[Cite as *Morrissette v. DFS Servs., L.L.C.*, 2011-Ohio-2369.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Julien R. Morrissette,	:	
Plaintiff-Appellant,	:	
		No. 10AP-633
v.	:	(C.P.C. No. 09CVC-16281)
DFS Services, LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 17, 2011

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

Ulmer & Berne LLP, William D. Edwards and *Adrienne L. Rapp,* for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Plaintiff-appellant, Julien R. Morrissette, appeals from a judgment of the Franklin County Court of Common Pleas granting the Civ.R. 12(B)(6) motion to dismiss of defendants-appellees, DFS Services, LLC and Vicki Stokes. Because (1) the trial court improperly required plaintiff to plead age was the "but-for" cause of his termination, (2) the trial court properly concluded plaintiff failed to state a claim of reverse race discrimination, and (3) the trial court did not abuse its discretion when it denied plaintiff leave to amend his re-filed complaint, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶2} Plaintiff filed his original complaint in November 2008; he voluntarily dismissed it without prejudice pursuant to Civ.R. 41(A) on October 8, 2009. On October 30, 2009 plaintiff re-filed his complaint with the trial court, alleging he began working in 1988 as a collections specialist for DFS, a credit card business. According to the complaint, an African-American co-worker made unsubstantiated and untruthful claims accusing plaintiff, a Caucasian, of using racially derogatory and improper language. DFS, through the actions of its African-American human resources manager Stokes, involuntarily terminated plaintiff's employment, effective August 5, 2008. Count One of plaintiff's complaint addressed age discrimination, while Counts Two and Three concerned race discrimination.

{¶3} On December 23, 2009 defendants filed a motion to dismiss plaintiff's complaint pursuant to Civ.R. 12(B)(6), asserting plaintiff could not state a claim for age discrimination because plaintiff did not allege, pursuant to *Gross v. FBL Financial Servs., Inc.* (2009), 129 S.Ct. 2343, 2350, that his age was the "but-for" cause of his termination. Defendants further asserted plaintiff's reverse race discrimination claim failed because, pursuant to *Courie v. Alcoa Wheel & Forged Prods.* (C.A.6, 2009), 577 F.3d 625, 632, plaintiff did not allege either the circumstances supporting an inference that DFS was the unusual employer who discriminated against non-minority employees or facts indicating more favorable treatment was afforded to similarly situated minority employees.

{¶4} Plaintiff responded to defendants' motion to dismiss, contending not only did *Gross* not apply at the pleading stage but he sufficiently alleged facts indicating defendants engaged in reverse race discrimination against him. Plaintiff also requested

that, if the court found defendants' motion to dismiss meritorious, the court allow him leave to amend his complaint.

{¶5} Following defendants' reply, the trial court filed its decision and entry on June 10, 2010 granting defendants' motion to dismiss. Quoting from *Gross*, the trial court stated a plaintiff must prove by a preponderance of the evidence that age was the "but-for" cause of the challenged adverse employment action. (Decision, 3.) The court concluded plaintiff, contrary to *Gross*, did not plead facts indicating his age was the exclusive basis for his termination. Accordingly, the trial court concluded plaintiff's complaint failed to state a claim for age discrimination.

{¶6} The court determined plaintiff's reverse discrimination claim also was lacking because he did not allege facts that might be direct or indirect evidence of discriminatory intent, such as "a 'similarly situated' black employee" receiving better treatment from DFS. (Decision, 5.) Concluding Stokes' being of a different race than plaintiff was "not enough to prove that race motivated the decision to terminate his employment," the court granted defendants' motion to dismiss the complaint and denied plaintiff leave to amend his complaint. (Decision, 5.)

II. Assignments of Error

{¶7} Plaintiff appeals, assigning the following errors:

> ASSIGNMENT OF ERROR NO. I:
>
> The Trial Court erred when it granted Appellees' Motion to Dismiss by applying a heightened form of evidentiary pleading of specifics to Appellant's Complaint instead of "a short and plain statement of the claim showing that the party is entitled to relief." Civ.R. 8(A)(1). See *Swierkiewicz v. Sorema, N.A.* (2002), 534 U.S. 506, 122 S.Ct. 992.

ASSIGNMENT OF ERROR NO. II:

The Trial Court erred in granting Appellees' Motion to Dismiss Appellant's claim of age discrimination when the Court applied a "but for" test to Chapter 4112 claims.

ASSIGNMENT OF ERROR NO. III:

The Trial Court erred by holding that Appellant did not make a prima facie showing for his age discrimination claim.

ASSIGNMENT OF ERROR NO. IV:

The Trial Court erred in granting Appellees' Motion to Dismiss on Appellant's claim of age discrimination by construing the evidence in favor of Appellee.

ASSIGNMENT OF ERROR NO. V:

The Trial Court erred by applying the test for summary judgment as opposed to the test for a 12B(6) motion in making its decision.

ASSIGNMENT OF ERROR NO. VI:

The Trial Court erred as a matter of law and to the prejudice of Appellant when it improperly considered evidence from the previously filed case and applied that evidence in its determination that Appellant failed to state a claim of age discrimination, and unlawful reverse discrimination.

ASSIGNMENT OF ERROR NO. VII:

The Trial Court erred when it failed to grant Appellant leave to file an Amended Complaint when it improperly considered evidence from the previously filed case and applied that evidence in making its decision not to grant Appellant leave.

Plaintiff's first five assignments of error are interrelated and will be addressed together; we address the sixth and seventh assignments of error separately.

III. First, Second, Third, Fourth, and Fifth Assignments of Error–Age Discrimination Claim

{¶8} Plaintiff's first five assignments of error assert the trial court erred when it applied a heightened form of evidentiary pleading to his complaint, requiring him to plead age was the "but-for" cause of his termination. Because plaintiff discusses the first and fifth assignments of error only in the context of the age discrimination claim, we do the same.

{¶9} Appellate review of a trial court's decision to dismiss a case, pursuant to Civ.R. 12(B)(6), is de novo. *Singleton v. Adjutant Gen. of Ohio,* 10th Dist. No. 02AP-971, 2003-Ohio-1838. In order for a court to dismiss a case pursuant to Civ.R. 12(B)(6), "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. The court must presume all factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party. *Bridges v. Natl. Engineering & Contracting Co.* (1990), 49 Ohio St.3d 108, 112.

{¶10} Because Ohio is a "notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶29. " '[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.' " Id., quoting *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145. In examining the trial court's decision to grant a motion to dismiss for failure to state a claim upon which relief may be granted, "we review the applicable law for each cause of action before us and determine whether

the facts as alleged in the complaint would entitle plaintiff[] to relief." *Maitland v. Ford Motor Co*., 103 Ohio St.3d 463, 2004-Ohio-5717, ¶12. See also *Wright v. Ghee,* 10th Dist. No. 01AP-1459, 2002-Ohio-5487, citing *Grange Mut. Cas. Co. v. Klatt* (Mar. 18, 1997), 10th Dist. No. 96APE07-888 (noting a court will not consider unsupported conclusions that may be included among, but not supported by, the factual allegations of the complaint).

{¶11} Count One of plaintiff's complaint addressed unlawful age discrimination under R.C. 4112.02, 4112.14, and 4112.99. R.C. 4112.02(A) states "[i]t shall be an unlawful discriminatory practice * * * [f]or any employer, because of the * * * age * * * of any person, to discharge without just cause * * * that person." R.C. 4112.14(A) provides "[n]o employer shall * * * 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." R.C. 4112.99 authorizes civil actions for any violations of Chapter 4112.

{¶12} "To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent" and may establish such intent with either direct or indirect methods of proof. *Ricker v. John Deere Ins. Co.* (1998), 133 Ohio App.3d 759, 766, discretionary appeal dismissed (2000), 88 Ohio St.3d 1229, citing *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 583, 1996-Ohio-265. When a plaintiff seeks to establish age discrimination indirectly, the plaintiff may establish discriminatory intent using the analysis set forth in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, as the Supreme Court of Ohio adopted it in *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, and more recently modified it in *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-

Ohio-723. *Coryell* announced that, to establish a prima facie case of age discrimination in violation of R.C. 4112.14(A), a plaintiff-employee must demonstrate 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." Id. at paragraph one of the syllabus, modifying and explaining *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, syllabus.

{¶13} Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a nondiscriminatory reason for the discharge. If the employer demonstrates a nondiscriminatory reason, the burden shifts back to the plaintiff-employee to establish the defendant-employer's stated reason is merely a pretext for discrimination. Id. at ¶24. The "shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.' " *Kohmescher* at 505, quoting *Loeb v. Textron, Inc.* (C.A.R.I.,1979), 600 F.2d 1003, 1014.

{¶14} Even so, the *McDonnell Douglas* framework for establishing discriminatory intent is an "evidentiary standard rather than a pleading standard." *Coryell* at ¶25. In accordance with Civ.R. 8(A), "a plaintiff may plead a prima facie case of age discrimination by pleading 'a short and plain statement of the claim showing that the party is entitled to relief.' " *Coryell* at ¶25, adopting the holding in *Swierkiewicz v. Sorema, N.A.* (2002), 534 U.S. 506, 122 S.Ct. 992 (concluding a plaintiff need not plead his or her prima facie case because, for example, a plaintiff who as a result of discovery has direct evidence of discrimination will not need to use the *McDonnell Douglas* burden-shifting

analysis employed in a case involving proof of discrimination through the indirect method).

{¶15} In the end, "plaintiffs do not have to establish a prima facie case of discrimination to survive Civ.R. 12(B)(6) motions to dismiss; they need only comply with the pleading requirements of Civ.R. 8(A)." *Jackson v. Internatl. Fiber*, 169 Ohio App.3d 395, 2006-Ohio-5799, ¶33. Pursuant to Civ.R. 8(A) "the complaint must 'concisely set forth * * * those operative facts sufficient to give "fair notice of the nature of the action." ' " *Johnson v. Ferguson-Ramos*, 10th Dist. No. 04AP-1180, 2005-Ohio-3280, ¶49, discretionary appeal not allowed, 107 Ohio St.3d 1410, 2005-Ohio-5859, quoting *Welch v. Finlay Fine Jewelry Corp.*, 10th Dist. No. 01AP-508, 2002-Ohio-565, quoting *DeVore v. Mut. of Omaha* (1972), 32 Ohio App.2d 36, 38.

{¶16} Here, plaintiff's complaint alleged he was 56 years of age when defendants involuntarily terminated him from his employment in 2008. (Complaint ¶2, 5.) He alleged he worked at DFS for over 20 years and was consistently among the top collectors, winning three "Excellence Awards" during his employment. (Complaint ¶5.) According to plaintiff's complaint, DFS had a stated policy of discriminating against older employees in favor of substantially younger employees and replaced plaintiff with several employees under the age of 40. If plaintiff's allegations are construed to be true, he sufficiently stated a claim for age discrimination.

{¶17} The trial court relied on *Gross* in reaching the opposite conclusion. See *Coryell* at ¶15 (acknowledging that, although Ohio courts "are not bound to apply federal court interpretation of federal statutes to analogous Ohio statutes, we have looked to federal case law when considering claims of employment discrimination brought under

the Ohio Revised Code"). In *Gross*, the United States Supreme Court determined the language in 29 U.S.C. 623(a)(1), the Age Discrimination in Employment Act, required a plaintiff bringing a disparate treatment claim under the Act to establish, by a preponderance of the evidence, that age was the "but-for" cause of the employer's adverse action. Id. at 2350-51.

{¶18} The trial court improperly required plaintiff to allege in his pleading what must be proved if *Gross* were to apply at the trial stage: that age was the "but-for" cause of his termination. Plaintiff did not need to meet the evidentiary standard to allege a claim for age discrimination in his complaint; he needed only to satisfy Civ.R. 8(A)'s notice pleading requirement by alleging a short and plain statement of age discrimination showing he is entitled to relief. The notice pleading standard " 'relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims,' " and it "should not be transposed into a rigid pleading standard for discrimination cases." *Gessner v. Union*, 159 Ohio App.3d 43, 2004-Ohio-5770, ¶11-12, quoting 5 C. Wright & A. Miller, Federal Practice and Procedure (2d ed. 1990) Section 1202, p. 76; *Swierkiewicz*, supra.

{¶19} Because plaintiff complied with Civ.R. 8(A) and *Coryell* when he alleged sufficient facts to put defendants on notice he was asserting an age discrimination claim against them, the trial court erred in granting defendants' motion to dismiss plaintiff's age discrimination claim. Plaintiff's first and second assignments of error are sustained, rendering moot his third, fourth, and fifth assignments of error, as well as the sixth assignment of error as it relates to the age discrimination claim only.

IV. Sixth Assignment of Error - Reverse Race Discrimination Claim

{¶20} Plaintiff's sixth assignment of error asserts the trial court erred in considering evidence outside the complaint when it granted defendants' motion to dismiss. When a trial court considers a Civ.R. 12(B)(6) motion to dismiss, the "court is confined to the averments set forth in the complaint and cannot consider outside evidentiary materials." *Hutchinson v. Beazer East, Inc.,* 8th Dist. No. 86635, 2006-Ohio-6761, ¶14, citing *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228; *Wickliffe Country Place v. Kovacs,* 146 Ohio App.3d 293, 2001-Ohio-4302. Civ.R. 12(B) states that, if a Civ.R. 12(B)(6) motion presents matters outside the pleading, "and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment."

{¶21} Defendants' motion to dismiss included facts and arguments not contained in the complaint, including the name of the employee who accused plaintiff of making racist comments; plaintiff's complaint simply referred to the individual as the "African American employee." (R. 22; Complaint ¶14, 18.) In responding to defendants' motion, plaintiff asked the court to exclude those matters not contained in his complaint. The trial court complied with plaintiff's request and excluded those facts in defendants' motion that were not alleged in plaintiff's complaint, with one exception: the court stated the name of the accusing employee. Plaintiff asserts that, because the trial court used the employee's name, the trial court must have considered the arguments it said it excluded.

{¶22} Although plaintiff is correct in noting the trial court used the employee's name, we have some difficulty concluding the trial court's misstep is the type of conduct the principle at issue is designed to address. The name of the employee did not change

the nature of the argument under Civ.R. 12(B)(6) nor prejudice plaintiff, since the employee's name was irrelevant to the court's decision. *Fifer v. Buffalo Café* (1991), 76 Ohio App.3d 297, 299 (noting the court "made its decision based on the facts in the pleadings, which is proper procedure under Civ.R. 12(B)(6)"). Rather, the issue is whether plaintiff alleged reverse race discrimination.

{¶23} R.C. 4112.02(A) provides "[i]t shall be an unlawful discriminatory practice * * * [f]or any employer, because of the race * * * of any person, to discharge without just cause * * * that person." Counts Two and Three of plaintiff's complaint addressed reverse discrimination, asserting plaintiff is a Caucasian male whom both an African-American co-worker accused of making racist statements and an African-American human resources manager fired. Plaintiff further alleged other similarly situated employees who had claims of discrimination brought against them, or who may have had beliefs similar to plaintiff's, were not terminated. (Complaint ¶2, 4, 13, 14, 18, 19.) According to plaintiff's complaint, defendants unlawfully considered his race and the unsubstantiated claim of the African-American co-worker in deciding to terminate him. (Complaint ¶14, 15, 19.)

{¶24} Plaintiff, again, need not establish his prima facie case in his complaint; he need only comply with the requirements of Civ.R. 8(A) and plead his case with a short and plain statement of his claim showing he is entitled to relief. *Coryell* at ¶25. Applying the *Coryell* standard, the court in *Jackson* concluded Jackson's discrimination complaint complied with notice-pleading requirements because Jackson alleged he was a member of a statutorily protected class, "was discharged for violating company sick-leave policy while white employees were subjected to more favorable treatment," and was qualified for the position. *Jackson* at ¶34.

{¶25} In contrast to *Jackson*, plaintiff failed to plead sufficient facts to put defendants on notice he was bringing a reverse race discrimination claim against them. Plaintiff alleged defendants unlawfully considered his race in deciding to terminate his employment, but in terms of operative facts plaintiff alleged only that an African-American accused him, an African-American fired him, and similarly situated employees who may have had similar claims brought against them were not subject to discipline. Plaintiff's allegations that African-Americans accused and fired him alone are insufficient to support his contention that defendants considered his race in deciding to terminate his employment.

{¶26} Had plaintiff alleged defendants treated him differently than other similarly situated minority employees, he would have bolstered his contention that defendants considered his race. By contrast, plaintiff's assertion that defendants treated him differently than similarly situated employees of all races is insufficient to allege plaintiff was subject to disparate treatment on account of his race. See *Johnson* at ¶50 (determining nurse's complaint alleging racial discrimination failed because the nurse failed to plead "operative facts such as her race or the nature of the discrimination"). Without operative facts to support the statement that defendants considered his race in deciding to fire him, the statement amounts to an unsupported conclusion and is insufficient to withstand a motion to dismiss. *Wright,* citing *Grange Mut. Cas. Co.*

{¶27} Because the trial court properly granted defendants' motion to dismiss plaintiff's claims for reverse race discrimination, plaintiff's sixth assignment of error is overruled.

V. Seventh Assignment of Error – Leave to Amend

{¶28} Plaintiff's seventh assignment of error asserts the trial court erred in denying him leave to amend his complaint, as the court improperly considered factors from plaintiff's previously filed case.

{¶29} In plaintiff's memorandum opposing defendants' motion to dismiss, plaintiff requested leave to amend to add additional facts such as the names of similarly situated employees and the names, ages, and salaries of employees hired after defendants terminated plaintiff. The court denied plaintiff leave to amend, noting the case was originally filed in November 2008, the parties conducted extensive discovery, and, due to the case being dismissed and re-filed, the "case overall ha[d] been pending for an extended period of time." (Decision, 6.) With those factors, the court concluded "defendants would be prejudiced by filing the amended complaint at this date." (Decision, 6.) Plaintiff contends the trial court erred in considering the total amount of time the case had been pending, and instead should have viewed the action as having just begun when he re-filed his complaint.

{¶30} Civ.R. 15(A) states that, after the time has passed in which a responsive pleading may be served, a party may amend its pleading only by leave of court or written consent of the adverse party. The rule nonetheless states "[l]eave of court shall be freely given when justice so requires." Whether to grant or deny a motion for leave to amend a pleading is within the discretion of the trial court, and an appellate court will not reverse the trial court's decision absent an abuse of discretion. *Wilmington Steel Prod., Inc. v. Cleveland Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 122.

{¶31} Plaintiff contends that because his "voluntary dismissal pursuant to Civ.R. 41(A) renders the parties as if no suit had ever been filed," the trial court improperly considered the previously filed case. *Hutchinson* at ¶22, quoting *Denham v. New Carlisle*, 86 Ohio St.3d 594, 597, 1999-Ohio-128. *Hutchinson*, however, examined whether a Civ.R. 41(A) dismissal dissolved certain interlocutory orders; it did not address whether a Civ.R. 41 voluntary dismissal precludes a court from considering the previously dismissed case when deciding whether to grant leave to amend a pleading.

{¶32} *Williams v. Western Reserve Transit Auth.*, 7th Dist. No. 06-MA-137, 2007-Ohio-4747, however, addressed the issue and held the trial court did not abuse its discretion when it denied the plaintiff leave to amend his re-filed complaint. *Williams* pointed out the plaintiff's "original complaint was filed over two and a half years earlier," so the plaintiff had ample time to clarify his theory of relief. Id. at ¶41. The court viewed the plaintiff's waiting nearly three years to amend his pleading as "a delaying tactic or, at the very least, one that would cause prejudice to" the defendant. Id.

{¶33} Similarly here, the trial court permissibly considered the total amount of time the action had been pending, including the previously filed but dismissed action, when it denied plaintiff leave to amend his complaint. Cf. *Adams v. Kurz,* 10th Dist. No. 09AP-1081, 2010-Ohio-2776, ¶32-36 (concluding trial court did not abuse its discretion in considering total amount of time action had been pending, including previously filed but dismissed complaint, when court denied plaintiff's motion for an extension of time in which to file an affidavit of merit pursuant to Civ.R. 10(D)(2)(b)). In that regard, plaintiff admits his case was pending for nearly two years, plaintiff obtained the information he sought to add during discovery on the original complaint, and he possessed the

information when he re-filed his complaint. Under those circumstances, we cannot say the trial court abused its discretion in denying plaintiff's motion to amend his complaint. Plaintiff's seventh assignment of error is overruled.

{¶34} Having sustained plaintiff's first and second assignments of error, rendering plaintiff's third, fourth, and fifth assignments of error moot, as well as the sixth assignment of error as it relates to the age discrimination claim only, and having overruled plaintiff's sixth and seventh assignments of error, we affirm in part and reverse in part the judgment of the trial court, and we remand this matter to the trial court for further proceedings consistent with this decision.

Judgment affirmed in part and reversed in part; case remanded.

FRENCH and DORRIAN, JJ., concur.

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