[Cite as *Perez v. Theller*, 2011-Ohio-2176.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Rogelio R. Perez	Court of Appeals No. S-10-053
Appellant	Trial Court No. 09 CV 473
v.	
Kimberly Theller, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: May 6, 2011

* * * * *

Charles R. Hall, Jr. and Randy F. Hoffman, for appellant.

Stephen J. Stanford and Lisa L. Nagel, for appellees.

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YARBROUGH, J.

{¶ 1} Appellant, Rogelio R. Perez ("Perez"), appeals from a judgment of the Sandusky County Court of Common Pleas granting summary judgment in favor of appellees Kimberly Theller ("Theller"), Traci McCaudy ("McCaudy"), and the Fremont

City School District ("appellees" or "District"). For the following reasons, we affirm. Perez assigns one error for review:

{¶ 2} "The trial court abused its discretion by granting the Appellees' motion for summary judgment."

{¶ 3} This appeal arises from an employment discrimination lawsuit Perez filed against appellees in April 2009. He has been employed in the District's maintenance department in various capacities since 1967. He is still employed there. Perez has had several supervisors over the years, but his direct supervisor for the last three years has been Theller. She has been employed by the District for 27 years and is presently the Director of Facilities and Operations. Theller is responsible for the District's daily transportation, maintenance and food service operations. There are a total of five employees in the maintenance department, all of whom Theller supervises.

{¶ 4} Perez filed a six-count complaint against Theller, McCaudy and the District alleging (1) race and age discrimination and harassment under R.C. Chapter 4112; (2) wrongful harassment in violation of public policy; (3) negligence; (4) intentional infliction of emotional distress; (5) defamation; and (6) invasion of privacy. Appellees moved for summary judgment on all these claims. In support of their motion, they offered the deposition testimony of Perez and Theller, several affidavits, numerous exhibits, and Perez's written discovery responses. These materials comprise the record herein.

{¶ 5} Perez responded to the motion by dismissing all but the statutory race and age claims, pursuant to Civ.R. 41(A). He then opposed summary judgment on the remaining claims. They alleged that Theller "developed an endless pattern of continued harassment which includes unrealistic work load [sic], written disciplinary reports and suspension from work without just cause." They also charged the District and McCaudy with "refusing to stop" the alleged harassment.

{¶ 6} From Perez's deposition testimony, the trial court found that his race claim was based upon a few unrelated statements, two of them quite remote in time, and his general belief that he was assigned more tasks than others, while also being denied overtime work. He also asserted that of the five maintenance employees Theller supervises, only he is a member of a protected racial class. The court noted that Perez "did not file a grievance or report any specific acts of discrimination to his union steward. Nor were there any more specific allegations of discrimination in [his] deposition."

{¶ 7} The court determined that the age claim was based on nothing more than the fact that Perez held the highest seniority among the maintenance employees. In his deposition, when asked whether Theller or the other four employees had ever made direct comments to him about his age or race, he responded "no." During the period Theller supervised Perez, she disciplined him several times for poor work performance and for violating the District's procedure for requesting vacation leave. The measures used were progressive and included verbal counselings, written warnings and reprimands. The latter items were placed in his personnel file. Theller also suspended Perez twice. The

court's summary judgment ruling, however, dealt only with the reprimands, not the suspensions. In its decision, the court concluded that Perez did not establish a nexus between the reprimands and the allegedly increased workload and any discriminatory intent by Theller. It found that appellees "articulated facts that made it clear that the reprimands were due to [his] failure * * * to perform his work satisfactorily." While Perez considered the reprimands harassment by Theller, the court noted he did not seek any psychological or medical treatment for this perceived harassment. In granting summary judgment, the court ruled that Perez "[had] not produced sufficient evidence" of specific discriminatory acts to meet his burden of showing there were triable issues on his race and age claims.

{¶ 8} On appeal, summary judgments are reviewed de novo by this court. *Zemcik v. LaPine Truck Sales & Equip.* (1998), 124 Ohio App.3d 581, 585. We apply the same standard as the trial court, viewing the facts in a light most favorable to the non-moving party and resolving any doubts in favor of that party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12. We afford no deference to the lower court's ruling, but independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, ¶ 12.

{¶ 9} Perez filed his claims for race and age discrimination and harassment pursuant to R.C. Chapter 4112, Ohio's civil right statute. R.C. 4112.02 declares it an unlawful discriminatory practice for an employer to discharge without just cause or otherwise discriminate against a person on the basis of race or age "with respect to hire,

tenure, terms, conditions, * * * or any matter directly or indirectly related to employment." Id. The Ohio Supreme Court has held that actions brought under this statute are to be construed and decided in light of federal cases interpreting 42 U.S.C. Section 2000e ("Title VII"). See *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St.3d 293, 295; *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192, 196.

{¶ 10} To prevail in an employment discrimination action, the plaintiff must prove discriminatory intent. *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 583. The method of proof for establishing such intent may be direct or indirect. *Mauzy* at 584-587. Here, with respect to the reprimands, suspensions and allegedly "increased workload," Perez admitted having no direct evidence of discrimination. Moreover, he did not pursue this method in opposing summary judgment below. Instead, Perez argues that his evidentiary submissions sufficed to establish the elements of his prima facie case through the second method, thus "[raising] an inference of discriminatory intent indirectly." *Mauzy* at 583.

{¶ 11} In race and age discrimination cases under R.C. 4112.02, the elements of the prima facie case are virtually identical. To establish either claim, the plaintiff must show (1) that he was a member of a statutorily protected class; (2) that he suffered an adverse employment action; (3) that he was qualified for the position; and (4) that he was either replaced by someone outside the protected class or that similarly-situated non-protected employees were treated better or more favorably. See, e.g., *Samadder v. DMF*

of Ohio, Inc., 154 Ohio App.3d 770, 2003-Ohio-5340, ¶ 35 (race); *Hall v. Banc One Mgt. Corp*., 10th Dist. No. 04AP-905, 2006-Ohio-913, ¶ 19 (age). In age-discrimination cases specifically, the fourth element was modified to require a showing that the plaintiff was replaced by, or his discharge allowed the retention of, "a person of a substantially younger age." See *Coryell v. Bank One Trust Co.*, 101 Ohio St.3d 175, 2004-Ohio-723, ¶ 20.

{¶ 12} A prima facie case of race or age discrimination is established by means of the burden-shifting paradigm set forth in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. Ohio courts have adopted and followed this framework. See, e.g., *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 10-14 and *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 504. The burden-shifting occurs in three phases of proof: first, the employee submits evidence to establish the prima-facie elements, as described above. This is not conclusive, however. It merely creates a presumption of discrimination by the employer. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 254. At this point the second phase occurs as the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge or other "adverse employment action." *Burdine* at 254-255; see, also, *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 507. If the employer submits evidence which, if taken as true, would permit the conclusion that a nondiscriminatory reason existed for the adverse action, then the employer's burden is met and the presumption dropped, as if rebutted. *St. Mary's* at 510-511; *Williams* at ¶ 12. In the third

phase, the burden shifts back to the employee to show by a preponderance of the evidence that the employer's articulated reason was but a pretext for the discrimination. *Burdine* at 253. The standard of proof for pretext is more stringent than it appears. The employer's articulated reason cannot be proven to be pretextual "unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's* at 515 (emphasis sic) and *Williams* at ¶ 14; see, also, *Mendlovic v. Life Line Screening of Am., Ltd.*, 173 Ohio App.3d 46, 2007-Ohio-4674, ¶ 32.

{¶ 13} For both discrimination claims at issue here, it is not disputed that Perez, a 62-year-old Hispanic male, falls within the relevant protected class. Neither is it disputed that he is generally "qualified" for employment in the District's maintenance unit. Thus, the first and third elements of his prima facie case were shown. The second and fourth elements, however, will be addressed together, because the salient facts are interrelated and the summary judgment ruling failed to address Perez's suspensions from work.

{¶ 14} Regarding the second element, Perez was not discharged or replaced, so he must identify another "adverse employment action." Not everything in the workplace that makes an employee upset or resentful is necessarily "adverse" or grounds for an actionable claim. *Primes v. Reno* (C.A.6, 1999), 190 F.3d 765, 767. An "adverse employment action" is defined as a "materially adverse change in the terms and conditions of [the plaintiff's] employment." *Hollins v. Atlantic Co.* (C.A.6, 1999), 188 F.3d 652, 662. Examples include "hiring, firing, failing to promote, reassignment with significantly different responsibilities, * * * a demotion evidenced by a decrease in wage

or salary, a less distinguished title, a material loss of benefits," or other circumstances unique to a particular situation. *Tepper v. Potter* (C.A.6, 2007), 505 F.3d 508, 515, quoting, in part, *Ford v. Gen. Motors Corp*. (C.A.6, 2002), 305 F.3d 545, 553 and *Burlington Indus., Inc. v. Ellerth* (1998), 524 U.S. 742, 761. Employment actions that are not materially adverse are *de minimis* and, thus, not actionable. *Ford* at 553.

{¶ 15} Except for the two suspensions here, the other disciplinary measures about which Perez complains simply do not constitute adverse acts by his employer. The numerous meetings or "counselings" with Theller, the purpose of which was to review and correct Perez's work deficiencies or to admonish his disregard of the vacation-request procedure, were not adverse actions. *Handshoe v. Mercy Med. Ctr.* (C.A.6, 2002), 34 Fed.Appx. 441, 446 (receiving counseling and a negative "write-up" is not an adverse action.) The verbal and written warnings and the written reprimands were also not adverse actions.[1] *Weigold v. ABC Appliance Co*. (C.A.6, 2004), 105 Fed.Appx. 702, 708 (verbal reprimand); *Jones v. Butler Metro. Hous.* (C.A.6, 2002), 40 Fed.Appx. 131, 137 (written reprimand). The reprimands, in particular, reflected Theller's adherence to the progressive disciplinary process required by the District's collective bargaining agreement with the maintenance employees. They were but antecedent "steps" under the

[1]For example, the record indicates, and Perez admitted, that he twice submitted inaccurate time cards. He received a warning letter from Theller on that issue. In it she also reiterated the District's process for requesting vacation-leave, overtime and "comp time," emphasized that her pre-approval was needed, and asked for his future compliance with the rules.

contract toward genuinely adverse actions, such as suspension from work or, ultimately, termination.

{¶ 16} The material adversity of a suspension is determined by the context under which it is imposed. Duration and lost income are the critical factors. Suspensions *with pay* are not deemed to be adverse, but if imposed even temporarily without pay, they are. See, respectively, *Jackson v. City of Columbus* (C.A.6, 1999), 194 F.3d 737, 752 (with pay pending investigation, held not adverse) and *McKethan-Jones v. Ohio Dept. of Health* (C.A.6, 2001), 7 Fed.Appx. 475, 479 (five-days without pay held adverse). Also considered adverse are unpaid suspensions in which the employer later fully recompensed the employee's lost wages and any lost benefits. See *White v. Burlington Northern & Sante Fe Ry. Co*. (C.A.6, 2004), 364 F.3d 789, 802-03. Perez's suspensions here qualified as adverse actions. *McKethan-Jones*, supra. He received a three-day suspension without pay on March 9, 2009, and a five-day suspension without pay on January 13, 2010. Thus, on these two matters, the burden shifted to appellees to articulate a nondiscriminatory basis. In doing, so they offered Theller's deposition testimony.

{¶ 17} Theller cited two grounds for imposing the three-day suspension: "inadequate work performance" and "falsifying information" on work sheets. Maintenance staff turned in these sheets to keep Theller updated about the status of assigned tasks. She described an incident in which Perez gave her inaccurate information about an emergency "call button" he was sent to fix in a classroom. Regarding his job

performance, Theller testified that typically Perez failed to complete his assignments in a timely fashion, failed to complete them at all, or failed to do them properly. In the latter two cases, Theller would have to dispatch other employees to complete or correct the work. The cited deficiencies included failing to lock or unlock doors in classroom buildings, not fixing a leaking sink in one building, not fixing a leaking urinal in the boys' lavatory, improperly repairing a leaking toilet in the girls' lavatory, and failing to repair a hole in the wall of a room at the middle school. Theller explained that in a public school crowded with young children, the need to maintain hygienic standards is a priority, so problems in the lavatories must be remedied promptly.

{¶ 18} Perez's five-day suspension resulted from again taking vacation without pre-approval and continued poor work performance. In particular, he had been directed to fix a steam leak in a principal's office during the Christmas break while the school was closed. The leak occurred in an area containing asbestos, which required special handling procedures and for which he had been trained. Not only was this repair not completed before classes resumed, but Theller indicated that Perez, while working on the leak, had dislodged some of the asbestos material. He then left it exposed, prompting complaints from the principal who discovered it on his return. A custodian, who Theller testified would not normally have done this work, had to remediate the material.

{¶ 19} Given the foregoing, we find the District carried its burden of providing legitimate reasons for the two suspensions. Perez does not dispute Theller's dissatisfaction with his job performance or with his disregard of the rules for vacation

leave. Indeed, we note that if an employee is unable to establish that "he was performing his job 'at a level which met his employer's legitimate expectations,'" the claim for discrimination cannot succeed. *McDonald v. Union Camp Corp.* (C.A.6, 1990), 898 F.2d 1155, 1160. This means that if Perez "was not doing what his employer wanted him to do," at the level or quality expected, then "he was not doing his job." *McDonald* at 1160, quoting *Kephart v. Institute of Gas Technology* (C.A.7, 1980), 630 F.2d 1217, 1223. A material factual dispute is not created on an employee's day-to-day job performance "merely by challenging the judgment of his supervisors." Id.

{¶ 20} The pretext phase of *McDonnell Douglas's* burden-shifting framework is a direct analog to the reciprocal burden the nonmovant faces under Civ.R. 56(E). There, the nonmovant is required to oppose summary judgment with particularized evidence indicating that a triable issue exists. *Jackson v. Alert Fire & Safety Equip. Inc.* (1991), 58 Ohio St.3d 48, 52. "[The] motion can be overcome only by specific and provable facts—not mere allegations. Evidence of a *possible* inference is insufficient." *Allore v. Flower Hosp.* (1997), 121 Ohio App.3d 229, 234; *Mendlovic*, supra, at ¶ 32 ("mere conjecture that the employer's stated reason is a pretext * * * is an insufficient basis" for denying summary judgment).

{¶ 21} It was thus Perez's burden to show that the reasons Theller gave for the suspensions were a mask for the discrimination—by showing they were untrue *and* by submitting proof that discrimination was the real motivation. *St. Mary's*, supra; *Williams*, supra. Instead, he attempted to rebut her testimony by citing several unrelated remarks,

reasserting the admitted facts of his age and ethnicity, and paraphrasing the conclusory language from his complaint. None of these sufficed to meet his burden of demonstrating pretext. Perez offered no evidence, for example, that Theller imposed the suspensions on grounds *other than* those expressed in her deposition or that she did not reasonably believe the reasons given warranted those measures. Thus, given this failure of proof during the pretext phase, the trial court did not err in awarding appellees summary judgment.

{¶ 22} Because Perez also alleged an "endless pattern of continued harassment" as part of the discrimination claims, we will address his points of contention on that issue. He claims that Theller assigned him a "heavier" workload than what his fellow maintenance workers received and denied him opportunities for overtime. These complaints ostensibly bear on the fourth element's "better or more favorable treatment" component with respect to the nonminority employees. Perez suggests the reasons *must be* race- and age-based, because he is both the oldest maintenance worker and the only Hispanic, and therefore this suffices to raise an inference of a discriminatory mind-set. Both claims fail, however, since the evidence in the record is either insufficient or nonexistent.

{¶ 23} As an initial matter, during summary judgment below, Perez repeatedly asserted the fact of his membership in two protected classes—presumably to imply disparate impact. However, that he is the oldest of, or the only Hispanic among, five maintenance employees is not enough from which to infer discrimination. To suggest

such an inference, the statistical or class-based evidence must show disparate treatment *in relation to* a specific adverse employment action. *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 384-85. Here, Perez failed to establish any such nexus to the suspensions discussed previously. Regarding the workload complaint, he failed to rebut Theller's testimony that his assignments were not disproportionately greater than those of others, but arguably less. Nor did he demonstrate how or in what manner she favored other workers in assigning specific tasks.

{¶ 24} Denials of overtime only constitute an "adverse" action where they provably result in economic harm to the employee. See *Burlington Indus., Inc. v. Ellerth*, supra, at 762 ("A tangible employment action * * * inflicts direct economic harm.") First, Perez's deposition testimony was quite vague regarding the issue of overtime. He merely stated that he "sometimes" worked overtime hours, while at other times he declined it for personal or family-related reasons, none of which involved Theller. Second, he submitted no evidence that such lost opportunities resulted in "direct economic harm" to him. Finally, Theller's uncontradicted testimony was that during her tenure any overtime had to be pre-approved and that Perez failed to follow the District's written procedure for receiving it. He provided no evidence that fellow workers who received overtime work were somehow favored by being exempted from this requirement.

{¶ 25} Finally, the trial court construed the "harassment" language of the discrimination claims as also alleging a hostile work environment. The gravamen of a

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hostility complaint based on race is that "the harassment had the purpose or effect of unreasonably interfering with the employee's work performance or creating an intimidating, hostile, or offensive work environment." See *Farris v. Port Clinton City School Dist.*, 6th Dist. No. OT-05-041, 2006-Ohio-1864, ¶ 51; *Russell v. Univ. of Toledo* (C.A.6, 2008), 537 F.3d 596, 608. To assess whether a workplace is sufficiently hostile or abusive, courts consider such factors as the severity and frequency of the conduct, and "whether it is physically threatening or humiliating." *Faragher v. City of Boca Raton* (1998), 524 U.S. 775, 787-88.

{¶ 26} Apart from his status as the only minority employee whom Theller supervises, Perez offered three isolated statements as evidence of harassment. Two of the three statements, however, were made decades ago and not by Theller.[2] The third—Theller's alleged remark about her husband's arrest in Mexico—was not shown to be related to any employment action nor was it overtly discriminatory. At best it was ambiguous. Comments parsed randomly from the workplace, even if made, generally do not suffice either as actionable discrimination or to show an environment "permeated" by hostility or ridicule so as to "amount to discriminatory changes in the terms or conditions of employment." See *Russell* at 608 ("isolated comments" too remote in time); *Brewer*, supra, at 384 ("stray remarks" unrelated to "the decision-making process" not actionable);

[2]In his deposition, Perez cited two incidents that occurred 40 years earlier: the first, in which some unnamed worker referred to him as "Mexican Roy" and to another employee, also named Roy, as "white Roy"; the second, in which he was allegedly called a "spic" by another employee.

Faragher at 787 ("mere utterance of ethnic or racial epithet which engenders offensive feelings in the employee" insufficient).

{¶ 27} After reviewing the evidence Perez submitted during summary judgment as instances of the alleged harassment, we find that he failed to satisfy the relevant standard for showing a hostile work environment—i.e., either that Theller's actions "unreasonably interfered with [his] work performance" or that the conduct of the maintenance staff was so hostile, abusive or extreme as to constitute "a [discriminatory] change in the terms or conditions of employment." *Faragher* at 788; *Russell* at 608.

{¶ 28} Accordingly, summary judgment was properly granted on Perez's remaining discrimination and harassment claims under R.C. Chapter 4112. His sole assignment of error is not well-taken.

{¶ 29} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, P.J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE