[Cite as *Knepper v. Ohio State Univ.* , 2011-Ohio-6054.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Benjamin Knepper,	:	
Plaintiff-Appellant,	:	
		No. 10AP-1155
v.	:	(C.C. No. 2007-01851)
The Ohio State University,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on November 22, 2011

Mowery Youell & Galeano, Ltd., Merl H. Wayman, and *Spencer M. Youell*, for appellant.

Michael DeWine, Attorney General, *Randall W. Knutti*, and *Amy S. Brown*, for appellee.

APPEAL from the Court of Claims of Ohio.

BROWN, J.

{¶1} Benjamin Knepper, plaintiff-appellant, appeals from two judgments of the Court of Claims of Ohio. In one judgment, the court granted summary judgment to defendant-appellee, The Ohio State University ("OSU") on Knepper's retaliation claim. In the other judgment, the court ruled in favor of OSU on Knepper's age discrimination claim.

{¶2} Knepper, born March 29, 1952, was employed as an exhibition designer/preparator with OSU's art galleries and the Wexner Center for the Arts ("Wexner Center") from July 1980 through October 2004. He worked specifically at the Wexner Center as an exhibition designer from 1989 until October 2004. On April 15, 2004, Gretchen Metzelaars, the Wexner Center's director of administration, notified Knepper that his position was being abolished effective October 17, 2004.

{¶3} On April 26, 2004, Knepper's attorney mailed a letter to Metzelaars, indicating that Knepper believed he was being terminated because of his age and gender. On May 10, 2004, Metzelaars wrote a letter to Knepper's attorney, indicating that OSU would welcome Knepper's application for any preparatory position that is posted in the future.

{¶4} On October 21, 2005, OSU posted a job opening for assistant exhibition designer at the Wexner Center, and Knepper applied for the position on October 26, 2005. On November 1, 2005, OSU posted a job opening for another assistant exhibition designer at the Wexner Center, and Knepper also applied for the position. William Fugman, who was 28 years old at the time, and Patrick Weber, who was 30 years old at the time, also applied for the assistant exhibition designer positions. Fugman and Weber had both been temporary exhibition preparators at the Wexner Center since July 2005 and June 2005, respectively.

{¶5} On November 17, 2005, Knepper, Fugman, and Weber were interviewed for the two positions by Jill Davis, the exhibitions manager; Peg Fochtman, the Wexner Center's human resources manager; and Larry Heller, the chief exhibition designer. OSU hired Fugman and Weber for the positions.

{¶6} On February 1, 2007, Knepper filed a complaint against OSU, alleging (1) OSU discriminated against him when it failed to hire him for one of the two assistant exhibition designer positions and, instead, hired two less-qualified and younger applicants; and (2) OSU retaliated against him when it refused to hire him after he complained of age and gender discrimination in the April 2004 letter.

{¶7} On May 19, 2008, OSU filed a motion for summary judgment. On May 30, 2008, Knepper filed a motion for summary judgment. On August 27, 2008, the trial court granted OSU's motion for summary judgment with regard to Knepper's retaliation claim but denied OSU's motion for summary judgment with regard to Knepper's age discrimination claim. The trial court also denied Knepper's motion for summary judgment.

{¶8} On September 2, 2008, a liability only bench trial commenced on Knepper's age discrimination claim. On November 17, 2010, the trial court issued a judgment, finding in favor of OSU on the age discrimination claim. Knepper appeals both judgments in favor of OSU, asserting the following assignments of error:

> [I.] The Lower Court's Judgment On Knepper's Age Discrimination Claim Is Against The Manifest Weight Of The Evidence.
>
> [II.] The Lower Court Erred In Granting Summary Judgment In Favor Of OSU On Knepper's Retaliation Claim.

{¶9} Knepper argues in his first assignment of error that the judgment of the Court of Claims, with regard to Knepper's age discrimination claim, was against the manifest weight of the evidence. In a civil case, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence and

must be affirmed by a reviewing court. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 81. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not. Id. The applicable standard requires the appellate court to give the trial court's decision a presumption of correctness, and we may not substitute our judgment for that of the trial court. Id. This presumption arises in part because the fact finder occupies the best position to observe the witnesses' demeanor, gestures, and voice inflections, and to utilize these observations in weighing credibility. Id. at 80.

{¶10} R.C. 4112.02(A), Ohio's general anti-discrimination statute, provides that it is an unlawful discriminatory practice for any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to refuse to hire that person. Ohio courts examine state employment discrimination claims under federal case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000. *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723. Title VII jurisprudence imposes upon the plaintiff the initial burden of establishing a prima facie case of discrimination. *Bucher v. Sibcy Cline, Inc.* (2000), 137 Ohio App.3d 230, 239, citing *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, 93 S.Ct. 1817, 1824. Once a plaintiff establishes a prima facie case, the employer is required to set forth some legitimate, non-discriminatory basis or bases for its action. Id. If the employer is able to meet this burden, the plaintiff is then afforded an opportunity to prove by a preponderance

of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253, 101 S.Ct. 1089, 1093.

{¶11} To establish a prima facie case of age discrimination, where no direct evidence is available, a plaintiff must demonstrate that he or she: (1) was a member of the statutorily protected class, i.e., was at least 40 years old at the time of the discrimination, (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. *Coryell* at paragraph one of the syllabus.

{¶12} In the present case, the trial court found that Knepper had established a prima facie case for age discrimination, and OSU successfully overcame the presumption of discrimination by articulating a legitimate, non-discriminatory reason for not hiring Knepper; specifically, Knepper lacked the necessary computer skills and experience in managing complex projects. Thus, Knepper was required to present evidence that OSU's reasons were a mere pretext for discrimination. To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. *Dews v. A.B. Dick Co.* (C.A.6, 2000), 231 F.3d 1016, 1021. Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against him. *Johnson v. Kroger Co.* (C.A.6, 2003), 319 F.3d 858, 866. A reason cannot be proved to be a pretext for discrimination unless it

is shown both that the reason was false, and that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 515, 113 S.Ct. 2742, 2752.

{¶13} Here, Knepper argues that the trial court failed to address the numerous examples of pretext that he presented at trial. He first contests the trial court's conclusion that Fugman and Weber were more qualified for the positions. Knepper's contentions can be summarized as follows: (1) Fugman did not satisfy the education requirement of the job posting because he had a bachelor's degree in media studies and not the posted requirement of a bachelor's degree in fine arts, and (2) Fugman had only five months of employment as a temporary exhibitions designer at OSU, while Knepper had 24 years of experience related to the posted requirements of handling artwork in a museum setting, managing complex projects, and in-depth knowledge of contemporary art.

{¶14} With regard to Weber, Knepper argues he was more qualified, as well, for the following reasons: (1) although both he and Weber had master's degrees in fine arts, Weber had only six months of experience related to each job requirement, compared to Knepper's 24 years of experience with regard to the posted requirements of handling artwork in a museum setting, managing complex projects, carpentry and construction skills; and in-depth knowledge of contemporary art, (2) Weber listed no carpentry or construction skills, while Knepper had 30 years of residential and commercial carpentry and construction experience, (3) Weber was never given the supplemental application questions, as was Knepper, which asked questions regarding years of paid employment, educational background and/or work experience related to fine art, years of experience in a contemporary art setting, experience in managing complex projects, and carpentry and constructions skills.

{¶15} Knepper points to Weber's and Fugman's failure to satisfy the listed requirements of the position as evidence of pretext. We disagree that this necessarily demonstrates pretext. In *Wrenn v. Gould* (C.A.6, 1987), 808 F.2d 493, the plaintiff argued he was discriminated against and was the only candidate qualified for the position. In denying the plaintiff's appeal, the court held that an initial posting that required a master's degree was merely an employment preference and not tantamount to a "public quote contract." Id. at 502. Additionally, the court recognized that it was permissible for an employer to take factors into account beyond those posted when selecting among job applicants. Id. See also *Briggs v. Anderson* (C.A.8, 1986), 796 F.2d 1009, 1026 (evidence of discrimination is not conclusively proven by the employer's departure from stated minimum qualification requirements, because a successful applicant's strong qualifications in other areas sought by the employer tend to disprove an inference of discrimination).

{¶16} Here, the trial court cited evidence that Fugman and Weber possessed other qualifications and characteristics that were not specifically listed in the posting. Specifically, Fugman and Weber had computer experience that Knepper did not possess. On this issue, the testimony was clear. Peggy Fochtman, the human resource manager at the Wexner Center who was present during the interviews, and Jill Davis, the exhibitions manager at the Wexner Center, who was also present during the interviews, both agreed that the pertinent jobs had evolved and the job postings should have listed computer modeling and 3-D imaging as requirements. In this respect, Fochtman testified she was looking for model-building experience and computer experience, both of which were skills she did not believe Knepper possessed. Davis, who made the ultimate hiring decision,

testified that she was looking for designers with up-to-date computer skills and experience with 3-D imaging software to build digital image models. She reiterated her affidavit testimony that Knepper never learned how to build models using the computer, and she testified she did not believe he was open to learning new methods of doing things. Knepper also never mentioned to her during the interview that he had computer skills, and when Davis asked him about such, he did not respond. Knepper conceded he did not respond to the interview question about computer modeling and skills because he was not expecting the question.

{¶17} Knepper points to Heller's testimony to support his claim that he possessed sufficient computer skills. Heller, who was the chief preparator at the Wexner Center and also on the interview committee, testified that Knepper had computer training and experience, and he believed Knepper had sufficient computer knowledge for the jobs at issue and could receive additional training, if necessary. Heller agreed that computer skills were absolutely necessary to the job. However, Knepper admitted he and Heller had been "dear" friends for 15 to 20 years and would be friends forever. Davis said she believed Heller testified that Knepper was the best person for the job because he and Knepper are very good friends, and Heller did not want to damage Knepper's case. Davis also said that Heller never told her that Knepper had computer experience or that he thought Knepper was the better candidate. Thus, the trial court could have found Heller's testimony unconvincing.

{¶18} Knepper's own testimony regarding his computer experience was also unpersuasive. Knepper points out that he had training in the computer design programs VectorWorks and Visio, and both Fochtman and Davis testified they were unaware of his

experience. However, Knepper did not specify the depth of this training, except that his VectorWorks training included self-tutorials and his Visio training was for an unspecified period in Dublin, Ohio. Importantly, Knepper never testified that he actually could use these programs with any proficiency. Knepper did testify that he used e-mail daily, had early access to computers at OSU, and was "quite friendly" with computers; however, this experience does not equate to experience with complex 3-D imaging programs and model-building programs. Again, as mentioned above, Knepper admittedly failed to answer the question during his interview about his computer and model-building experience, leaving the committee to question whether he had such experience.

{¶19} As for Weber's and Fugman's computer skills, Davis testified that both had considerable skills in this regard. Although Knepper points to the fact that Weber had no experience with VectorWorks, Davis testified Weber had experience with other 3-D imaging software and was very skilled on computers. Heller also wrote in his notes that, although Weber did not know how to use VectorWorks, he wanted to learn. Heller believed that both Fugman and Weber were qualified for the positions, which he admitted "absolutely" required computer skills.

{¶20} We also note that, besides Knepper's lack of computer skills, there was evidence presented that Knepper was deficient in other areas pertinent to the job, while Fugman and Weber possessed favorable traits. Fochtman testified Knepper did not have experience managing complex projects. Also, Davis, in an affidavit referred to during her testimony, stated she believed Knepper was non-communicative, closed-minded, and demonstrated contempt for management. She did not like how he communicated with his boss and thought he lacked the communication skills necessary for the job. Davis also

found Knepper quiet, reserved, an ineffective communicator, and closed to suggestions from others. Davis also testified that Weber and Fugman were team players who got along with the rest of the department. She believed Fugman had good communication skills, spoke his mind, was friendly, was open to working with a team, and understood the hierarchy of the system. As for Weber, Davis thought he was a good communicator. Thus, we find this argument without merit.

{¶21} Knepper also argues under this assignment of error that there was an irregularity in the hiring process that supports evidence of pretext. Specifically, Knepper contends that Fugman and Weber were hired for their positions prior to the interviews of any of the candidates, pointing to two position descriptions generated by OSU during the job-posting process. One document indicated that Fugman's position as assistant exhibition designer was approved and effective on September 9, 2005, six weeks prior to the job posting, and the other document indicated Weber's position as assistant exhibition designer was approved and effective on November 2, 2005, 11 days prior to that job posting. However, the position descriptions were not signed, and Davis testified that she had never seen these specific documents, and her office did not generate them. Davis also verified that she did not make her hiring decision until all of the interviews were completed on November 17, 2005. Fochtman did not testify regarding these documents, and we have no further insight into their origin. Therefore, we agree with the trial court that, without some other evidence explaining them or corroborating the implication suggested by them, we cannot find that they establish OSU engaged in age discrimination in hiring Fugman and Weber. Thus, we find this argument without merit.

{¶22} Knepper also argues that pretext was evident in OSU's inconsistent reasons for rejecting Knepper for the positions. Specifically, Knepper contends an e-mail Fochtman sent him conflicted with Davis's trial testimony. Knepper points out that, in the e-mail, Fochtman told Knepper that he was not chosen for the positions because he did not have any experience managing complex projects, and the chosen candidates were better qualified in model building and computers. He further points out that Davis testified she believed he lacked communication skills, was not a team player, and was not open to new methods or suggestions. However, Knepper fails to acknowledge that a significant factor cited by Davis at trial for not hiring him was his lack of computer and model-building skills, which was the same reason cited by Fochtman. Knepper's lack of computer experience was a major issue at trial, and both Davis and Fochtman agreed these skills were necessary to keep the Wexner Center moving forward. That Fochtman and Davis might have had additional and/or personal reasons for believing Knepper was not the best candidate for the positions is not evidence of pretext. Significant is that Davis testified that the ultimate hiring decision was hers, yet Knepper never asked Davis why he was not hired. Knepper guides us to no authority for the proposition that all members of a hiring committee must have the same opinions about candidates, lest pretext be inferred. For these reasons, we find this argument without merit.

{¶23} It is important to keep in mind that the issue before the trial court was not whether OSU made the best possible decision in not hiring Knepper, but whether it made a discriminatory decision. See *Stein v. Natl. City Bank* (C.A.6, 1991), 942 F.2d 1062, 1065 (stating it is not the function of courts to judge the wisdom of particular business policies). There is a lack of evidence that OSU made a discriminatory decision. Rather,

the evidence was convincing that Knepper did not possess the computer, model-building, and 3-D imaging skills important to the position, and Weber and Fugman did. In addition, there was evidence from Fochtman and Davis that Knepper lacked other important qualities desired for the position. For these reasons, we cannot find the trial court's decision in favor of OSU on Knepper's age discrimination claim was against the manifest weight of the evidence. Knepper's first assignment of error is overruled.

{¶24} Knepper argues in his second assignment of error that the trial court erred when it granted summary judgment with regard to his retaliation claim. When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408. Civ.R. 56(C) provides that, before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks*.

{¶25} As mentioned above, R.C. 4112.02(I) provides that it is unlawful to discriminate against a person because that person made a charge of discrimination. A claim for retaliation invokes a shifting burden method of proof. First, a plaintiff must establish a prima facie case, consisting of four elements: (1) she engaged in protected activity; (2) the employer knew of her participation in the protected activity; (3) the

employer took adverse action against her; and (4) a causal link existed between the protected activity and the adverse action. *Chandler v. Empire Chem., Inc.* (1994), 99 Ohio App.3d 396. If the plaintiff establishes a prima facie case, the burden shifts to the defendant-employer, and it must state a legitimate, non-discriminatory reason for taking the adverse action. Id. Finally, if the defendant-employer proves equal to its burden, the burden shifts back to the plaintiff, and she must prove that the defendant-employer's reason is mere pretext for unlawful retaliation. Id. A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason. *St. Mary's Honor Ctr.* at 515.

{¶26} In the present case, the trial court granted summary judgment to OSU based upon findings that (1) Knepper's April 26, 2004 letter to Metzelaars, the Wexner Center's director of administration, expressing his belief that he had been discriminated against did not rise to the level of protected activity, which relates to the first element of a prima facie case of retaliation, and (2) even if Knepper's letter constituted protected activity, Knepper failed to demonstrate a causal connection between his April 2004 letter and OSU's November 2005 decision not to hire him, due to the length of time between the two events, which relates to the fourth element of a prima facie case of retaliation.

{¶27} Although Knepper herein contests both of the trial court's bases for granting summary judgment, we will address the causation element first, as our analysis of that element is dispositive of the entire claim. With regard to causation, Knepper argues that the trial court erred when it concluded that there was insufficient evidence of a causal connection between his April 26, 2004 letter to OSU and OSU's decision not to re-hire him based upon the length of time that elapsed between the events. A causal connection

is shown through direct evidence or through knowledge coupled with a closeness in time that creates an inference of causation. *Nguyen v. Cleveland* (C.A.6, 2000), 229 F.3d 559, 566. Close temporal proximity between the employer's knowledge of the protected activity and the adverse employment action alone may be significant enough to constitute evidence of a causal connection, but only if the adverse employment action occurs "very close" in time after an employee learns of a protected activity. *Clark Cty. School Dist. v. Breeden* (2001), 532 U.S. 268, 273, 121 S.Ct. 1508, 1511; *Mickey v. Zeidler Tool & Die Co.* (C.A.6, 2008), 516 F.3d 516, 525 (employee was fired on the day his employer learned that he had filed an EEOC complaint); *Payton v. Receivables Outsourcing, Inc.*, 163 Ohio App.3d 722, 2005-Ohio-4978 (two-day interval); *Thatcher v. Goodwill Industries of Akron* (1997), 117 Ohio App.3d 525, 535 (three-week interval).

{¶28} However, if some time elapses between the protected activity and the subsequent adverse employment action, the employee must produce other evidence of retaliatory conduct, namely, evidence of additional discrimination, to establish causation. *Mickey* at 525; see also *Hall v. Banc One Mgt. Corp.*, 10th Dist. No. 04AP-905, 2006-Ohio-913, ¶47 (interval of two months between complaint and adverse action "so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff's] favor on the matter of causal link"), reversed on other grounds, 114 Ohio St.3d 484, 2007-Ohio-4640; *Ningard v. Shin Etsu Silicones*, 9th Dist. No. 24524, 2009-Ohio-3171, ¶17 (holding that mere temporal proximity does not suffice, especially when the events are separated by more than a few days or weeks); *Boggs v. The Scotts Co.*, 10th Dist. No. 04AP-425, 2005-Ohio-1264, ¶26 (additional evidence required after two-month interval); *Aycox v. Columbus Bd. of Edn.*,

10th Dist. No. 03AP-1285, 2005-Ohio-69, ¶21 (additional evidence required after two- to four-month interval); *Briner v. Natl. City Bank* (Feb. 17, 1994), 8th Dist. No. 64610 (additional evidence required after three-month interval).

{¶29} In the present case, no inference of causation can be deduced from "temporal proximity." Knepper's attorney sent the letter to OSU in April 2004, and OSU rejected Knepper for the two positions in November 2005. Thus, OSU rejected Knepper 19 months after he sent the letter alleging age discrimination. Accordingly, to survive summary judgment, Knepper was required to submit additional evidence of retaliatory conduct or discriminatory intent between the time he took part in the protected activity and the time he was rejected for a new position. See *Hall* at ¶47; *Ford v. Gen. Motors Corp.* (C.A.6, 2002), 305 F.3d 545, 552-53.

{¶30} However, Knepper has not submitted additional evidence of retaliatory conduct or discriminatory intent. Indeed, the record reveals the opposite. In reply to the April 2004 letter, Metzelaars sent Knepper a letter encouraging him to apply for another job at OSU in the future, stating:

> Should Mr. Knepper still be interested in the preparatory position at the time the position is posted, we would welcome his application for that job or for any positions that may open at the Wexner Center for the Arts that match his qualifications. On April 15, 2004, Mr. Knepper was given a listing of telephone numbers of OSU contacts that might be of use to him. One of those numbers was Employment Services, specifically Kathy Henderson. Mr. Knepper may work with Ms. Henderson for assistance with applying for open positions within the University.

{¶31} Knepper acknowledged Metzelaars's support at trial, testifying that he "was encouraged by Ms. Metzel[a]ars to apply whenever there [was] an opening." In addition,

that Knepper was actually granted an interview in November 2005 after applying for the positions is suggestive, in and of itself, that OSU was not retaliating or discriminating against him for the April 2004 letter. Favorable conduct toward the employee after the protected activity occurs is not indicative of retaliatory conduct. See *Meyers v. Goodrich Corp.*, 8th Dist. No. 95996, 2011-Ohio-3261, ¶35. Furthermore, that Fochtman and Davis presented several reasons why Knepper was not hired, as outlined above, supports a finding that Knepper's rejection for the new positions was based upon legitimate reasons and not in retaliation for his letter. Thus, we conclude that Knepper did not raise any genuine issue of material fact regarding a causal link between the protected activity and his rejection for a new position. Knepper has failed to meet his burden of demonstrating OSU's reasons for not hiring him were a pretext. Therefore, the trial court properly granted summary judgment to OSU on Knepper's retaliation claim, and his second assignment of error is overruled.

{¶32} Accordingly, Knepper's two assignments of error are overruled, and the judgments of the Court of Claims of Ohio are affirmed.

Judgments affirmed.

BRYANT, P.J., and TYACK, J., concur.

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