[Cite as *Stookey v. S. Shore Transp. Co.*, 2012-Ohio-3184.]

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

Ronald Stookey	Court of Appeals No. E-11-044
Appellant	Trial Court No. 2009-CV-0865
v.	
South Shore Transportation Co.	**DECISION AND JUDGMENT**
Appellee	Decided: July 13, 2012

* * * * *

John D. Franklin and Faten A. Eidi, for appellant.

Richrd D. Panza, Paul R. Phillips, and Linda C. Ashar, for appellee.

* * * * *

YARBROUGH, J.

{¶ 1} Appellant, Ronald Stookey, appeals a judgment of the Erie County Court of Common Pleas granting summary judgment on his age discrimination claim in favor of defendant-appellee, South Shore Transportation Company ("South Shore"). Because

appellant has failed to satisfy his burden of proving that South Shore's non-discriminatory reason for terminating him was merely pretext, we affirm.

I. Facts and Procedural Background

{¶ 2} On April 22, 2009, Stookey's employment with South Shore was terminated after he violated the company's drug and alcohol policy. The violation occurred on April 17, 2009, when, after arriving at work, Stookey was asked to submit to a routine random alcohol test at around 10:45 p.m.[1] He completed the test at Firelands Hospital emergency room at 12:26 a.m. The test revealed a blood alcohol content level of 0.039. According to company policy, he was administered a second confirmatory test, conducted about 20 minutes later, which returned a level of 0.034. South Shore's drug and alcohol policy stated that employees who tested between 0.02 and 0.0399 would be relieved of their duties for the following 24 hours. For those employees testing above 0.04, South Shore's employee manual authorized disciplinary action up to and including termination.

{¶ 3} Based on the test results, South Shore terminated Stookey, stating that he had violated the company policy against prohibited conduct by reporting for work at a level of 0.04 or greater. South Shore's managers arrived at this conclusion based on the facts that Stookey was on the job and was asked to submit for testing at 10:45 p.m., he

[1] Stookey had previously been screened for drugs on March 12, 2009. He was asked to submit to both a drug and alcohol test on that date, but did not submit to the alcohol test at that time, stating correctly that DOT regulations only permitted alcohol tests to be conducted directly before, during, or after a safety sensitive function. His supervisor had mistakenly believed that he was going to be working within a half hour of the request when in actuality he would not be at work for another five hours. Thus, the alcohol test on April 22, 2009, was conducted to make up for the missed screening.

tested at a level of 0.039 at 12:26 a.m. (0.001 below the threshold for termination), and the second test administered around 20 minutes later showed a drop of 0.005. The managers reasoned that given the change in blood alcohol content from the first test to the second, Stookey must have been above 0.04 when he arrived at work. South Shore claimed in the alternative that Stookey could have been drinking on the job, which would also subject an employee to possible disciplinary action, including termination.

{¶ 4} Notably, other South Shore employees who had previously failed drug tests were not terminated, but were disciplined in a different manner. For example, Bill Linthicum, 24 years younger than Stookey, was not terminated after testing positive for a controlled substance. Similarly, Randy Gardner, in his early forties, was not terminated after testing positive for marijuana. In addition, three other individuals ages 35-51 were not fired after failing a drug or alcohol test. Stookey was 59 years old at the time of his termination.

{¶ 5} On October 9, 2009, Stookey filed a complaint in the Erie County Court of Common Pleas for age discrimination in violation of R.C. 4112.02. Following discovery, South Shore moved for summary judgment. After considering the parties' arguments, the trial court granted South Shore's motion on May 16, 2011.

{¶ 6} Stookey has timely appealed, assigning the following error:

> The trial court erred by granting Appellee's Motion for Summary Judgment on Stookey's claim of age discrimination under Ohio Revised Code § 4112.02.

II. Standard of Review

{¶ 7} On appeal, a grant of summary judgment is reviewed de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). The moving party may prevail only if (1) there is no genuine issue as to any material fact, (2) he or she is entitled to judgment as a matter of law, and (3) 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, who is entitled to have the evidence construed most strongly in his or her favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

III. Analysis

{¶ 8} This appeal involves a claim for age discrimination under R.C. 4112.02, which makes it unlawful for an employer to discriminate against an employee for employment matters on the basis of age. The trial court granted summary judgment in favor of South Shore based on its finding that Stookey had not met all the requirements for making a prima facie case of age discrimination.

{¶ 9} Absent any direct evidence of discrimination, Ohio has followed the *McDonnell Douglas/Burdine* framework for determining discrimination in employment cases. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992). Initially, the employee must establish a prima facie case of discrimination, a four-part test. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501, 505-506, 575 N.E.2d 439 (1991).

If a prima facie case is established, the facts are examined under a burden-shifting analysis, where the employer must articulate a legitimate, nondiscriminatory reason for the employee's termination. If successful, the employer has rebutted the discrimination claim and the burden shifts back to the employee to show that the articulated reason is merely pretext. *Tex. Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

A. Prima Facie Case

{¶ 10} To make a prima facie showing of employment discrimination, an employee must demonstrate that he or she was (1) a member of a protected class, (2) discharged, (3) qualified for the position, and (4) replaced by a person from outside the protected class. *McDonnell Douglas*, 411 U.S. at 802. In cases like the present, where the claim is one of disparate treatment, the Sixth Circuit has ruled that the fourth prong may also be satisfied by facts that establish the employee was a member of a protected class and he or she was treated differently than similarly situated, non-protected employees engaging in the same or similar conduct. *Mitchell*, 964 F.2d at 583. Because the parties do not dispute satisfaction of the first three prongs, establishment of a prima facie case is determined by a showing that Stookey was similarly situated to other employees who were treated differently.

{¶ 11} To be similarly situated, the individuals with whom the plaintiff seeks to compare his or her treatment must have dealt with the same supervisor, been subjected to the same standards, and engaged in the same conduct without such differentiating or

mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Id.* The Sixth Circuit clarified that the specific factors discussed in *Mitchell* may not be relevant in cases arising under different circumstances and that courts should make an independent determination as to the relevancy of other factors. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998). In *Mitchell*, the court determined that an employee who was fired after withholding sensitive materials and lying to her supervisor was not similarly situated to employees who were not fired for swearing at the supervisor or repeatedly coming to work late. The court stated that the employee did not produce facts sufficient to establish that absenteeism and insubordination were of comparable seriousness to withholding documents and lying to a supervisor. *Mitchell*, 964 F.2d at 584.

{¶ 12} Here, relying on the *Mitchell* factors, Stookey points to multiple comparators who have violated the company's policy against drug use as fulfillment of the fourth prong. In particular, he identifies that Bill Linthicum, 24 years younger than Stookey, failed a drug test, and Randy Gardner, listed as being in his early forties, tested positive for marijuana. Neither of these employees was terminated. Stookey also claims that, like him, both of these individuals were drivers, and both were supervised by Craig Wysocki as the Drug-Free Workplace Coordinator.

{¶ 13} South Shore, on the other hand, argues that the comparators were not similarly situated for three reasons: (1) the comparators violated drug instead of alcohol tests, (2) the comparators did not have the same supervisors, and (3) the comparators

were not held to the same standards. We disagree. First, we see no substantial difference between a failed drug test and a failed alcohol test. South Shore's employee manual supports this proposition, because it treats both drug and alcohol offenders in the same manner. In addition, both types of activities are described as prohibited conduct, and both are grounds for disciplinary action up to and including termination. Second, as it relates to the consequences for a failed drug or alcohol test, we think both Stookey and the comparators had the same supervisor, Craig Wysocki, who was responsible for administering and enforcing violations of the company's drug and alcohol policy. Finally, we find that Stookey and the comparators were subject to the same standards since the same drug and alcohol policy, as written in the employee manual, was applied to both.

{¶ 14} In *Burdine*, the U.S. Supreme Court commented that, "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." The prima facie case merely serves to raise a rebuttable presumption of discrimination by "eliminat[ing] the most common nondiscriminatory reasons for the [employer's treatment of the plaintiff]". *Burdine*, 450 U.S. at 253. In this light, we find that Stookey is similarly situated to the other company drivers who were not terminated for violating the drug and alcohol policy. Accordingly, Stookey has met the requirements for establishing a prima facie case, and has raised a rebuttable presumption of discrimination.

B. Burden-Shifting Analysis

{¶ 15} Once the employee has made a prima facie case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's termination. *McDonnell Douglas*, 411 U.S. at 802. South Shore's articulation of its nondiscriminatory reason must be clearly set forth through the introduction of admissible evidence. *Burdine*, 450 U.S. at 255. If the employer carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds. *Id.* It is then upon the employee to persuade the court that the employer's proffered explanation is merely pretext. *McDonnell Douglas*, 411 U.S. at 804-805.

{¶ 16} Here, South Shore's managers stated in an affidavit that they had made the decision to apply the drug and alcohol policy more strictly. Further, in his deposition, Craig Wysocki stated that over his career at South Shore, enforcement of the policy had become lenient. After discussing the matter with manager Cole Hanley, the managers agreed that the policy needed to be enforced more strictly. Therefore, because South Shore need not go beyond proffering its legitimate, nondiscriminatory reason, it has successfully rebutted the presumption of discrimination. *Burdine*, 450 U.S. at 254.

{¶ 17} The burden now returns to Stookey to demonstrate that the proffered reason for the employment decision is not the true reason. He may satisfy this burden either directly, by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is

unworthy of credence. *Burdine*, 450 U.S. at 256. Here, Stookey attempts to satisfy this burden by pointing to three facts.

{¶ 18} First, Stookey relies on the fact that South Shore's drug and alcohol policy permitted termination only after a positive alcohol test of 0.04 or higher. He argues that the fact that he was fired after testing at a level of 0.039, instead of 0.04, is evidence of pretext. However, to demonstrate pretext, Stookey must present evidence creating a material dispute as to the employer's honest belief in its proffered legitimate, nondiscriminatory reason. *Wigglesworth v. Mettler Toledo Internatl., Inc.*, 10th Dist. No. 09AP-411, 2010-Ohio-1019, ¶ 19. Stookey has not offered any such evidence. "[I]n order to discredit the employer's proffered reason, a plaintiff cannot simply show that the employer's decision was wrong or mistaken, 'since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.'" *Kundtz v. AT&T Solutions, Inc.*, 10th Dist. No. 05AP-1045, 2007-Ohio-1462, ¶ 37. Merely pointing out that he was terminated after the employer made a determination that he was over the allowable limit does not create such a material dispute.

{¶ 19} Second, Stookey offers an email from Cole Hanley to Wysocki, which conveyed the need to test Stookey for alcohol. The email states, in relevant part, "[Stookey] still owes us a negative random [alcohol test] * * * Today is St. Patty's day…party! It would be interesting to have him tested at 10:00 [p.m.] or whenever he gets to work tonight. He probably isn't thinking that he still has a test coming." Here,

Stookey attempts to point out that the email is proof of a discriminatory animus, arguing that since the email exposes a concerted plan to test him, it is more likely than not evidence of age discrimination. However, he fails to articulate how the motivation to test him is evidence that the harsher enforcement policy was mere pretext.

{¶ 20} The third fact Stookey points to is that, although purportedly decided months earlier, South Shore's decision to enforce the drug and alcohol policy more strictly was discovered only after he was fired. However, we do not find convincing the fact that the stricter enforcement was not discovered until after Stookey's termination. Stookey, along with all the other employees at South Shore, already knew what the policy was. Neither the standard relating to the prohibited level of alcohol content, nor the potential consequences for its violation changed. Further, the possibility that Stookey may have been singled out as the first person terminated under a stricter enforcement of the policy does not raise an issue about whether the decision to more strictly enforce the policy was indeed made.

{¶ 21} We do not find the facts presented by Stookey as proof of pretext to be persuasive. "[T]he ultimate burden borne by a plaintiff in an age discrimination action is that of proving 'he was discharged because of his age.'" *Kohmescher*, 61 Ohio St.3d at 505 (quoting *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 (6th Cir.1975)). On the whole, Stookey has failed to discredit the legitimate, nondiscriminatory reason for his termination offered by South Shore. Without such evidence, we must conclude that the

trial court did not err in granting summary judgment to South Shore on Stookey's claim. Accordingly, appellant's assignment of error is not well-taken.

IV. Conclusion

{¶ 22} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE