[Cite as *Knepper v. Ohio State Univ.*, 2008-Ohio-4796.]

Court of Claims of Ohio

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BENJAMIN KNEPPER

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2007-01851

Judge Clark B. Weaver Sr.

DECISION

{¶ 1} On May 19, 2008, defendant filed a motion for summary judgment pursuant to Civ.R. 56. On May 30, 2008, plaintiff filed a cross-motion for summary judgment and a memorandum contra to defendant's motion. On June 13, 2008, defendant filed a response to plaintiff's motion for summary judgment. On July 2, 2008, the motions came before the court for oral hearing.[1]

{¶ 2} Civ.R. 56(C) states, in part, as follows:

{¶ 3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can 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 or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

[1]On August 15, 2008, plaintiff filed additional authority, which this court has considered, in support of his motion.

{¶ 4} Plaintiff filed this action alleging age discrimination in violation of R.C. 4112.99 and retaliation in violation of R.C. 4112.02(I). The facts that gave rise to his claims are as follows.

{¶ 5} Plaintiff was employed as an exhibition designer/preparator with defendant, The Ohio State University (OSU) Wexner Center for the Arts, from July 1980 through October 2004. Prior to obtaining that position, plaintiff earned both a bachelor's and a master's degree in Fine Arts from OSU. On April 15, 2004, Gretchen Metzelaars, Director of Administration, notified plaintiff that his position had been abolished, effective October 17, 2004, due to "a reduction in workforce under section 9.15 of the University Operating Manual." (Plaintiff's Exhibit 1.) David Bamber, another exhibition designer, was also notified that his position had been abolished. Both plaintiff and Bamber were over age 50 at the time.

{¶ 6} On April 26, 2004, Spencer Youell, plaintiff's legal counsel, sent a letter to Metzelaars in which he suggested that plaintiff be granted a new position that had been created, that of exhibition preparator, or any equivalent position consistent with his experience. Youell noted that plaintiff was 52 years old and had worked for OSU for 23 years. He requested that plaintiff be assisted in his efforts to retain state employment until he had accumulated 25 years of service, and reached the age of 55, thereby maximizing his retirement benefits. The letter also stated that "[i]t is Mr. Knepper's belief that he and Mr. Bamber were terminated by Wexner Center for the Arts because of their age and sex. Based upon recent events, it is Mr. Knepper's belief that the Chief Curato, Helen Molesworth, has the desire and intent to hire less qualified, younger females for the open position and other possible available jobs within the Wexner center." (Plaintiff's Exhibit 2.)

{¶ 7} On May 10, 2004, Metzelaars replied to Youell's letter, stating that "[s]hould 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 in the Wexner Center for the Arts that match his qualifications." (Plaintiff's

Exhibit 3.) No further action was taken by either plaintiff or OSU regarding the allegations of age and gender discrimination.

{¶ 8} On October 21 and November 1, 2005, OSU posted job openings for the positions of assistant exhibition designer. Plaintiff applied and, on November 17, 2005, was interviewed for both positions. The interview panel consisted of Jill Davis, Exhibitions Manager, Peg Fochtman, Human Resources Manager, and Larry Heller, Chief Exhibition Designer. The panel also interviewed two other individuals, William Fugman and Patrick Weber. On November 17, 2005, plaintiff was notified that he had not been selected for either position.

{¶ 9} On January 3, 2006, plaintiff filed an administrative charge with the Ohio Civil Rights Commission alleging that OSU's Wexner Center had refused to rehire him because of his age and in retaliation for his attorney's April 26, 2004 letter expressing plaintiff's complaints concerning age and gender discrimination. (Defendant's Exhibit F.) The Ohio Civil Rights Commission found no probable cause for either allegation. (Defendant's Exhibits G and I.) On February 1, 2007, plaintiff filed the instant action in this court.

{¶ 10} Defendant contends that plaintiff's age discrimination claim is barred by his election to seek remedies set forth in R.C.4112.08; that it is time-barred; and that OSU had legitimate, nondiscriminatory reasons for declining to rehire plaintiff. Defendant further contends that plaintiff cannot establish the necessary elements of a retaliation claim under R.C. 4112.02(I).

{¶ 11} With regard to the age discrimination claim, plaintiff contends that OSU hired Fugman and Weber instead of him because they were younger and despite the fact that they were less qualified. He also contends that the interviewers based their decision on criteria that were not listed as requirements in the job postings.

{¶ 12} "'Under Ohio law, a plaintiff may file a civil action alleging age-based employment discrimination under one of three statutory provisions: R.C.4112.02(N),[2] 4112.14,[3] and 4112.99.[4] Alternatively, a plaintiff may file a charge administratively with the OCRC [Ohio Civil Rights Commission] under R.C. 4112.05. R.C. 4112.08 provides that 'any person filing a charge under division (B)(1) of section 4112.05 of the Revised Code, with respect to the unlawful discriminatory practices complained of, is barred from instituting a civil action under section 4112.14 or division (N) of section 4112.02 of the Revised Code.'" *McNeely v. Ross Corr. Inst.*, Franklin App. No. 06AP-280, 2006-Ohio-5414, ¶14.

{¶ 13} In *McNeely*, the Tenth District Court of Appeals held that, because plaintiff had elected to pursue a charge with the OCRC, he was barred from bringing a civil action under R.C. 4112.02(N) or 4112.14. Id. at ¶16. (Citations omitted.) The court

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[2]R.C. 4112.02(N) states: "An aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred, in any court with jurisdiction for any legal or equitable relief that will effectuate the individual's rights."

[3]R.C. 4112.14 states in part:

"(A) No 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.

"(B) Any person aged forty or older who is discriminated against in any job opening or discharged without just cause by an employer in violation of division (A) of this section may institute a civil action against the employer in a court of competent jurisdiction. * * * The remedies available under this section are coexistent with remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code; except that any person instituting a civil action under this section is, with respect to the practices complained of, thereby barred from instituting a civil action under division (N) of section 4112.02 of the Revised Code or from filing a charge with the Ohio civil rights commission under section 4112.05 of the Revised Code."

[4]R.C. 4112.99 states: "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief."

went on to infer that the election doctrine also applied to claims brought under R.C. 4112.99, based upon its previous decision and interpretation of the statutes in *Balent v. Natl. Revenue Corp*. (1994), 93 Ohio App.3d 419. Id. at ¶ 17.

{¶ 14} However, subsequent to *McNeely*, the Supreme Court of Ohio addressed the issue whether the election doctrine applies to claims brought under R.C. 4112.99. In *Leininger v. Pioneer National Latex*, 115 Ohio St.3d 311, 318, 2007-Ohio-4921, the court explained that: "R.C. 4112.08 requires a liberal construction of R.C. Chapter 4112. Although R.C. 4112.02(N), 4112.08, and 4112.14(B) all require a plaintiff to elect under which statute (R.C. 4112.02, 4112.05, or 4112.14) a claim for age discrimination will be pursued, when an age discrimination claim accrues, a plaintiff may choose from the full spectrum of remedies available. * * * In *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135, we stated that R.C. 4112.99 provides an independent civil action to seek redress for any form of discrimination identified in the chapter. Id. at 136. A violation of R.C. 4112.14, (formerly R.C. 4101.17) therefore, can also support a claim for damages, injunctive relief, or any other appropriate relief under R.C. 4112.99. This fourth avenue of relief is not subject to the election of remedies." This court concludes that *Leininger* is controlling and that plaintiff's R.C. 4112.99 age-based discrimination claim is not barred by the R.C. 4112.08 election of remedies. (Internal citations omitted.)

{¶ 15} Defendant has also asserted that plaintiff's age discrimination claim is time-barred because it was not filed in this court within 180 days after he was notified that he would not be rehired. Defendant again relies upon *McNeely* for that proposition.

{¶ 16} With respect to that issue, the *McNeely* court relied upon the Supreme Court's decision in *Bellian v. Bicron Corp*. (1994), 69 Ohio St.3d 517, at the syllabus, wherein it is stated that: "[a]ny age discrimination claim, premised on a violation described in R.C. Chapter 4112, must comply with the one-hundred-eighty-day statute of limitations period set forth in former R.C. 4112.02(N)."

{¶ 17} However, *Bellian* has since been superceded by statute. Specifically, as noted in *Compton v. Swan Super Cleaners, Inc*., 2008 U.S. Dist. LEXIS 39526 (S.D. Ohio Apr. 29, 2008), "shortly after *Bellian*, the Ohio General Assembly created [R.C.] 4112.14, the only provision in the Revised Code dedicated exclusively to age discrimination claims. See S.B. No. 162, 121st Gen. Ass. File 37 (Ohio 1995). Although [R.C.] 4112.14 does not set forth a statute of limitations, Ohio courts have consistently held it to be six years." (Citations omitted.) Additionally, only months after *Bellian* was decided the Supreme Court revisited the statute of limitations issue for cases filed under R.C. 4112.99. In *Cosgrove v. Williamsburg of Cincinnati Management Co.* (1994), 70 Ohio St.3d 281, the court held that "[s]ince R.C. 4112.99 does not contain its own statute of limitations, we must look to other sections of the Revised Code for the appropriate limitations period. R.C. 2305.07 states, in relevant part, that 'an action upon * * * a liability created by statute other than a forfeiture or penalty * * * shall be brought within six years after the cause thereof accrued.'"

{¶ 18} While the six-year statute of limitations may be applicable to cases brought against private parties in courts of common pleas, cases against state entities in this court are governed by the statute of limitations set forth under R.C. 2743.16 which provides in pertinent part that: "civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." Since plaintiff's cause of action accrued on November 17, 2005, when he was notified that he would not be rehired, and he filed his complaint on February 1, 2007, his complaint is well within the applicable two-year statute of limitations.

{¶ 19} Alternatively, defendant argues that it had a legitimate, nondiscriminatory reason for declining to rehire plaintiff. Specifically, defendant contends that Fugman and Weber were better qualified than plaintiff in various respects, including computer expertise and communication skills. Ultimately, plaintiff is required to prove that the

justifications offered by defendant were a mere pretext for discrimination. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792; *Texas Dept. of Comm. Affairs v. Burdine* (1981), 450 U.S. 248, 252-253, quoting *McDonnell Douglas* at 802, 804. The court must determine either: "'(1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate the [refusal to hire], or (3) that the proffered reason was insufficient to motivate the [refusal to hire].'" *Owens v. Boulevard Motel Corp*. (Nov. 5, 1998), Franklin App. No. 97APE12-1728, quoting *Frantz v. Beechmont Pet Hosp.* (1996), 117 Ohio App.3d 351. The court finds that genuine issues of material fact exist with regard to the question of pretext, and that neither party is entitled to judgment on the age discrimination claim as a matter of law.

{¶ 20} Defendant next argues that plaintiff cannot establish a prima facie case of retaliation under R.C. 4112.02(I). That code section provides that it is unlawful "[f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code."

{¶ 21} Plaintiff claims that he was not rehired in retaliation for the letter his attorney wrote in April 2004, wherein plaintiff's beliefs about discrimination were expressed subsequent to the abolishment of his job. In order to establish a prima facie case of retaliation, pursuant to R.C. 4112.02(I), a plaintiff is required to prove that: "'(1) plaintiff engaged in a protected activity; (2) the employer knew of plaintiff's participation in the protected activity; (3) the employer engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action.'" *Motley v. Ohio Civil Rights Commission*, Franklin App. No. 07AP-923, 2008-Ohio-2306, ¶11; quoting *Zacchaeus v. Mt. Carmel Health Sys*., Franklin App. No. 01AP-683, 2002-Ohio-444. (Additional citations omitted.) "If the evidence indicates that an employer 'would have made the same employment decision regardless of the employee's participation in

the protected activity, the employee cannot prevail.'" Id. quoting *Pulver v. Rookwood Highland Tower Investments* (Mar. 26, 1997), Hamilton App. No. C-950361.

{¶ 22} The first element of a prima facie case of retaliation is that plaintiff must have engaged in a "protected activity." Generally, "[a]nyone who *participates in bringing a claim* of unlawful discriminatory practice is engaging in a protected activity." *HLS Bonding v. Ohio Civ. Rights Comm'n*., Franklin App. No. 07AP-1071, 2008-Ohio- 4107, ¶21, citing *Thatcher v. Goodwill Industries of Akron* (1997), 117 Ohio App.3d 525, 535. (Emphasis added.)

{¶ 23} In the present case, the court finds that the April 2004 letter expressing plaintiff's beliefs that he and Bamber had been discriminated against, without more, does not rise to the level of protected activity as contemplated under statutory or case law. However, even if the letter were considered as such, plaintiff is also required to show that "the alleged retaliatory action followed [the employee's] participation in the protected activity sufficiently close in time to warrant an inference of retaliatory motivation." *Neal v. Hamilton County* (1993), 87 Ohio App.3d 670, 678. Here, plaintiff alleges that he was not rehired in November 2005 in retaliation for the letter that was sent in April 2004. That amount of time is simply far too long to infer a retaliatory motive on the part of defendant. See *Reeves v. Digital Equipment Corp.* (N.D. Ohio, 1989), 710 F.Supp. 675, 677. ("[A]s a matter of law, three months is too long to support an inference of retaliation.") In sum, the court finds as a matter of law that plaintiff cannot prove either that he engaged in protected activity or that there was a causal connection between expression of his beliefs and defendant's decision not to rehire him. Therefore, defendant is entitled to judgment in its favor on plaintiff's claim of retaliation.

{¶ 24} In conclusion, the court finds that neither party is entitled to summary judgment on plaintiff's claim of age discrimination, but that defendant is entitled to judgment in its favor on the retaliation claim. Accordingly, plaintiff's motion for summary judgment shall be denied in its entirety, and defendant's motion for summary judgment shall be granted, in part.

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JUDGMENT ENTRY

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An oral hearing was conducted in this case upon the parties' cross-motions for summary judgment. For the reasons set forth in the decision filed concurrently herewith, plaintiff's motion for summary judgment is DENIED. Defendant's motion for summary judgment is GRANTED as to plaintiff's claim of retaliation, and DENIED as to the claim of age discrimination.

_____
CLARK B. WEAVER SR.
Judge

cc:

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LH/cmd
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