

assigned to less desirable job duties, subjected to stricter scrutiny, and more frequently admonished and disciplined because of her age and sex.

{¶3} By contrast, defendant argues that plaintiff was a “probationary employee,” that could be terminated for any reason or at any time that she was judged to be unqualified for the work required. It is defendant’s position that plaintiff was terminated for poor performance, and that she cannot establish a prima facie case of either age or sex discrimination.

{¶4} The Supreme Court of Ohio has held that age discrimination cases brought in state courts should be construed and decided in accordance with federal guidelines and requirements. *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 147. A plaintiff may establish a prima facie case of discrimination either by direct evidence or by the indirect method established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. In this case, plaintiff presented no direct evidence. Therefore, an inference of discriminatory intent may be made establishing that plaintiff: 1) was a member of a protected class; 2) suffered an adverse employment action; 3) was qualified for the position held; and 4) that comparable, non-protected persons were treated more favorably. *Goad v. Sterling Commerce, Inc.* (June 13, 2000), Franklin App. No. 99AP-321, unreported, following *McDonnell Douglas*. In the case of age discrimination, it must be shown that age was the motivating factor for the adverse employment action. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501.

{¶5} Once a plaintiff establishes a prima facie case, discrimination is presumed. The burden of production then shifts to the employer to come forward with evidence of a

legitimate, nondiscriminatory reason for plaintiff's discharge. *Kohmescher, supra*. If the employer articulates a legitimate, nondiscriminatory reason, the presumption of discrimination is rebutted; plaintiff must then present evidence that the employer's proffered reason was a mere pretext for unlawful discrimination. *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 668, 591 N.E.2d 752, 755.

{¶6} Upon review of the evidence in this case, the court finds that plaintiff has satisfied her burden of proof on the first three elements of her prima facie case: she is certainly a member of both protected classes, she was qualified for the position at the time she was hired; and an adverse employment action was taken against her. However, plaintiff did not establish the fourth element, nor did she show, for the purposes of her age discrimination claim, that her termination was motivated by discriminatory intent.

{¶7} To establish the fourth element, *i.e.*, that a "comparable non-protected person" was treated more favorably, plaintiff "must show that the 'comparabl[e]' [was] similarly-situated in all respects." *Mitchell v. Toledo Hosp.* (C.A.6, 1992), 964 F.2d 577, 582. The "respects" in which the "comparabl[e]" must be "similarly-situated" depend on "the factual context in which the *** case arose [.]" *Ercegovich v. Goodyear Tire & Rubber Co.* (C.A.6, 1992), 154 F.3d 344, 352.

{¶8} "[T]he individuals with whom the plaintiff seeks to compare *** her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Id.* at 352, quoting *Mitchell, supra*, at 583.

{¶9} In the present case, the comparables presented by plaintiff did not provide sufficient support for her claims. Some of the employees terminated by defendant were under the age of forty and some of the new hires were older than age forty. Likewise, some were younger males and females whereas others were older males and females. In the final analysis, the data fails to show any consistent scheme or pattern. It is simply not reasonable to infer from that evidence that non-protected persons in comparable positions were treated more favorably than plaintiff, or that plaintiff's termination was motivated by age discrimination. Furthermore, it is not reasonable to infer that female employees were terminated three times more frequently than males simply because of their sex.

{¶10} Nevertheless, even if the court were to find that plaintiff established a prima facie claim of age or sex discrimination, defendant has produced persuasive evidence of a legitimate, nondiscriminatory reason for plaintiff's discharge. Specifically, the totality of the evidence demonstrates that plaintiff was simply not suited to the position of a CO. During the trial, the parties spent a great deal of time examining the particulars of a series of "incidents" plaintiff was involved in during her tenure. The court does not find any of those incidents to be dispositive of the issue of plaintiff's performance. To the contrary, the paramount concern shown by the evidence is defendant's strict need for security. The court recognizes that the role of a CO is not easy; nevertheless control must be maintained and regulations scrupulously enforced, particularly when large numbers of inmates are involved. An individual's disposition and demeanor are as important to the role as the raw ability to carry out assigned tasks. While an employer has no discretion in the area of discriminatory practices, a great deal of latitude is provided in evaluating probationary

employees. Moreover, the general rule is that this court will not substitute its judgment for that of the employer and may not second-guess the business judgments of employers regarding personnel decisions. See, e.g., *Watson v. Kent State University* (Aug. 8, 1994), Court of Claims No. 91-06627, unreported; *Dodson v. Wright State Univ.* (Dec. 3, 1997), Court of Claims No. 93-03196, unreported; *Washington v. Central State Univ.* (April 24, 1998), Court of Claims No. 96-08849, unreported. In this case, the court is persuaded by the evidence that defendant fairly assessed plaintiff's ability to do the job. The court further finds that plaintiff's failure to meet "acceptable minimal expectations" was the basis for her termination rather than any scheme or plan to rid the institution of older and/or female employees. In sum, defendant's reasons for terminating plaintiff were not a mere pretext.

{¶11} For these reasons, plaintiff has failed to prove her claims of age and sex discrimination. Likewise, her claims of breach of contract, estoppel and bad faith must fail. Judgment shall be rendered in favor of defendant.

FRED J. SHOEMAKER
Judge

Entry cc:

James H. Banks
P.O. Box 40
Dublin, Ohio 43017

Attorney for Plaintiff

Larry Y. Chan
65 East State St., 16th Fl.
Columbus, Ohio 43215

Assistant Attorney General

LH/cmd

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