[Cite as *Fenton v. Time Warner Entertainment Co.*, 2003-Ohio-5326.]

Please see Judgment Upon Reconsideration at *Fenton v. Time Warner Entertainment Co.*, 2003-Ohio-6317.

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

RONALD K. FENTON :

Plaintiff-Appellant : C.A. CASE NO. 19755

vs. : T.C. CASE NO. 02CV2237

TIME WARNER ENTERTAINMENT CO. :

Defendant-Appellee :

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O P I N I O N

Rendered on the 3rd day of October, 2003.

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GRADY, J.

{¶1} Plaintiff, Ronald K. Fenton, appeals from a summary judgment for Defendant, Time Warner Cable, Western Ohio Division ("Time Warner"), on Fenton's statutory and common law claims alleging age discrimination. Fenton presents two assignments of error on appeal.

FIRST ASSIGNMENT OF ERROR

{¶2} "THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING

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SUMMARY JUDGMENT TO THE DEFENDANT BY ASSIGNING IMPROPER WEIGHT AND CREDIBILITY TO DEFENDANT'S WITNESSES AND FACTUAL ASSERTIONS."

SECOND ASSIGNMENT OF ERROR

{¶3} "THE TRIAL COURT'S DECISION AND ENTRY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND FAILED TO RESOLVE GENUINE ISSUES OF LAW AND FACT IN FAVOR OF THE NON-MOVING PARTY."

{¶4} Summary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law. Civ.R. 56. The burden of showing that no genuine issue of material fact exists is on the moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First National Bank & Trust Co.* (1970), 21 Ohio St.2d 25. In reviewing a trial court's grant of summary judgment, an appellate court must view the facts in a light most favorable to the party who opposed the motion. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326. Further, the issues of law involved are reviewed de novo. *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1.

{¶5} Fenton resigned his position as a supervisor with Time Warner on July 10, 2000, and his resignation became effective on July 21, 2000. It is undisputed that Fenton

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resigned when faced with the alternative of discharge. Fenton was then fifty years of age.

{¶6} Fenton commenced the underlying action against Time Warner on allegations that his discharge constitutes a form of age discrimination prohibited by R.C. 4112.14, for which that section affords him a right of relief, and that he is also entitled to relief because the facts and circumstances that prompted Time Warner to discharge him are contrary to public policy. See *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228.

{¶7} Time Warner filed a motion for summary judgment after the initial pleadings were filed. When it determined the motion, the trial court stated: "For purposes of this motion, the court adopts and fully incorporates herein the facts as set forth in Defendant's [Time Warner's] Motion for Summary Judgment as Section 1, Basic Operative Facts." (Decision, Order and Entry, p.1).

{¶8} Fenton argues in his first assignment of error that the court's statement portrays a violation of the mandate of Civ.R. 56(C) that "the party against whom the motion for summary judgment is made . . . (is) . . . entitled to have the evidence . . . construed most strongly in the party's favor." We do not agree.

{¶9} Absent any conflict in the factual evidence material to the issues presented, and we see none here, Civ.R. 56(C) merely requires the court to adopt the particular construction that might reasonably be put on the

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evidence before it which most strongly favors the claim or defense of party against whom the motion is made and which the motion puts in issue. A reading of the trial court's decision causes us to conclude that the court followed that precept, the contrary implications of its statement notwithstanding.

{¶10}At most, the court's statement merely reflects that it accepted the order and sequence of events set out in Time Warner's motion. Fenton's contentions are not that those matters are incorrect. He argues instead that different implications should be attached to them vis-a-vis his age discrimination claims. However, unless these meanings plausibly follow, the court is not bound to adopt them.

{¶11}All this is made murkier by the shifting burdens that age discrimination claims involve, which are discussed below. However, we are convinced that the trial court's statement, standing alone, neither portrays nor reveals a violation of Civ.R. 56(C). Fenton's first assignment of error is overruled.

{¶12}Fenton's burden in prosecuting his R.C. 4112.14 claim for relief requires proof of the four matters set in *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146. The trial court found that Fenton could not bear his burden on the last of those: that he was replaced by, or that his discharge permitted the retention of, a person not belonging to the protected class.

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{¶13}The protected class in this instance is persons who are forty years of age and older when they are discharged by their employer. R.C. 4112.14(B). Fenton's resignation cum discharge was effective on July 21, 2000. Fenton was then fifty years of age, and therefore within the class of persons protected by R.C. 4112.14.

{¶14}The record shows that upon Fenton's termination his job duties were distributed by assignment among three other Time Warner employees. Two of those were then thirty-nine years of age. The third was forty or more years old. Approximately eight months later, those duties were re-distributed between two persons who were then forty years of age or more.

{¶15}The trial court, relying on *Atkinson v. International Technegroup, Inc.*(1955), 106 Ohio App.3d 349, found that Fenton was "replaced" for purposes of *Barker v. Scovill* when his job duties were finally reassigned to two members of the protected class, eight months after Fenton's discharge, and that the prior assignment and distribution of his duties on or immediately after the date of his discharge was only temporary and did not amount to a replacement. We do not read *Atkinson* to support that temporal distinction. Further, in defining what "replacement" means, *Atkinson* applies a narrower definition than the definition we adopted in *Cruz v. South Dayton Urological Associates, Inc.* (July 25, 1997), Montgomery App. No. 16021, which recognizes replacement to include re-assignment of a

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person's duties to existing employees. Therefore, the issue is not resolved by *Atkinson*.

{¶16}Whether and when Fenton was "replaced" is a question of fact. If the initial distribution and assignment of his job duties among three persons was a replacement and one of those persons was then not a member of the protected class, then the fourth prong of the *Barker v. Scovill* test is satisfied. That question cannot be resolved on summary judgment, as the trial court did, because on this record it is a genuine issue of fact which is material to Fenton's age discrimination claim.

{¶17}The trial court did not address the further provisions of *Barker v. Scovill* that relieve an employer of liability for age discrimination even when the four prong test is satisfied. Those are: (1) whether the employer had a legitimate, non-discriminatory reason for the action it took, or (2) whether the purported reason was merely a pretext for prohibited age discrimination. *Id*. In that connection, we have held that "[w]hether such reasons are legitimate depend not on their correctness, but on their nature; whether, as reasons, or more properly causes, they are matters on which an employer may justly rely in making the choice concerned." *Risley v. Comm Line, Inc.* (May 2, 2003), Miami App. No. 02CA42, 2003-Ohio-2211, at paragraph 26.

{¶18}The trial court never reached these additional questions, having determined that Fenton could not satisfy

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all four of the predicate *Barker v. Scovill* tests. Time Warner didn't argue in support of its motion that it had a legitimate, non-discriminatory reason to fire Fenton, as it now suggests on appeal. As a result, Fenton never asserted a pretext rebuttal, except to suggest that his age was the true reason for his discharge. Therefore, we cannot find that the evidence on those matters was so clearly adduced before the trial court that we might base a judgment on them now, even assuming we agree with Time Warner. *State v. Peagler* (1996), 76 Ohio St.3d 496. On remand of Fenton's R.C. 4112.14 claim, Time Warner may renew its motion on those other grounds.

{¶19}The trial court also granted summary judgment for Time Warner on Fenton's common law claim that the basis of his discharge was contrary to public policy. Fenton argues that Time Warner, which claims that it fired him for failing to report to the facility he was responsible for when a "catastrophic failure" occurred, necessarily fired him for not operating his vehicle in a rainstorm when its windshield wipers wouldn't work, which prevented his travel. Operating his vehicle under those conditions would violate the "unsafe operation" prohibitions of R.C. 4513.021(C), according to Fenton.

{¶20}We agree with the trial court that Fenton's contention is not sustained. There is no evidence that Time Warner directed Fenton to drive his vehicle, only that it wanted him to take more effective action in dealing with the

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outage, which Time Warner calls a "catastrophic failure." Fenton might have done that by maintaining better contact with his subordinate who was at the site. He might even have gone there after his wife picked him up, instead of going to dinner with his wife and their friends. He might have gone to the site the next day, instead of leaving town. The matter of the malfunctioning windshield wipers is incidental to Fenton's larger failure, which apparently led Time Warner to fire him.

{¶21}The second assignment of error is sustained, in part, and overruled, in part. The matter will be remanded to the trial court to conduct further proceedings on Fenton's statutory claim for age discrimination.

BROGAN, J., concurs.

FAIN, P.J., concurs in judgment only.

FAIN, J., concurring in the judgment:

{¶22}I agree that there is a genuine issue of material fact whether Time Warner's reason for firing Fenton was non-discriminatory, requiring reversal of the summary judgment rendered in Time Warner's favor. I write separately to dissociate myself from the statement, contained in *Risley v. Comm Line, Inc.* (May 2, 2003), Miami App. No. 02CA42, 2003-Ohio-2211, paragraph 26, and re-asserted in the majority opinion in this case, that:

{¶23}"Whether [the claimed, non-discriminatory] reasons [for an adverse employment decision] are legitimate depend

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not on their correctness but on their nature; whether, as reasons, or more properly causes, they are matters on which an employer justly may rely in making the choice concerned."

{¶24}In my view, the issue is not whether the employer, assuming any disputed facts to be as determined by the employer, had just cause to take an adverse employment action, but whether the employer's reason for taking the action was, in fact, based upon prohibited discrimination. I find support for this view in *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 149-150:

{¶25}"Finally, appellant suggests that an employer may not escape liability under R.C. 4101.17 simply by showing that he dismissed a member of the class which the statute protects for reasons other than the latter's age. The employer must also, appellant contends, adduce evidence that he discharged the employee for 'just cause.' We disagree. This court determined in *Plumbers* [*& Steamfitters Commt. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192], at 199, that just cause was not an issue in an action alleging racial discrimination in contravention of R.C. 4112.02(A). [Footnote omitted.] We now hold that such a consideration is equally irrelevant in an R.C. 4101.17 age discrimination case. Under the latter, and for the purposes of this case, an employee has been discharged with just cause when his termination was not based on his age.

{¶26}"To condition an employer's right to discharge an employee between the ages of forty and seventy upon proof of

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just cause would confer greater rights upon that group of employees than would be enjoyed by others. The imposition of such a condition would constitute an improper and unwarranted extension of the protection afforded by R.C. 4101.17."

{¶27}In my view, the issue is not whether the employer's stated reasons for discharging an employee "are matters on which an employer may justly rely in making the choice concerned," which is another phrase for just cause, but whether the employer's stated reasons were, in fact, the reasons for the discharge. If the stated grounds for discharge appear patently unreasonable – e.g., the employee whistled while he worked – a strong argument can be made in support of an inference by the factfinder that this proffered ground for the discharge was not, in fact, the real reason for the discharge, but it is nevertheless for the factfinder to determine the truth of the matter, and it might conclude that the employer's decision to fire the employee was, in fact, based upon irrational, but not discriminatory, grounds.

{¶28}Determinations whether the proffered reasons for a discharge "are matters on which an employer may justly rely in making the choice concerned" will involve courts in deciding not whether to believe the employer's assertion as to what its real reason for discharging the employee was – a credibility determination like others trial courts are routinely called upon to make – but will involve trial

courts in determining whether the proffered reasons for a discharge are matters on which an employer may justly rely, i.e., whether they constitute just cause. In my view, this is not the proper role of the courts in a jurisdiction that continues to embrace the "at-will employment" doctrine, at least as a general rule.

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