

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

Clara C. Gaither

Court of Appeals No. L-12-1359

Appellant

Trial Court No. CI201102002

v.

Toledo Area Regional Transit Authority

DECISION AND JUDGMENT

Appellee

Decided: July 19, 2013

* * * * *

Thomas A. Sobecki, for appellant.

Janine T. Avila, Tammy G. Lavalette and Joan H. Rife,
for appellee.

* * * * *

JENSEN, J.

{¶ 1} Plaintiff-appellant, Clara C. Gaither, timely appeals the November 29, 2012 judgment of the Lucas County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Toledo Area Regional Transit Authority (“TARTA”). The issues before the court are (1) whether the trial court erred in holding that appellant failed

to establish a prima facie case of retaliation, and (2) whether the trial court erred in holding that appellant failed to establish that TARTA's asserted non-retaliatory reasons for terminating appellant were pretextual. For the reasons that follow, we find appellant's assignments of error not well-taken and affirm the trial court's dismissal of appellant's claim.

A. Factual Background

{¶ 2} Clara C. Gaither was employed by TARTA as a coach operator (i.e., a bus driver) from April 10, 2002, until her termination on June 20, 2008. Gaither claims that she was terminated in retaliation for filing complaints of race and gender discrimination, the last of which she lodged on June 12, 2008.¹ TARTA denies that Gaither's termination was retaliatory or discriminatory. It claims that it discharged Gaither because she committed her fifth route deviation in violation of TARTA's policies.

{¶ 3} Gaither had a lengthy disciplinary history that included chronic attendance problems, multiple accidents (one of which she failed to report), and inaccurate reporting of traffic violations. She had been suspended a number of times. Pertinent to this case, she also had been disciplined on several occasions for driving her bus off route or off schedule.

{¶ 4} According to her job description as a TARTA bus driver, Gaither was required to arrive at work on time and to meet all time points on her route. "Meeting all

¹ In addition to her retaliation claim, Gaither originally asserted claims of gender and race discrimination, but those claims were dismissed by the trial court. Gaither does not appeal the dismissal of her discrimination claims.

time points” means that she was required to drive her bus according to schedule and to reach each stop at the appropriate time. Before beginning her route, Gaither was expected to pick up a “time board” at the station office. The time board indicates where and when the driver is supposed to be at certain time points during the bus route. Bus drivers are prohibited from deviating from their route without prior authorization from the dispatcher. Gaither was trained on the use of the time boards and understood that route deviation was grounds for termination.

{¶ 5} Despite understanding TARTA’s policies with respect to meeting time points and driving the designated bus route, Gaither had a history of violations. On August 5, 2002, she was counseled about operating her route ahead of schedule. On May 19, 2005, she was counseled again about operating off schedule and off route. She was told that future incidents would result in more severe discipline, up to and including termination. On June 26, 2007, Gaither received a written warning for operating off route and off schedule and was told that further instances would result in more severe discipline. And on July 30, 2007, Gaither was suspended for driving off route and missing a time point. TARTA maintained documentation of these incidents.

{¶ 6} On June 18 or June 19, 2008, while Gaither was operating a route for another driver who was on vacation, TARTA received a complaint from a customer indicating that Gaither’s bus had never arrived to pick up the customer. TARTA investigated and found that Gaither had failed to operate her bus according to the proper time board. Gaither said that she had followed the same route all week but had checked

the time board on Monday only, and possibly Tuesday. Because she failed to check the time board on Wednesday, Thursday, and Friday, she failed to recognize that the schedule had been amended to correct an error in the schedule. She had been driving the wrong route most of the week and had been missing numerous time points.

{¶ 7} Jerry Austin, TARTA's then-Superintendent of Transportation, reviewed Gaither's file and discovered her lengthy disciplinary history, including her four previous route deviations and her unreported accident. He called a meeting with Gaither on June 20, 2008. Gaither testified that when she was called to speak with Austin, she did not know the reason. She had submitted a complaint of discrimination on June 12, 2008, but Austin informed her that they were not there to discuss her complaint.

{¶ 8} Gaither's complaint originated from a May 15, 2008 incident in which she was assigned a bus that would not start. She believed that a better bus would have been assigned to her if she were white or was driving a route in a predominantly white area. Gaither complained to TARTA's station manager. She perceived that during their discussion, the station manager had talked to her as though she were a child and had "made an unprofessional gesture with her head." Ultimately, one of the mechanics was able to get Gaither's bus started. She was still unhappy about being assigned what she believed to be an inferior bus, and she felt slighted because after repairing the bus, the mechanic did not bring the bus to the front of the garage, thus requiring her to walk to the back of the garage to get it. She claimed also that as she pulled the bus out of the garage,

several TARTA mechanics were congregating in front of the garage “with their clansmen demeanor of victory.”

{¶ 9} The June 12, 2008 complaint was not the first that Gaither had filed. Gaither had made claims of discrimination or harassment in the past. In particular, she believed that TARTA’s benefits administrator, Lisa Leu, had harassed her by requiring her to submit to an examination by a TARTA physician in connection with sick leave she took in the Fall of 2004; by requiring her to obtain a work release after a sick leave in August of 2005; and by requesting completed medical certifications relating to a request for FMLA leave in March of 2006. Gaither claimed that Leu had scrutinized her leave requests, had used an arrogant, demeaning tone in addressing her, had exhibited harassment in her “timing, her approach, her voice tone, and her overall mannerism,” and had abused her power. In November of 2005 Gaither filed a charge with the Ohio Civil Rights Commission (“OCRC”) regarding Leu’s handling of her sick leave, but she withdrew that charge. She also complained to TARTA that in April of 2006, TARTA’s Equal Employment Opportunity officer, Craig Bruns, on one occasion, called her a “gal,” which Gaither interpreted to have undertones of sexual and racial discrimination. In addition, Gaither claimed that TARTA subjected her to unwarranted discipline and sought to “blemish” her record.

{¶ 10} When Austin met with Gaither on June 20, 2008, he acknowledged that he had received her June 12, 2008 complaint, but he told her that that was not the purpose of

the meeting. He explained that he had called the meeting to discuss her route deviation. He informed her that he had decided to terminate her.

{¶ 11} Gaither filed suit almost three years later on March 1, 2011, alleging that TARTA harassed her and discriminated against her based on sex and race, and that it terminated her employment in retaliation for filing claims of harassment and discrimination. After conducting extensive discovery, including a number of depositions, TARTA moved for summary judgment on all of Gaither's claims. The trial court granted TARTA's motion. Gaither filed this appeal as to the dismissal of her retaliation claim only, and assigned the following errors:

I. The trial court erred in holding that appellant had failed to establish a *prima facie* case of retaliation.

II. The trial court erred in holding that appellant had failed to establish that appellee TARTA's asserted nonretaliatory reasons for terminating appellant were pretextual.

B. Standard of Review

{¶ 12} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 13} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A “material” fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

C. Analysis

{¶ 14} Gaither's complaint alleges violations of R.C. 4112.99. Ohio courts often look to federal case law interpreting analogous federal statutes when considering employment discrimination claims. *Coryell v. Bank One Trust Co.*, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, ¶ 15.

{¶ 15} In the absence of direct evidence, to establish a prima facie case of retaliation, an employee must show that (1) she engaged in protected activity; (2) her employer knew she engaged in protected activity; (3) her employer subsequently took an adverse employment action; and (4) the adverse employment action causally related to the protected activity. *Ladd v. Grand Trunk W. R.R., Inc.*, 552 F.3d 495, 502 (6th Cir.2009). Upon establishing "a prima facie case, the burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions." *Morris v. Oldham Cty. Fiscal Ct.*, 201 F.3d 784, 793 (6th Cir.2000), quoting *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed2d 668 (1973). At that point, the burden shifts again to the employee to demonstrate that the "proffered reason was not the true reason for the employment decision." *Id.*, quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

{¶ 16} The trial court concluded that Gaither failed to establish a prima facie case because to establish causal relation, she relied only on the fact that her termination occurred eight days after submitting her complaint. The trial court held that this was insufficient. The trial court further concluded that Gaither had failed to create a genuine

issue of material fact that TARTA's asserted nondiscriminatory reason for terminating her was a pretext for retaliatory conduct. Gaither appeals both of these conclusions.

I. The trial court erred in holding that appellant had failed to establish a *prima facie* case of retaliation.

{¶ 17} For purposes of its motion for summary judgment, TARTA did not challenge the first three elements of Gaither's claim; it challenged only the fourth element—causal relation. To establish a causal connection, a plaintiff must proffer evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse employment action. *Dixon v. Gonzales*, 481 F.3d 324, 333 (6th Cir.2007). (Citations omitted.)

{¶ 18} Gaither claims that the temporal proximity between her filing of the June 12, 2008 complaint and her June 20, 2008 termination itself raises the inference that her engagement in protected activity was the likely reason for her termination. She conceded at her deposition that “the date and time * * * of the complaint” is the only evidence upon which she bases her retaliation claim. TARTA argues, and the trial court agreed, that in this case, temporal proximity alone was not sufficient, thus Gaither failed to establish a *prima facie* case of retaliatory discharge.

{¶ 19} In its decision, the trial court, citing *Cleveland v. S. Disposal Waste Connections*, 491 Fed.Appx. 698 (6th Cir.2012), observed that “the Sixth Circuit has recently reiterated that temporal proximity alone may not support an inference of retaliation absent other compelling evidence.” However, Gaither argues that under

Mickey v. Zeidler Tool and Die Co., 516 F.3d 516 (6th Cir.2008), the Sixth Circuit has made clear that temporal proximity alone may support an inference of causal connection.

{¶ 20} The Sixth Circuit itself has recognized that it lacks a uniform approach on whether causal connection can be established solely on the basis of temporal proximity. *Krumheuer v. GAB Robins N. Am.*, 484 Fed.Appx. 1, 5 (6th Cir.2012). Certainly, *Mickey* did hold that in *some* instances, temporal proximity alone may suffice to establish an inference of causal relation. In *Mickey*, the employer terminated the employee the very day it learned that the employee had filed an EEOC charge. The Sixth Circuit found that the timing of the termination raised an inference that it was in retaliation for the employee having filed his charge. The court reasoned:

[I]f an employer immediately retaliates against an employee upon learning of his protected activity, the employee would be unable to couple temporal proximity with any such other evidence of retaliation because the two actions happened consecutively, and little other than the protected activity could motivate the retaliation. Thus, employers who retaliate swiftly and immediately upon learning of protected activity would ironically have a stronger defense than those who delay in taking adverse retaliatory action.

However, since *Mickey*, the Sixth Circuit has recognized that it is under rare circumstances that an inference of causal connection may be established by temporal

proximity only. In *Vereecke v. Huron Valley School Dist.*, 609 F.3d 392, 401 (6th Cir.2010), the court explained:

In analyzing the facts in temporal proximity cases, we have always looked at the totality of the circumstances to determine whether an inference of retaliatory motive could be drawn. At this point, our case law can fairly be characterized as recognizing the possibility that, on a particular set of facts, extremely close temporal proximity could permit an inference of retaliatory motive, but also recognizing that often evidence in addition to temporal proximity is required to permit the inference. Indeed, we have rarely found a retaliatory motive based only on temporal proximity. (Citations omitted.)

Even more recently, in *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 471-472 (6th Cir.2012), the Sixth Circuit again cautioned against inferring causation based on temporal proximity alone. *But see Taylor v. Geithner*, 703 F.3d 328, 339 (6th Cir.2013) (“If there is a very close temporal proximity, then no other evidence is needed.”).

{¶ 21} Despite the lack of uniformity in the Sixth Circuit cases, this district has taken the position that “temporal proximity does not support a claim of retaliation absent other compelling evidence.” *Coch v. Gem Indus.*, 6th Dist. Lucas No. L-04-1357, 2005-Ohio-3045, ¶ 40, citing *Boggs v. The Scotts Co.*, 10th Dist. Franklin No. 04AP-425, 2005-Ohio-1264, ¶ 26 (involving lay-off occurring just days after employee engaged in allegedly protected activity). Because Gaither relies solely on the timing between her

June 12, 2008 complaint and her June 20, 2008 termination, we find that she has failed to establish causal connection, and has, therefore, failed to make a prima facie case of retaliatory discharge.

{¶ 22} Gaither's first assignment of error is not well-taken.

II. The trial court erred in holding that appellant had failed to establish that appellee TARTA's asserted nonretaliatory reasons for terminating appellant were pretextual.

{¶ 23} In addition to finding that Gaither failed to make a prima facie showing of retaliatory discharge, the trial court also found that Gaither failed to rebut TARTA's asserted legitimate, non-retaliatory reason for terminating her. The trial court observed that TARTA had provided an "overwhelming amount of evidence" substantiating its decision to terminate Gaither and that Gaither failed to show that TARTA's asserted reasons were pretextual. We agree with the trial court's conclusion.

{¶ 24} Gaither does not dispute that she failed to meet her time points on the dates in question. She admitted at her deposition that she knew that she was supposed to check the time board before starting her route, yet she did not do this on Wednesday, Thursday, and Friday because she thought she had memorized the route. She knew that failing to meet time points was a terminable offense. She had been suspended for this before and was clearly told that further offenses would result in more serious discipline, including termination.

{¶ 25} Also, as described above, Gaither had a long disciplinary history. She was disciplined approximately 15 times for attendance violations. She provided inaccurate information about prior traffic citations. She was involved in a number of accidents and failed to report an accident. She served an 11-day suspension for failure to report a chargeable accident, reporting false information to a supervisor, reporting false information over the TARTA radio system, falsifying a TARTA accident report, crossing railroad tracks without stopping, operating a TARTA vehicle on private property, and unauthorized route deviation.

{¶ 26} On the prior occasions that she was disciplined for being off route or off schedule, Gaither was warned that future violations would result in more serious discipline up to and including termination. Her final violation was not a simple matter of route confusion—Gaither admitted that she violated TARTA policy by failing to check the time board. TARTA asserted legitimate, non-retaliatory reasons for terminating Gaither. The burden, therefore, shifts to Gaither to show that TARTA's reasons were pretextual.

{¶ 27} An employee can show pretext by showing: (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that the proffered reasons were insufficient to motivate the employer's action. *Chen v. Dow Chemical Co.*, 580 F.3d 394, 400 (6th Cir.2009), citing *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 460 (6th Cir.2004). The employee must produce sufficient evidence from which a jury could reasonably reject the employer's

explanation for its action. *Id.* (Citations omitted.) “When an employer reasonably and honestly relies on particularized facts in making an employment decision, it is entitled to summary judgment on pretext even if its conclusion is later shown to be ‘mistaken, foolish, trivial, or baseless.’” *Id.*, citing *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 713-715 (6th Cir.2007).

{¶ 28} The first way of showing pretext requires evidence that the proffered bases for the plaintiff’s discharge are “factually false.” *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir.1994), *overruled on other grounds*. The third way ordinarily requires evidence that other employees, particularly employees not in the protected class, engaged in substantially identical conduct but were not fired. *Id.* And under the second way, the employee admits the factual basis underlying the employer’s proffered explanation and admits that such conduct *could* motivate dismissal, however, the employee argues that the sheer weight of the circumstantial evidence of discrimination makes it “more likely than not” that the employer’s explanation was pretextual. *Id.* Gaither has failed to show pretext in any of these three ways.

{¶ 29} Gaither’s evidence of pretext was that TARTA failed to clear up confusion about how to read the time boards, TARTA typically only counseled employees for route deviations, and TARTA had never fired anyone for route deviation. First, Gaither did not claim that she was confused or unable to read the time board—she simply failed to look at the time board after Tuesday of the week in question. Second, she provided names of people that were granted sick leave, assigned a better bus or a better route, or

who she believed to have driven off-route before, but she failed to show that any of these individuals were similarly situated employees. The Sixth Circuit has explained:

[T]o be deemed “similarly situated” in the disciplinary context, “the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have 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.” *Russell v. Univ. of Toledo*, 537 F.3d 596, 607 (6th Cir.2008), quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992).

Despite Gaither’s claims that TARTA usually counseled, but did not terminate, employees for route deviations, she identified no employees who were treated more favorably who had disciplinary histories as extensive as hers, with so many prior instances of route deviations, and with route deviations caused by failing to check the time boards as required by policy. She also offered very little in the way of circumstantial evidence of discrimination. Her “evidence” consists primarily of her interpretation of people’s demeanors, tones of voice, and mannerisms. Having presented insufficient evidence to rebut TARTA’s asserted legitimate, non-retaliatory explanations for terminating her, Gaither has failed to create a genuine issue of material fact that TARTA’s reasons were pretextual.

{¶ 30} Gaither’s second assignment of error is not well-taken.

D. Conclusion

{¶ 31} The trial court properly held that appellant failed to establish a prima facie case of retaliation and correctly determined that she failed to create a genuine issue of material fact that appellee's asserted non-retaliatory reasons for terminating her were pretextual. We, therefore, affirm the November 29, 2012 judgment of the Lucas County Court of Common Pleas. The costs of this appeal are assessed to appellant 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, P.J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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