436 F.Supp. 409, 414. See also *Minster Farmers Coop. Exch. Co. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, ¶ 28. "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." *Id.* at ¶ 28, citing *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369.

{¶ 17} An employment relationship with no fixed duration is deemed to be at-will, which refers to the traditional rule that an employee is free to seek work elsewhere, and the employer may terminate the employment relationship at any time, for no cause, or any cause that is not unlawful. *Welch v. Finlay Fine Jewelry Corp.*, 10th Dist. No. 01AP-508 (Feb. 12, 2002); *Collins v. Rizkana*, 73 Ohio St.3d 65, 67 (1995). "Generally, where the employee furnishes no consideration 0ther than his or her services incident to the employment, the relationship amounts to an indefinite general hiring terminable at the will of either party unless the terms of the contract or other circumstances clearly manifest the parties' intent to bind each other." *Pyle v. Ledex, Inc.*, 49 Ohio App.3d 139, 141 (12th Dist.1988), citing *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 103-04 (1985).

{¶ 18} However, the terms of discharge may be altered when the conduct of the parties indicates a clear intent to impose different conditions regarding discharge.

Condon v. Body, Vickers & Daniels, 99 Ohio App.3d 12, 18 (8th Dist.1994.) The two exceptions to the employment at-will doctrine are promissory estoppel, and an express or implied contract altering the terms for discharge. *Mers* at 104.

{¶ 19} Employer policies and oral representations can constitute evidence of an implied employment contract removing a plaintiff from a set of at-will employees. *Fennessey v. Mount Carmel Health Sys., Inc.*, 10th Dist. No. 08AP-983, 2009-Ohio-3750, ¶ 8 citing *Mers.* However, Alexander has "a heavy burden" to establish an implied contract inasmuch as she must demonstrate the existence of each element necessary to the formation of a contract including the exchange of bilateral promises, consideration, and mutual assent. *Id.* at ¶ 18, citing *Sagonowsky v. The Andersons, Inc.*, 6th Dist. No. L-03-1168, 2005-Ohio-326, ¶ 14. "Both parties must have intended for the language in the handbook or manuals to be legally binding." *Id.* at ¶ 18, citing *Smiddy v. Kinko's, Inc.*, 1st Dist. No. C-020222, 2003-Ohio-446, ¶ 20. "Unless the evidence presented clearly manifests the intent of the parties to be bound by an employment contract, an employment agreement is presumed to be terminable at will." *Condon* at 20, citing *Shaw v. J. Pollock & Co.,* 82 Ohio App.3d 656, 659 (9th Dist.1992).

{¶ 20} Alexander's belief that CSCC's policies afford her "contractual rights does not mean that it does unless the employer intends it to do so." *Fennessey* at ¶ 18. Employer handbooks "do not create employee rights that alter the at-will nature of employment unless the parties have a meeting of the minds indicating that such items are to be considered valid contracts altering the terms for discharge." *Id.* at ¶ 22, citing *Bartlett v. Daniel Drake Mem. Hosp.,* 75 Ohio App.3d 334, 338 (1st Dist.1991). Without mutual assent of the parties, a policy manual is merely a unilateral statement of rules and policies which creates no rights or obligations. *Id.* at ¶ 22, citing *Napier v. Centerville City Schools,* 157 Ohio App.3d 503, 2004-Ohio-3089, (2d Dist.), ¶ 15.

{¶ 21} Alexander states in her affidavit that she never considered herself an at-will employee and that she believed CSCC's policies afforded her certain rights, including seniority and the right to "bump[]" or displace employees with less seniority. (Alexander Affidavit, ¶ 5.)

{¶ 22} Alexander argues that she:

> [E]xpected, based on knowing the Policies and Procedures and applying them in her duties as an HR employee, that the Policies and Procedures would apply to her. Columbus State certainly reciprocally understood the Policies and Procedures were legal obligations. For that reason, the Policies and Procedures were deliberately drafted by HR employees and CSCC officers and then approved by the Board. Finally, the lack of a disclaimer in the Policies and Procedures certainly has to be considered as evidence that CSCC understood that the Policies and Procedures would be viewed as binding promises.

(Appellant's Brief, 21-22.) However, Alexander has not presented any evidence to support such claims.

{¶ 23} Whether the disciplinary procedure above is a true "progressive" procedure is irrelevant given the facts of this case – i.e., that both parties understood that Alexander's termination was not for disciplinary reasons. Furthermore, assuming that Policy No. 3-32(A) played a meaningful role in Alexander's separation, said policy indicates that "any of the progressive steps may be omitted depending on the nature of the behavior, and 3-32 (A), (D), (E), (F), (G), and (H), all indicate that immediate termination may occur if the misconduct is severe, or in violation of college policy and/or the law." *Fennessey* held that:

> Where a disciplinary policy is not stated in absolute terms, but is qualified by noting that, depending on the seriousness of the offense, any or all of the steps preliminary to discharge may be skipped, the disciplinary procedure is not mandatory; rather, the employer is merely publishing the possible penalties that may be taken for violating company policies, while maintaining discretion as to which penalty will be used. *Sagonowsky*, citing *Gargasz v. Nordson Corp.* (1991), 68 Ohio App.3d 149, 587 N.E.2d 475. Under such circumstances, the employee remains an at-will employee who could be terminated at any time. *Id.* at ¶ 81, 587 N.E.2d 475.

Id. at ¶ 20. As such, in light of the above, and the fact that we find there was no exchange of bilateral promises, consideration, and mutual assent, we find that CSCC's Policy No. 3-32 is not mandatory in this case.

{¶ 24} Alexander argues that the lack of an "at-will" disclaimer in the Policies and Procedures certainly has to be considered as evidence that CSCC understood that the

Policies and Procedures would be viewed as binding promises. The court in *Saganowsky* addressed the same issue and stated:

> Appellant, however, argues that because the principles and handbook are devoid of any reference to "at will" employment status, he is more than a mere at-will employee. We disagree. According to *Phung*, 23 Ohio St.3d 100, and *Henkel*, 45 Ohio St.2d at 254-255, in the absence of a contract which provides for a specific duration of employment, an employee is presumed to be employed at will, terminable at any time, with or without cause. If [the employer] had specified that appellant was merely an at-will employee, it would merely have bolstered its defense. The absence of such a specification, however, does not change the presumption of law in Ohio that, unless otherwise stated, an employee is terminable at will.

Id. at ¶ 49. While we agree that the lack of an "at-will" disclaimer is to be considered, along with many other factors, in determining whether an implied contract exists, and would certainly be beneficial in clarifying any misunderstanding, we agree with *Saganowsky*, that the absence of an "at-will" disclaimer does not change the presumption that, unless otherwise stated, an employee is terminable at-will.

{¶ 25} Alexander's personal understanding is insufficient to prove an implied contract existed. Alexander has not identified any other provisions in CSCC's policies that either vary this at-will relationship, or establish the existence of an implied employment contract. Heater states in her affidavit that Alexander never signed an employment contract with CSCC and no promises were made to her regarding the term of her employment. (Heater Affidavit, ¶ 8.) Alexander admits that she never entered into a contract with CSCC. (Alexander Depo., 19-20, 93.) Appellant simply did not identify any representation or promise by CSCC that created a legitimate expectation that her employment would continue indefinitely. It is well-settled by our courts that representations that do not specify a particular duration of terms of employment are presumed to be terminable by either party at-will for any reason not contrary to law. *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 04AP-941, 2005-Ohio-6367, ¶ 41, quoting *Moss v. Electroalloys Corp.*, 9th Dist. No. 02CA008111, 2003-Ohio-831, ¶ 12.

{¶ 26} Therefore, construing the evidence most strongly in favor of Alexander, reasonable minds could only conclude that she was an at-will employee and that no contract existed, express or implied, between Alexander and CSCC. Consequently, Alexander's claim for breach of contract fails as a matter of law. For the foregoing reasons, Alexander's first assignment of error is overruled.

V. SECOND ASSIGNMENT OF ERROR – NO PRIMA FACIE CASE OF AGE DISCRIMINATION

{¶ 27} Alexander argues in her second assignment of error that the trial court erred when it determined that no reasonable factfinder could find that she established all of the elements of a prima facie age discrimination case.

{¶ 28} Alexander claims, under R.C. 4112.14, that CSCC discriminated against her on the basis of age. Alexander's age discrimination claim is based upon a theory of disparate treatment. R.C. 4112.14(A) provides that "[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." *See also* R.C. 4112.02(A) and 4112.99. In deciding cases brought under R.C. 4112.14 and 4112.02, Ohio courts may rely on federal anti-discrimination case law. *See Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 582 (1996).

{¶ 29} "To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent. * * * Discriminatory intent may be proven by either direct or indirect evidence." *Hardgrow v. Dept. of Rehab. & Corr.*, 10th Dist No. 11AP-919, 2012-Ohio-2731, ¶ 18; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Ricker v. John Deere Ins. Co.*, 133 Ohio App.3d 759, 766 (10th Dist.1998), citing *Mauzy* at 583. Alexander has not presented any direct evidence of discriminatory intent. Alexander admits that to her knowledge, no one at CSCC made discriminatory comments about her age. (Alexander Depo., 128.) When a plaintiff seeks to establish age discrimination indirectly, as here, the plaintiff may establish discriminatory intent by utilizing the analysis set forth in *McDonnell Douglas*, as first adopted and modified by Ohio courts in *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146 (1983), and lastly by *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723.

{¶ 30} The plaintiff must first establish a prima facie case of age discrimination. By satisfying the prima facie case, the plaintiff creates a presumption that the employer unlawfully discriminated against the employee. *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 11. A prima facie case of employment discrimination may be established by proof (1) that the plaintiff was a member of a protected class, (2) that the plaintiff suffered an adverse employment action, (3) that the plaintiff was qualified for the position they lost, and (4) either that the plaintiff was replaced by someone outside the protected class, *see McDonnell Douglas Corp.* at 802, or that "a comparable non-protected person was treated better." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992), citing *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir.1988). *See also Caldwell v. Ohio State Univ.*, 10th Dist. No. 01AP-997, 2002-Ohio-2393, ¶ 62.

{¶ 31} In *Coryell*, the court further modified the fourth element of the prima facie analysis, stating that the plaintiff must establish that they were "replaced by, or the discharge permitted the retention of, a person of substantially younger age." *Coryell* at paragraph one of the syllabus, modifying and explaining *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501 (1991), syllabus. The *Coryell* court declined to define "substantially younger," explaining that the term "substantially younger" as applied to age discrimination in employment cases defies an absolute definition and is best determined after considering the particular circumstances of each case. *Id.* at ¶ 23. "In order to prove under R.C. 4112.02 that a person of substantially younger age replaced her, plaintiff cannot merely recite that the defendant hired new employees, but instead must present evidence that another employee actually replaced her by assuming a 'substantial portion' of her duties." *Mittler v. OhioHealth Corp*, 10th Dist. No. 12AP-119, 2013-Ohio-1634, ¶ 25, citing *Mazzitti v. Garden City Group, Inc.*, 10th Dist. No. 06AP-850, 2007-Ohio-3285, ¶ 22.

{¶ 32} There is no dispute between the parties that Alexander satisfies the first three prongs of the test. Alexander was sixty-one (61) years of age at the time of her discharge and there is no dispute that she was qualified for the position, and that she was discharged. The dispute arises as to the fourth prong.

{¶ 33} Alexander argues that "[t]he person who took over most of her duties, specifically her EEO Program Coordinator duties, was approximately twenty years

younger than her. A smaller percentage of her duties, specifically the Title IX Program Coordinator duties, were taken over by several employees who were ten to thirty years younger than Ms. Alexander." (Appellant's Brief, 3.) Additionally, Alexander argues that co-worker "Demers took over all of Ms. Alexander's former EEO duties, which was the vast majority of her work, while several employees were assigned her Title IX work, which was the smaller portion of her duties." (Appellant's Brief, 27.) Finally, Alexander argues that "[s]ince the much younger Ms. Demers took over more than a 'substantial portion' of Ms. Alexander's duties, she must be viewed as the replacement." (Appellant's Reply Brief, 7.) Conversely, CSCC contends that Alexander was not replaced inasmuch as her former job duties were assumed by other employees.

{¶ 34} In regard to the fourth prong, Alexander's argument can be summarized as follows: (1) the vast majority of Alexander's work was EEO related, (2) the person who took over all of her EEO duties, Demers, was approximately twenty years younger than Alexander, and therefore, (3) Demers took over more than a "substantial portion" of Alexander's work and is her replacement. A review of the record does not substantiate evidence of Alexander's claims.

{¶ 35} Alexander testified that in the last years of her employment that she was "the Program Coordinator with responsibilities for E.E.O. and Title IX, and in that capacity I was essentially responsible for making sure that all the tools, resources, and people were gathered together in order to move forward * * * E.E.O., Title IX or other college initiatives" and "reasonable accommodations under the" Americans with Disabilities Act ("ADA"). (SPBR Tr. 25-26.) Alexander testified that she also helped review and maintain CSCC's policies on: (1) EEO matters such as anti-discrimination, (2) ADA reasonable accommodations, (3) Title IX compliance, (4) sexual harassment, and (5) anti-violence. (SPBR Tr. 29.)

{¶ 36} Nothing in the record, including testimony and affidavits, indicates that the "vast majority" or even most of Alexander's work was EEO related. While Alexander was the EEO/Title IX Coordinator, several other CSCC employees worked on EEO matters. (Alexander Affidavit, ¶ 4.) Alexander testified that, during the last two years of employment, she would average two formal investigations a month, but by March 2013, she only had one outstanding EEO complaint. (SPBR Tr. 70, 359, 360.) Alexander also

testified that during the last two years of her employment "eighty percent of [her] time was spent typing up various iterations of the policies and procedures that different people in the organization made suggestions on." (Alexander Depo., 87.) Alexander worked on CSCC's policies and procedures with respect to the ADA, the Rehabilitation Act of 1973, EEO, affirmative action, anti-harassment, sexual harassment, and workplace family and relationship violence, in addition to background check guidelines. (SPBR Tr. 90-95, 111-112.)

{¶ 37} Kimberly Hall ("Hall") testified that she is the Chief of Staff at CSCC. (SPBR Tr. 190.) Hall was also interim Vice-President of Human Resources immediately prior to Heater assuming the same position in late January 2013. (SPBR Tr. 190-91.) During Hall's tenure as Vice-President of Human Resources, Alexander reported directly to her. Hall testified that Alexander's Title IX duties "were expansive. Title IX * * * has created some pretty massive requirements for * * * colleges. * * * [A]t the time she [Alexander] was the designated Title IX coordinator. * * * [Alexander] acknowledged that it was a lot of work for one person." (SPBR Tr. 196.) Hall also testified that Alexander "was very busy managing all of the Title IX responsibilities." (SPBR Tr. 238.) Alexander stated that as CSCC's Title IX Coordinator, the U.S. Department of Education required that her primary job be the handling of Title IX issues. (Alexander Depo., 89, 107.)

{¶ 38} A review of the record indicates that there was no evidence from Alexander, or anyone else, that her EEO duties were the vast majority, or even a majority, of her work. In fact the evidence supports Heater's testimony that "[w]e did not have a lot of E.E.O. complaints" and that "there wasn't enough active investigations at the time that would fill a normal work experience in terms of the position." (SPBR Tr. 248, 249.) Alexander has failed to present evidence that her EEO duties comprised a majority of her work.

{¶ 39} Even if Alexander had shown any evidence that her EEO duties were a majority of her work, nothing in the record indicates that Demers took over all, or even most, of Alexander's EEO duties. Alexander testified that after her termination former co-workers Wanda Demons, Amy Burns, Julie Vanwynsberghe, and Sandra Kellam took over part of her EEO duties (as well as Title IX duties) and now have the title of Business Partner/EEO/Title IX Investigator. (Alexander Depo., 77-84). Former co-worker Danette

Vance was given part of Alexander's Title IX duties and given the title of Deputy Title IX Coordinator. (Alexander Depo., 78.) Alexander does qualify her testimony by saying that the above job assignments were part of the "proposal" she learned about before she was terminated, and since she is not there to visually see what is actually occurring, she has verified the job titles from CSCC's website. (Alexander Depo., 163-166.) In addition, all of these former co-workers had "other job duties" and "continued doing the same thing that they were doing while I was there." (Alexander Depo., 83, 84.) Alexander admits that her position was redistributed to five people. (Alexander Depo., 83.)

{¶ 40} In regard to Demers, Alexander says that in the meeting in March 2013, Heater told her that "Demers was going to have oversight over compliance matters and that other people in the department were going to be assigned certain duties." (SPBR Tr. 69.) Alexander says that the nature of Demers "oversight" was not explained to her. (SPBR Tr. 72.) Alexander testified that Demers "became, for a short while, compliance officer, and she had oversight of all my duties * * * until the other people [above mentioned former co-workers] were trained, she performed them, and then [Demers] was promoted to director of compliance." (Alexander Depo., 81.)

{¶ 41} Nothing in the record indicates that Stephanie Demers took over a "substantial portion" of Alexander's work. Alexander acknowledged in her deposition that, following her termination, some of her duties were distributed among five employees and that these employees also performed job duties that she had never performed. (Alexander Depo. 83-84, 199, 153, 167). The evidence presented by Alexander supports Heater's description of who assumed Alexander's duties:

> Once Alexander was no longer employed by CSCC, her former primary job duties of handling EEO complaints and Title IX complaints were distributed amongst several other employees. These employees did not replace Alexander in the performance of the job duties that she had performed as an employee of CSCC. Furthermore, in addition to performing some of the job duties that Alexander had performed, these employees performed other job duties that Alexander had not been tasked to perform during my tenure at CSCC.

(Heater Affidavit, ¶ 7.)

{¶ 42} Construing the evidence in Alexander's favor, merely having oversight of Alexander's former duties for a "short while" until other co-workers were trained, does support the proposition that Demers took over a "substantial portion" of her duties and was her replacement. The record simply fails to support Alexander's contention that Demers assumed a substantial portion of her duties and replaced her. *Mazzitti* at ¶ 22.

{¶ 43} "A person is 'replaced' only when another employee is hired or reassigned to perform that person's duties. A person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work." *Id.* at ¶ 19, quoting *Atkinson v. Internatl. Technegroup, Inc.*, 106 Ohio App.3d 349, 359 (1st Dist.1995). It is well-established that "[s]preading the former duties of a terminated employee among the remaining employees does not constitute a replacement." *Id.* at ¶ 20, quoting *Lilley v. BTM Corp.*, 958 F.2d 746, 752 (6th Cir.1992).

{¶44} In the final analysis, Alexander failed to establish the fourth element of either prima facie case, as she failed to present evidence indicating that she was replaced by a substantially younger person, that a comparable non-protected employee was treated better, or that other reasonable evidence existed to raise an inference that CSCC terminated her because of her age. Based upon the undisputed evidence, the trial court properly found that Alexander failed to demonstrate that she was replaced by a person of substantially younger age. Inasmuch as Alexander was not replaced, she cannot satisfy the fourth prong of the *McDonnell Douglas* and *Coryell* tests and, therefore, cannot establish directly or indirectly a prima facie case of age discrimination. For the foregoing reasons, Alexander's second assignment of error is overruled.

VI. THIRD ASSIGNMENT OF ERROR – MOOT

{¶45} Alexander argues in her third assignment of error that the trial court erred when it determined that no reasonable factfinder could determine that CSCC's proffered reason for terminating Alexander's employment was pretext for discrimination.

{¶46} However, as Alexander failed to establish a prima facie case of age discrimination, we need not further consider whether CSCC's asserted reasons for terminating plaintiff's position was a pretext for discrimination. *See Dautartas v. Abbott Laboratories*, 10th Dist. No. 11AP-706, 2012-Ohio-1709, ¶ 42 (noting that the

"[a]ppellant's failure to establish a prima facie case of age discrimination through either direct or indirect methods of proof effectively ends [this court's] inquiry as a matter of law," and thus there was no reason to "proceed to the next two parts of the *McDonnell Douglas* analysis"); *Kowach v. Ohio Presbyterian Retirement Servs.*, 11th Dist. No. 2010-T-0033, 2010-Ohio-4428, ¶ 30. Accordingly, our ruling on Alexander's second assignment of error renders appellant's third assignment of error moot.

VII. DISPOSITION

{¶47} Having overruled Alexander's first two assignments of error, thereby rendering Alexander's third assignment of error moot, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

TYACK, J., concurs.

DORRIAN, J., concurs in judgment only.

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