

[Cite as *Davis v. Goodwill Industries of Miami Valley*, 2009-Ohio-6133.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

PATSY LEE DAVIS

Plaintiff-Appellant

V.

GOODWILL INDUSTRIES OF THE MIAMI VALLEY

Defendant-Appellee

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Appellate Case No. 23238

Trial Court Case No. 07-CV-01128

(Civil Appeal from
Common Pleas Court)

OPINION

Rendered on the 20th day of November, 2009.

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FAIN, J.

{¶ 1} Plaintiff-appellant Patsy Davis appeals from a judgment rendered against her, following a bench trial, on her claims against defendant-appellee Goodwill Industries of the Miami Valley, for age discrimination. Davis contends that the trial court failed to apply the applicable law to the facts. Davis further contends

that the trial court erred in excluding evidence of emotional and punitive damages, and in excluding two witnesses from testifying at trial.

{¶ 2} We conclude that the record fails to overcome the presumption that the trial court, as the finder of fact, applied the law correctly in rendering its decision. We further conclude that even if the trial court had erred in excluding evidence of damages, no prejudicial harm occurred, because the evidence related to damages, not to liability. Since the trial court found no liability, any error in the exclusion of evidence of damages is harmless. The trial court did exclude the testimony of one potential liability witness, but Davis failed to make an adequate proffer of that witness's testimony, without which we cannot find that any error in the exclusion of this testimony was sufficiently prejudicial to merit reversal. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} Defendant-appellee Goodwill Industries of the Miami Valley (Goodwill) is a provider of vocational rehabilitation training and job placement for disabled or disadvantaged persons. Goodwill receives public donations of goods, which are sold through retail stores. The revenues from these stores fund about 60% of Goodwill's operations. In January 1984, Goodwill hired plaintiff-appellee Patsy Davis as a part-time sales clerk. Davis became a full-time employee shortly thereafter, and was promoted to retail store manager in 1985. Davis remained a store manager until her employment was terminated, in December 2003, for violating Goodwill's employee purchase policy.

{¶ 4} Goodwill's policies and procedures were in writing and were provided to all employees, including Davis. Because Goodwill receives public donations, the organization considers itself and its employees to be stewards of the public trust. The stewardship policy states that:

{¶ 5} "The public, through their donations to Goodwill, is entrusting us to use their donations to the fullest in support of Goodwill's mission to help people with disabilities or disadvantaged. All material given by donors to Goodwill becomes the property of Goodwill and must not be used for the benefit of any one person.

{¶ 6} "Each employee receiving or handling any donation is actually a trustee of that donation. Under no circumstances may any employee remove donations or merchandise from a Goodwill Store or location without paying for it. Goodwill employees as the stewards of the public trust are also entrusted with the assets of our contracts, customers, clients, volunteers and fellow employees. Goodwill has a zero tolerance for theft and will terminate and prosecute any individuals involved." Goodwill Trial Ex. B, p. 28.

{¶ 7} Goodwill's employee manual lists various examples of serious misconduct that may result in immediate termination, including failure or refusal to perform assigned duties satisfactorily, failure to respond to supervision, theft or unauthorized removal of agency assets or property, including all items donated to Goodwill, whether or not the items are determined to be Marketable, and violation of the retail store outlets store policy. The retail outlets store policy provides that all merchandise must be on sale to the general public before any Goodwill employee is eligible to purchase it. This means that merchandise cannot be held in the back

room (where donations are processed and priced for sale) until it is time for a lunch break. Donations also cannot be hidden on the sale floor or placed behind the check-out counter. Employee purchases also cannot be made while employees are on the clock, nor can they be made before the store opens or after it closes. Davis was required to follow these procedures, and was required as a manager to ensure that her employees followed them as well. She was also required to contact the director of retail operations if these procedures were not followed.

{¶ 8} The Goodwill code of ethics, which Davis signed, requires employees to take no action for their own benefit at Goodwill's expense. Employees must also bring ethical violations to the attention of co-workers or supervisors. Goodwill provided a complaint procedure for employees, which began with discussing problems with an immediate supervisor, and proceeded to written grievances.

{¶ 9} Between 1985 and June 2002, Davis managed the Goodwill retail store on Leffel Lane in Springfield, Ohio. The store had approximately 5,000 square feet and was one of the smallest stores. In October 1992, Davis was promoted to team leader, with responsibility for two other stores as well as her own. This was part of a new system adopted after Goodwill management hired some consultants. In May 1993, Davis was removed from the team leader position, because she was not meeting her budgeted sales target and was not adhering to employee purchase book policies at both the Leffel Lane and Northridge stores. These policies required all employee purchases to be logged, with itemization of the date, what was purchased, when the purchase was made, and who checked the employee out of the store.

{¶ 10} Davis was also told, when she was demoted, that her scheduling was

inadequate, that processing at two of the stores was not meeting minimum requirements, and that there were consistent loose racks, meaning that not enough product was on the sales floor. Davis acknowledged these points. She testified that the team leader concept was not generally successful, and was discontinued.

{¶ 11} Between May 1993 and June 2002, Davis continued as manager of the Leffel Lane store. She received a number of awards, such as certificates of merit in 1996 and 1999. However, her evaluations indicate that, despite generally good sales, she had some problems with items like housekeeping and merchandising. For example, Davis's April 1999 evaluation states that her performance showed inconsistent achievement and that improved results were needed in planning attractive merchandise displays that make effective use of the sales area, and in maintaining the store premises in compliance with Goodwill's safety and housekeeping practices. Similarly, the September 1999 review indicates that she continued to struggle with sales floor presentation standards, and that she had some problems with turnover and production quotas. Nonetheless, her overall rating was 3.4 on a 4.0 scale.

{¶ 12} In December 1999, Goodwill hired Dennis McCain, a 62 year old man, who had 41 years of experience with Elder-Beerman department stores, including 21 years of experience managing retail stores. McCain was recruited for the position by a Goodwill Board member, who was also the retired chairman of Elder-Beerman. At the time, the Goodwill stores were not growing, and Goodwill's president wanted to improve the feel and look of the stores.

{¶ 13} McCain first visited the Centerville and Miamisburg Goodwill stores.

He found very poor standards, poor layout, poor merchandising, poor signage, and poor customer service. It was not a good shopping experience. At the time, Goodwill's philosophy was to go for cheap rent, and their stores were usually in a secondary, run-down shopping center. McCain introduced the concept of "New Generation" stores, which is a term he borrowed from Elder-Beerman. These were free-standing stores, to be designed and built in high-visibility retail developments that would drive the business and bring in better quality and more donations.

{¶ 14} McCain was regional retail manager for Goodwill from 1999 to 2006, when he retired at age 68. McCain worked on the Centerville store initially, as it was the largest volume store. Centerville was the prototype "New Generation" store, and six more stores like it were eventually built. During McCain's tenure, Goodwill's sales increased from about 5.2 million to more than \$15,500,000.

{¶ 15} When McCain first saw the Leffel Lane store, it was disorganized and dirty, had poor housekeeping, and had no aisles. Davis's recollection of McCain's first words to her were that the store was "horrendous." Davis knew there were issues, and conceded that the walls, carpeting, and racks looked pretty shoddy at that point.

{¶ 16} Davis testified that McCain belittled her throughout the remaining time that she was employed at Goodwill, and that no matter what she did, she could not make him happy. She indicated that she had complained to Goodwill's personnel manager, Bill Hines, and had asked him to have McCain stop harassing her. Allegedly, Hines said that he knew McCain was harassing her, and that he was watching him. Hines's testimony did not support these assertions.

{¶ 17} The testimony of other Goodwill employees, both current and those no longer with the company, also did not support Davis's testimony. No one witnessed McCain belittling Davis or treating her differently than other store managers. Hines testified that Davis had said that McCain was demanding. Hines did not find that inappropriate, as McCain was demanding of all his managers to achieve results.

{¶ 18} McCain evaluated Davis in March 2000, a few months after he was hired. For the most part, Davis met the job requirements, but needed improvement in managing sales, increasing improvement and merchandise presentation skills. McCain was very complimentary in his remarks, and stated, among other things, that Davis was a capable store manager, with potential.

{¶ 19} During the first several months after McCain came to Goodwill, all the existing stores were remodeled and remerchandised, including new paint and fixtures. Other measures were instituted to improve sales, like purchasing new merchandise from Target. The Leffel Lane store did well during the years 2000 and 2001, and Davis's reviews were positive. In the March 2002 review, which was for the prior year, McCain complimented Davis as being dedicated and a hard worker, and being greatly improved in merchandise production. Davis received a \$5,000 bonus for her results, which was one of the highest bonuses, if not the highest bonus, given that year. Davis was approximately 47 years old at the time.

{¶ 20} In June 2002, Goodwill opened its second "New Generation" store, on Bechtle Avenue, in Springfield, Ohio. This store was more than twice the size of the Leffel Lane store, but McCain felt that it was important to promote Davis. She had an outstanding year at Leffel Lane, had been in the Springfield market for some time,

and knew the clientele. McCain indicated that the decision was totally his, and that he felt Davis could handle the change.

{¶ 21} Davis claimed that Hines led her to believe that McCain did not want her as manager of the Bechtle store. However, Hines testified that the promotion was entirely McCain's decision, and that he did not know how Davis could have gotten the impression that McCain did not want her as the manager. Davis also testified that McCain hired an assistant manager, who was only 28, against her wishes, and that he did not allow her to bring her staff from the Leffel Lane store.

{¶ 22} The Bechtle store opened in June 2002. The store looked wonderful on the first day of operations, but did not maintain the required look thereafter. McCain received a complaint on the second weekend from Goodwill's Board Chair, who had stopped in. The Chair complained that the store was in disarray. McCain sent a group of people down to put the store back together. This process was subsequently repeated on numerous occasions.

{¶ 23} The store maintenance was also not up to par. There were spots on the carpet and the store looked like it was not being vacuumed or mopped daily. The bathrooms were not as clean as they should be, and merchandise was not kept fully stocked. After visiting the store in December 2002, McCain administered a corrective interview outlining these issues and indicating that he had many previous discussions with Davis. McCain reviewed the document with Davis, and she did not voice any disagreement about the points he had made, nor did she ask for help.

{¶ 24} Although sales were generally good at Bechtle, the problems with

merchandising, employee turnover, use of display space, and maintenance continued to persist. In late March 2003, David Devoss, a store group supervisor, visited the Bechtle store during a 50%-off sale, during which all items in the store were being sold at 50% of the regular price. Due to Devoss's complaint about how little merchandise was out on the sales floor, McCain asked Devoss to spend the rest of the day at the store and provide specifics. Devoss wrote a report, documenting the problems with the store. Out of 100 possible points, the store scored a 67, which was classified as "poor." Prior to that time, Devoss had found the same or similar issues at Bechtle.

{¶ 25} On March 31, 2003, McCain administered another corrective interview, again outlining the problems, and indicating that failure to improve performance could result in termination. By this time, McCain had decided to transfer Davis to another store. He selected the Urbana Goodwill store, which was ten minutes away, and was similar in size to the Leffel Lane store. He did not transfer Davis back to Leffel Lane, because he did not feel it would be fair to the assistant manager there, who had been promoted and was doing a good job. The store manager at Urbana was also doing a good job and McCain felt she could handle the Bechtle store.

{¶ 26} Davis testified that she wanted to step down, because she did not want to work under McCain any longer. However, McCain was in charge of all the Miami Valley Goodwill stores, including Urbana. Although nothing had been said to her about age being a factor, Davis contended at trial that age was a factor, because the store manager at Urbana was young, around twenty-six years of age. Davis's pay was not reduced, however, even though Urbana was a smaller store.

{¶ 27} After the transfer, the Urbana store was the “store of the month” for April and May 2003. McCain visited the store, and concluded that Davis was doing okay. While there were occasional housekeeping issues, the store was smaller, and Davis was doing better.

{¶ 28} Subsequently, in November and December 2003, Goodwill’s marketing department received two e-mails from customers, complaining about employees improperly purchasing merchandise and taking merchandise out of the back of the Urbana store. These acts were prohibited. After being informed of the complaints, Hines sent Goodwill’s loss prevention consultant, Dave Matson, to Urbana, to investigate. Matson interviewed four employees, and brought back written statements. One of the employees, Janet Carpenter, testified at trial, and indicated that she had witnessed several Urbana employees, including Davis, purchasing items from the back room without first placing the items on the sales floor.

{¶ 29} Matson reported his findings to Hines, who made the decision to terminate Davis for violation of the retail outlet store sales policy. Davis subsequently met with Matson, McCain, and Debra Willett, Goodwill’s Human Resources Supervisor. Hines was not available that day, as he was on vacation.

{¶ 30} Davis testified that she denied purchasing items from the back room, and that she was never told why she was being terminated. However, both Willett and McCain testified that Davis had admitted purchasing a book from the back room. They both also testified that the termination was for violating the store purchase policy, and that Davis was told at this meeting that she was being terminated.

{¶ 31} During the meeting, Davis raised the fact that McCain had held back a

gun and had purchased it. However, this purchase was made after prior approval of the head of Human Resources, and the gun would never have been placed on the sales floor, because Goodwill had a policy of refusing to sell weapons. Davis also testified at trial that McCain had held back a decanter at the Bechtle opening, and had purchased it. McCain denied that this ever occurred. Davis did not report the decanter issue to anyone at the time, nor did she raise this matter at her termination meeting. After Davis was fired, Goodwill transferred a 31-year-old female into the manager's position at the Urbana store. Davis was the only Urbana employee fired for violating the policy against buying items from the back room.

{¶ 32} Following her termination, Davis filed suit against Goodwill in 2005, and dismissed that action without prejudice. Davis then re-filed the action in 2007, alleging age discrimination in violation of R.C. 4112.14, and wrongful discharge in violation of public policy. The latter claim was dismissed without prejudice prior to trial, and a bench trial was held on the age discrimination claim. The trial court subsequently issued a decision and judgment entry, concluding that while Davis had presented a prima-facie case of age discrimination, Goodwill provided a non-discriminatory reason for the termination. The trial court further concluded that Davis failed to meet the burden of establishing that Goodwill's reason for her termination was pretextual.

{¶ 33} Davis now appeals from the judgment dismissing her age discrimination claim against Goodwill.

{¶ 34} Davis's First Assignment of Error is as follows:

{¶ 35} "IT IS ERROR FOR THE TRIAL COURT WHEN RULING ON A CASE TRIED TO THE COURT TO FAIL TO APPLY THE APPLICABLE LAW TO ITS ANALYSIS OF THE FACTS IT FINDS FROM THE EVIDENCE."

{¶ 36} Under this assignment of error, Davis contends that the trial court erred by failing to apply the three alternative standards of proof of pretext that are outlined in *Manzer v. Diamond Shamrock Chemicals Co.* (C.A. 6, 1994), 29 F.3d 1078. According to Davis, the trial court considered the first standard, when it concluded that Goodwill's reason for discharging her had a basis in fact. Davis contends, however, that the trial court failed to apply the two remaining standards of proof of pretext, which would have required the court to consider: (1) whether the alleged violation of the purchase policy actually motivated the discharge so that age discrimination played no substantial role in Goodwill's motivation; or (2) whether Goodwill's proffered reason for the discharge was sufficient to motivate the discharge.

{¶ 37} The present case has been brought under R.C. 4112.14, which precludes employers from discriminating against employees on the basis of age. In considering age discrimination claims brought under the Ohio Revised Code, the Supreme Court of Ohio looks to federal case law, even though state courts do not have to apply federal court interpretations of analogous federal laws. *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, at ¶ 15. Accord, *Grooms v. Supporting Council of Preventative Effort*, 157 Ohio App.3d 55, 63, 2004-Ohio-2034, at ¶ 20, n.3 (noting that federal case law interpreting Title VIII of the

Civil Rights Act applies generally to alleged violations of R.C. Chapter 4112).

{¶ 38} With regard to age discrimination claims:

{¶ 39} “A plaintiff may establish a violation of the ADEA by either direct or circumstantial evidence. * * * ‘Direct evidence of discrimination is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.’ * * * ‘Circumstantial evidence, on the other hand, is proof that does not on its face establish discriminatory animus, but does allow a factfinder to draw a reasonable inference that discrimination occurred.’ In *Gross v. FBL Financial Services, Inc.*, the Supreme Court recently emphasized that with both direct and circumstantial evidence, the burden of persuasion remains on ADEA plaintiffs to demonstrate ‘that age was the “but-for” cause of their employer's adverse action.’ ” *Geiger v. Tower Automotive* (C.A. 6, 2009), quoting from *Gross v. FBL Financial Services, Inc.* (2009), --- U.S. ----, 129 S.Ct. 2343, 2351 n. 4, 174 L.Ed.2d 119 (other citations omitted).

{¶ 40} The case before us does not involve direct evidence of age discrimination. In *Corydell*, the Supreme Court of Ohio held that:

{¶ 41} “absent direct evidence of age discrimination, in order to establish a prima facie case of a violation of R.C. 4112.14(A) in an employment discharge action, a plaintiff-employee must demonstrate that he or she (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.” *Corydell*, 2004-Ohio-723, at ¶ 20 (adopting the modified test for age discrimination applied in *O'Connor v. Consol. Coin Caterers Corp.*

(1996), 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433).

{¶ 42} “If an employee establishes a prima facie case, an inference of discrimination arises. The burden of production then shifts to the employer, which must articulate a non-discriminatory reason for taking an adverse employment action against the employee. McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. 1817, 36 L.Ed.2d 668. If the employer cites such a reason, the employee then bears the burden of proving * * * that the stated non-discriminatory reason for the adverse employment action is pretextual. The employee may do so by showing that the asserted reason has no basis in fact, that the reason did not actually motivate the adverse employment action, or that it was insufficient to motivate such action.” *Grooms*, 2004-Ohio-2034, at ¶ 21, citing *Manzer* (C.A.6, 1994), 29 F.3d 1078, 1084.

{¶ 43} The trial court concluded that Davis had established a prima facie case of discrimination, and that Goodwill provided a non-discriminatory reason for Davis’s termination. The non-discriminatory reason was Davis’s violation of Goodwill’s sales policy. The trial court noted that Davis had attempted to show the policy was a sham and was not enforced. However, the court rejected this contention, and in doing so, clearly found that Goodwill’s witnesses were more credible than Davis.

{¶ 44} In reviewing a trial court judgment after a bench trial, we are “ ‘guided by the presumption’ that the trial court’s findings are correct.” *Castlebrooks Apts. v. Ballard*, 2008-Ohio-4633, Montgomery App. No. 22421, at ¶ 13, quoting from *Patterson v. Patterson*, Shelby App. No. 17-04-07, 2005-Ohio-2254, at ¶ 26. “We also may not substitute our judgment for that of the trial court where there is ‘competent and credible evidence supporting the findings of fact and conclusions of

law rendered by the trial judge.’ ” Id., quoting from *Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 79-80. “ ‘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. 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.’ ” *Gevedon v. Ivey*, 172 Ohio App.3d 567, 579, 2007-Ohio-2970, at ¶ 54, quoting from *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264.

{¶ 45} After reviewing the evidence and the trial court’s decision, we find no error in the application of the law. In *Manzer*, the Sixth Circuit Court of Appeals explained the three standards of proof for pretext, as follows:

{¶ 46} “The first type of showing is easily recognizable and consists of evidence that the proffered bases for the plaintiff’s discharge never happened, i.e., that they are ‘factually false.’ * * * The third showing is also easily recognizable and, ordinarily, consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff. * * *

{¶ 47} “The second showing, however, is of an entirely different ilk. There, the plaintiff admits the factual basis underlying the employer’s proffered explanation and further admits that such conduct *could* motivate dismissal. The plaintiff’s attack on the credibility of the proffered explanation is, instead, an indirect one. In such cases, the plaintiff attempts to indict the credibility of his employer’s explanation by

showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant. In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup." 29 F.3d 1078, 1084 (internal citations omitted; emphasis in original).

{¶ 48} The trial court in the case before us did not specifically discuss the *Manzer* standards. Nonetheless, the decision indicates that the trial court failed to find any evidence of pretext, and did not credit Davis's theory that she had been discriminated against on the basis of age. We agree with the trial court.

{¶ 49} Davis contends that her supervisor, McCain, violated Goodwill's sales policy, but was not disciplined. We disagree, for several reasons. In the first place, McCain was substantially older than Davis, and was within the protected class. Therefore, no inference of improper animus necessarily arises, even if McCain had committed the same violation.

{¶ 50} More importantly, however, McCain did not violate Goodwill's policy. The weapon he purchased was not one that could have ever been sold at Goodwill. McCain also contacted the Human Resources Director and received permission before purchasing the weapon. McCain's situation, therefore, was unlike Davis's. Furthermore, although Davis testified that McCain improperly held back and purchased a decanter, the trial court did not find this testimony credible. McCain emphatically denied ever holding back this or any other item. Davis also failed to complain about the alleged infraction at the time, or even when she was discharged. Davis additionally failed to produce any witnesses who saw McCain do anything

improper. Under the circumstances, the trial court could reasonably have decided to believe McCain.

{¶ 51} As part of the third standard of proof of pretext, a plaintiff admits that her conduct could motivate dismissal, but offers circumstantial evidence showing, by its sheer weight, that an illegal motivation is more likely than not. Again, Davis's proof fails under this standard.

{¶ 52} There is no dispute about the fact that violating the sales policy could motivate dismissal. Davis failed, however, to submit any evidence of illegal motivation. The record contains no evidence that Goodwill's actions were motivated by improper animus.

{¶ 53} As the trial court noted, a large proportion of Goodwill employees were within the protected class. The Human Resources Manager was 49 when he was hired by Goodwill, and was approximately 58 years of age when Davis was terminated. Likewise, McCain was 62 when he became employed by Goodwill. One manager that Davis complained about as having preferential treatment, because she was able to bring a staff member with her to her assignment at a "New Generation" store, was 42 at the time, or within the protected class.¹

{¶ 54} Furthermore, Hines, Goodwill's Human Resources Director, testified that 41 other retail store employees were terminated for violations of Goodwill's retail store purchase policies during 2003. Other retail store managers were terminated

¹Davis was 47 or 48 at the time. The staff member that this manager brought to her new store had multiple disabilities, including communication issues because he was deaf. The staff member felt comfortable going to the new store, because the manager could effectively communicate with him.

for this reason during 2003, and two of them were under the age of 40. In 2003, Goodwill had 20 retail store managers. Five, including Davis, were between the ages of 40 and 49; seven were between the ages of 50 and 59, and two were over the age of 60. When Davis was terminated, she was replaced by a 31-year old woman. However, that manager was also later fired for violating Goodwill policy. Furthermore, even though Davis was the only employee terminated from the Urbana store, she was the store manager, and her infraction was correspondingly more serious. Davis also failed to offer any evidence as to the age of the other employees at the Urbana store.

{¶ 55} In short, there is nothing in the record to suggest that Goodwill's actions were a pretext for age discrimination, or that Goodwill discriminated against Davis on the basis of age.

{¶ 56} Davis's First Assignment of Error is overruled.

III

{¶ 57} Davis's Second Assignment of Error is as follows:

{¶ 58} "IT IS ERROR FOR THE TRIAL COURT TO PRECLUDE EVIDENCE OF EMOTIONAL DAMAGE AND PUNITIVE DAMAGES IN A CASE BROUGHT UNDER R.C. 4112.99 OR R.C. 4112.14."

{¶ 59} Under this assignment of error, Davis contends that the trial court erred by precluding testimony on emotional and punitive damages. Prior to trial, the court

sustained Goodwill's motion in limine, which had asked the court to preclude evidence of emotional distress and punitive damages. The trial court did not provide the parties with the basis of its reasoning, but simply issued a one-line decision granting Goodwill's motion.

{¶ 60} In arguing that the trial court erred, Davis relies on the decision of the Supreme Court of Ohio in *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921. Davis contends that under *Leininger*, a full panoply of damages, including emotional and punitive damages, is permitted in actions brought under R.C. 4112.99.

{¶ 61} Goodwill contends that R.C. 4112.14 does not permit recovery of non-economic damages or punitive damages. Goodwill further contends that even if the trial court erred in refusing to admit such evidence, the error was harmless, due to the court's judgment in favor of Goodwill on liability.

{¶ 62} In view of our disposition of the first assignment of error, we need not address this assignment of error at length. The trial court, as finder of fact, concluded that Goodwill did not discriminate against Davis on the basis of age. Accordingly. The types of damages that Davis could conceivably recover, if she had established liability, became irrelevant. In other words, even if the trial court erred in failing to admit evidence of certain alleged damages, the error is harmless, since the trial court never reached the damages issue.

{¶ 63} Davis argues that the exclusion is not harmless, because "Damages may come after liability in the sequence of a Trial. But injury and pain starts a

second after bullying and discriminatory treatment starts in the workplace.” Davis Appellate Brief, p. 15. This argument is unconvincing. If an employee is not the victim of unlawful discrimination, there is no basis for compensating the employee for injury or pain proximately caused by unlawful discrimination.

{¶ 64} Davis’s Second Assignment of Error is overruled.

IV

{¶ 65} Davis’s Third Assignment of Error is as follows:

{¶ 66} “IT IS ERROR FOR THE TRIAL COURT TO PRECLUDE TESTIMONY OF PLAINTIFF-APPELLANT’S WITNESSES WHERE SUCH PRECLUSION RESULTS FROM PLAIN ERROR.”

{¶ 67} Under this assignment of error, Davis contends that the trial court erred in excluding the testimony of two witnesses: Zak Carper, a former Goodwill employee, and Greg Davis, who is Davis’s husband. The trial court excluded these witnesses because they were not named as trial witnesses until three days before the discovery cut-off. Greg Davis was also not included as a potential witness in the joint pre-trial statement that was filed.

{¶ 68} Davis contends that the trial court abused its discretion, because the court failed to acknowledge that Carper was disclosed in 2005, as a person who had knowledge about Davis’s case. This occurred during the pendency of the action that was dismissed without prejudice. Davis also contends that the trial court improperly refused to hear evidence from Mr. Davis about the pain and hurt Davis suffered due to Goodwill’s alleged discrimination.

{¶ 69} “A trial court has broad discretion in determining whether to admit or exclude evidence. Absent an abuse of discretion that materially prejudices a party, the trial court's decision will stand.” *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66. Accord, *Banford v. Aldrich Chem. Co.*, 180 Ohio App.3d 107, 135, 2008-Ohio-6837, at ¶ 128. An abuse of discretion occurs when a trial court “makes a decision that is unreasonable, arbitrary, or unconscionable.” *Huntington Natl. Bank v. Burch*, 157 Ohio App.3d 71, 2004-Ohio-2046, at ¶ 14, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶ 70} After reviewing the record, we find no abuse of discretion. Carper was mentioned in 2005, as a person who had knowledge about the case. However, his name and address were not provided, as required. Furthermore, even though the 2005 interrogatories asked for the names of witnesses who would be called at trial, Davis did not list Carper as a potential trial witness. After the action was dismissed and re-filed, Goodwill sent additional interrogatories. Carper was not listed in the new interrogatory answers as a person who had knowledge about the case, and he was not listed as one of the ten potential trial witnesses.

{¶ 71} The discovery cut-off in the case was set for February 4, 2008. A few days before the discovery cut-off, Davis identified eighteen witnesses, including Carper and Greg Davis. In the identification, Davis stated that “Mr. Carper worked for Goodwill and will be testifying about his work experiences and his observations in regards to Goodwill’s treatment of Plaintiff.” Plaintiff’s Identification of Witnesses, p. 1. Davis also stated that “Mr. Davis is Plaintiff’s husband and will be testifying about Plaintiff’s emotional state both during and after her employment with Goodwill.”

Id. at p. 2.

{¶ 72} Goodwill subsequently filed a motion in limine, asking the court to preclude Davis from calling Carper and Greg Davis as witnesses. On the joint pre-trial statement, which was filed shortly thereafter, Davis identified Carper as a trial witness, but did not list her ex-husband. The trial court then heard argument on the matter on the day of trial.

{¶ 73} The argument disclosed that Carper had apparently been a Goodwill employee at some point, but had not worked for Goodwill for five years before trial. Therefore, Goodwill would have had no way to locate him. In arguing for admission of Carper's testimony, Davis did not identify specifically what Carper's testimony would be, and stated only that Carper had just a few things to talk about with regard to his contacts with Greg Davis, who was apparently also a former Goodwill employee. Nothing was said about Carper's contact with Davis or McCain, or about how his testimony would relate to the matters at issue.

{¶ 74} After hearing argument, the trial court excluded both Greg Davis and Carper as witnesses. The trial court held that it was an issue of fairness, and concluded that the witnesses would have been disclosed earlier if their testimony were that important. The court also mistakenly commented that both witnesses had not been listed in the joint pre-trial statement. And finally, the court correctly noted that the witnesses were not named until shortly before the discovery cut-off.

{¶ 75} Although the court erred in stating that Carper was not listed on the joint pre-trial statement, the mistake was slight, and did not indicate that the court acted unreasonably, arbitrarily, or irrationally. Davis also failed to show material

prejudice, because she offered only conclusory statements at the hearing about Carper's proposed testimony. In light of Davis's failure to identify more particularly the nature of the testimony, we have no means of concluding that its exclusion prejudiced Davis. See, e.g., *Mills v. Mills*, Trumbull App. No. 2002-T-0102, 2003-Ohio-6676, at ¶ 49 (noting that an appellate court cannot conclude that the trial court abused its discretion in failing to admit evidence, where the party who offered the evidence fails to demonstrate what the additional evidence would show and its potential effect on the matters at issue).

{¶ 76} The trial court also did not abuse its discretion in refusing to allow Greg Davis to testify; he was not even listed on the pre-trial statement. Furthermore, even if the trial court had erred, no material prejudice occurred, because Mr. Davis would have testified about emotional distress, not about liability issues.

{¶ 77} Davis's Third Assignment of Error is overruled.

V

{¶ 78} All of Davis's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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