

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kenneth H. Wise,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-383
v.	:	(C.C. No. 2007-07973)
	:	
The Ohio State University,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 20, 2011

Holland, Myers & Myers, and John F. Myers, for appellant.

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

APPEAL from the Court of Claims of Ohio.

DORRIAN, J.

{¶1} Plaintiff-appellant, Kenneth H. Wise ("appellant"), appeals from a decision of the Court of Claims of Ohio granting judgment in favor of defendant-appellee, The Ohio State University ("appellee"), on appellant's claim for age discrimination. For the reasons that follow, we affirm.

{¶2} Appellant was born on November 13, 1936. He began his career with appellee in 1970. In 1973, appellant transferred to the Krauss Dairy Center (the "dairy unit") at appellee's Wooster campus. As of 2003, appellant was employed as an Agricultural Technician 2 at the dairy unit. On August 20, 2003, appellant was notified

that his position was being abolished due to a lack of funds and reorganization of the dairy unit. At the time that his position was abolished, appellant was 67 years old and was the oldest employee at the dairy unit. Appellant was the only Agricultural Technician 2 in the dairy unit at that time.

{¶3} Under appellee's civil service rules, appellant was eligible to displace another employee in the same job classification with the fewest retention points, subject to certain limitations. Appellant was notified that he was eligible to displace another Agricultural Technician 2, who worked in a greenhouse. Appellant declined this position based on his medical history. Appellant was then notified that he would be placed on a layoff list for 12 months and that he would be eligible for reinstatement or reemployment if a vacant position in his job classification occurred during that period. Ultimately, appellant was not reemployed or reinstated, and his employment with appellee ended.

{¶4} On October 11, 2007, appellant filed a complaint in the Court of Claims of Ohio alleging age discrimination, disability discrimination, retaliation, and wrongful discharge in violation of public policy. The trial court granted summary judgment in favor of appellee on the disability discrimination, retaliation, and wrongful discharge in violation of public policy claims, and the case proceeded to trial on the age discrimination claim. The trial court issued a judgment in favor of appellee, ruling that appellant failed to prove his age discrimination claim based on direct or indirect evidence.

{¶5} Appellant appeals from the trial court's judgment, assigning the following error for this court's review:

The trial court erred in finding that Appellant failed to satisfy the fourth prong of the prima facie case that age was a factor

in the decision to abolish his position as part of an overall reduction in force.

{¶6} In his assignment of error, appellant argues that the trial court's finding that he failed to state a prima facie case of age discrimination was against the manifest weight of the evidence. The appropriate standard of review is whether the trial court's judgment is contrary to law. *Heffern v. Univ. of Cincinnati Hosp.* (2001), 142 Ohio App.3d 44, 51. "We will not disturb the judgment of the trial court if it is 'supported by some competent, credible evidence going to all the essential elements of the case.' " *Id.*, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. "In determining whether the judgment of the trial court is against the manifest weight of the evidence, a reviewing court must be guided by the presumption that the findings of the trial court are correct, as the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Ratliff v. Ohio Dept. of Rehab. & Corr.* (1999), 133 Ohio App.3d 304, 309, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶7} Appellant asserts that appellee terminated his employment based on his age, in violation of R.C. 4112.02(A) and 4112.14. R.C. 4112.02(A) provides that it is an "unlawful discriminatory practice [f]or any employer, because of the * * * age * * * of any person, to discharge without cause * * * or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." R.C. 4112.14(A) provides that "[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 and laws pertaining to the relationship between employer and employee." The statute further provides that any person age 40 or over who is discharged without just cause in violation of R.C. 4112.14(A) may institute a civil action against the employer. R.C. 4112.14(B).

{¶8} "Age discrimination may be demonstrated through either direct or indirect evidence." *Freshour v. TK Constructors, Inc.*, 10th Dist. No. 10AP-28, 2011-Ohio-2163, ¶18. In an age discrimination claim based on indirect evidence, Ohio courts apply a burden-shifting analysis adapted from the United States Supreme Court's decision in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817. *Freshour* at ¶19, citing *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, ¶9. Under this analysis, the plaintiff must present evidence establishing a prima facie case of discrimination. The burden then shifts to the defendant to offer a legitimate, non-discriminatory reason for its action. If the defendant meets this burden, then the burden shifts back to the plaintiff to prove that the defendant's proffered reason was merely a pretext for discrimination. *Id.*

{¶9} A plaintiff may 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." *Coryell* at paragraph one of the syllabus. In this case, appellee asserts that appellant was discharged as part of a work force reduction due to budget cuts. "[W]hen a plaintiff's position is eliminated as part of a work force reduction, courts modify the fourth element of the prima facie case to require the plaintiff to 'come forward with additional evidence, be it direct, circumstantial,

or statistical, to establish that age was a factor in the termination.' " *Woods v. Capital Univ.*, 10th Dist. No. 09AP-166, 2009-Ohio-5672, ¶57, quoting *Kundtz v. AT & T Solutions, Inc.*, 10th Dist. No. 05AP-1045, 2007-Ohio-1462, ¶21 (internal citations omitted).

{¶10} The trial court concluded that appellant established the first three elements of a prima facie case of discrimination by proving that he was within the protected class of people age 40 and over, that he was discharged, and that he was qualified for the position. The trial court found that appellant was discharged as part of a work force reduction and applied the modified fourth element of the prima facie standard. Accordingly, we must begin by determining whether the trial court's conclusion that appellant was discharged pursuant to a work force reduction was supported by competent, credible evidence. "In determining whether a valid work force reduction occurred, the key inquiry is whether or not the employer replaced the plaintiff." *Woods* at ¶58. "[I]f an employer did not replace the plaintiff, but rather consolidated jobs in order to eliminate excess worker capacity, then a work force reduction took place." *Id.*

{¶11} Dr. James Kinder ("Kinder"), the Chair of appellee's Department of Animal Sciences, testified that he was responsible for determining what positions in that department would be eliminated. Kinder testified that the Department of Animal Sciences restructured its dairy programs in response to budget reductions. Kinder stated that over a three-year period, the Department of Animal Sciences lost 23 positions due to budget cuts. During the round of reductions in which appellant's position was abolished, Kinder sought input from Joseph Hogan ("Hogan"), a professor in the Department of Animal Sciences, regarding which positions could be eliminated. Hogan testified that Kinder

asked him to recommend up to three positions that could be eliminated and still maintain the mission and function of the dairy unit. Hogan identified appellant's position as one of the three that could be eliminated. Hogan testified that he recommended that appellant's position be eliminated because appellant functioned as a "back-up" feeder. He concluded that appellant's duties could be distributed to other employees in the dairy unit.

{¶12} Ultimately, Kinder determined that appellant's position would be abolished because it was least essential in accomplishing the research goals of the dairy unit. Kinder testified that, after appellant's position was abolished, the essential duties of appellant's position were distributed to other employees, and other duties were eliminated. Hogan also testified that appellant's duties were distributed among four employees of the dairy unit, Bruce Phillips ("Phillips"), Craig Zimmerly ("Zimmerly"), Fred Sachariat ("Sachariat"), and Kevin Miller ("Miller"), in addition to their existing duties. Miller and Sachariat appeared at the trial and testified that they absorbed some of appellant's duties, along with other dairy unit employees.

{¶13} Appellant claims that he was replaced by Phillips and Sachariat. "However, 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." *Woods* at ¶58, quoting *Barnes v. GenCorp, Inc.* (C.A.6, 1990), 896 F.2d 1457, 1465. Hogan and Miller testified that appellant's duties were redistributed to other employees in the dairy unit, in addition to their existing duties. Therefore, appellant was not replaced by Phillips and Sachariat.

{¶14} Appellant also claims that he was replaced by Raymond Windsor ("Windsor") and Julie Schuster ("Schuster"). Windsor was offered a position as an

Agricultural Technician 1 on February 28, 2005. However, the evidence presented at trial indicated that Windsor was initially hired in 2001 as an Agricultural Technician 1 on a temporary basis and was reappointed in a series of temporary positions during the following years. Kinder explained that some of these positions would have been funded by grant funds of individual professors. Additionally, Miller testified that, after appellant's position was abolished, Windsor would only perform the functions that appellant previously performed "in an emergency situation." (Tr. 176.) Schuster was hired as an Agricultural Technician 1 on June 5, 2006. The evidence presented at trial indicated that Schuster was hired as a replacement for a Dairy Worker 2 who had retired from the dairy unit, not as a replacement for appellant's Agricultural Technician 2 position. Thus, there is competent, credible evidence supporting the trial court's conclusion that a valid work force reduction occurred because appellant's position was abolished, and he was not replaced.

{¶15} Next, we consider the trial court's conclusion that appellant failed to satisfy the modified fourth prong of the prima facie standard by not bringing forth additional direct, circumstantial, or statistical evidence to establish that age was a factor in his termination. Appellant offers three arguments in support of his claim that the trial court erred in finding that he did not establish that age was a factor in the decision to abolish his position.

{¶16} First, appellant argues that his duties were not eliminated or consolidated, but that Kinder and Hogan sought to eliminate him specifically because of his age. However, both Hogan and Miller testified that appellant's duties were consolidated by assigning them to other existing employees. Moreover, Kinder testified that he did not

know appellant's age when he decided that appellant's position should be terminated and that the first time he met appellant was when he informed appellant that his position was being abolished.

{¶17} Second, appellant argues that the way appellee applied its civil service rules to him demonstrates age discrimination. Appellant asserts that he was not properly afforded his right to displace other employees within his job classification. He also claims that he was not properly afforded the right of recall after being placed on a layoff list. We note that appellant does not appear to be directly appealing these alleged violations of the civil service rules as part of this action but is merely arguing that they constitute circumstantial evidence of age discrimination. Appellee's civil service rules require that appeals of layoff or displacement be filed with the State Personnel Board of Review. There is no indication that appellant filed such an appeal. Further, there is no evidence that these alleged violations of the civil service rules had any relationship to appellant's age. With respect to the recall issue, appellant argues that he should have been offered the Agricultural Technician 1 position that was offered to Windsor in February 2005. However, as noted above, Windsor had been employed by appellee in various roles since 2001, and his appointment as an Agricultural Technician 1 was not as a replacement for appellant. Therefore, even assuming that these alleged violations occurred, appellant has not demonstrated a nexus between the failure to properly apply the civil service rules and a bias against appellant based on his age.

{¶18} Third, appellant argues that his managers made age-related comments that demonstrated discriminatory animus. Appellant testified that sometime in 2001, Dr. Larry Smith ("Smith") made an age-related comment suggesting that the older employees

should leave and allow some younger employees to be hired. Appellant also testified that Phillips made a similar comment in late 2002, to the effect that the older employees should retire to make room for younger employees. Under the circumstances presented here, however, these comments are insufficient to establish that age was a factor in the abolition of appellant's position. " 'There is a vital difference between comments which demonstrate a discriminatory animus in the decisional process and stray remarks made by nondecisionmakers.' " *Swiggum v. Ameritech Corp.* (Sept. 30, 1999), 10th Dist. No. 98AP-1031, quoting *Gordon v. Universal Electronics, Inc.* (Oct. 1, 1997), 9th Dist. No. 18071. Kinder testified that he was responsible for determining what positions would be abolished. As noted above, Kinder stated that he was not aware of appellant's age when he decided that appellant's position should be abolished. Moreover, there is no evidence that Smith or Phillips were involved in deciding that appellant's position would be abolished. Kinder testified that he consulted with Hogan on which positions should be eliminated. Kinder stated that he did not seek input from Smith in determining which positions to abolish. Thus, while the age-related comments that appellant testified were made to him might arguably demonstrate bias by the individuals who allegedly made them, appellant has not presented evidence of age-related discrimination on the part of the people responsible for selecting his position to be abolished.

{¶19} Based on our review of the evidence, we find that the trial court's conclusion that appellant failed to satisfy the fourth element necessary to establish a prima facie case of age discrimination is not contrary to law. Accordingly, appellant's assignment of error is overruled.

{¶20} For the foregoing reasons, appellant's assignment of error is overruled, and the judgment of the Court of Claims of Ohio is hereby affirmed.

Judgment affirmed.

BROWN and TYACK, JJ., concur.
