[Cite as *Montague v. Oakwood Club, Inc.*, 2003-Ohio-876.]

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81370

WILLIAM MONTAGUE Plaintiff-Appellant vs. THE OAKWOOD CLUB, INC., et al. Defendants-Appellees	:	JOURNAL ENTRY AND OPINION

DATE OF ANNOUNCEMENT OF DECISION:	FEBRUARY 27, 2003
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. 427080
JUDGMENT:	Affirmed.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For Plaintiff-Appellant:	TIMOTHY J. GRENDELL GRENDELL & SIMON CO., L.P.A. 6640 Harris Road Broadview Heights, Ohio 44147 LAURYN M. YELSKY YELSKY & LONARDO 526 E. Superior Avenue 1050 Leader Building Cleveland, Ohio 44114
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PATRICIA ANN BLACKMON, P.J.:

{¶1} William Montague appeals the decision of the Cuyahoga County Common Pleas Court granting summary judgment in favor of The Oakwood Club, Inc. (Oakwood) on his claims of age discrimination, retaliation, tortious violation of public policy, and intentional infliction of emotional distress. On appeal, he assigns the following error for our review:

{¶2} "The trial court erroneously decided Plaintiff's claim of age discrimination based on summary judgment while genuine issues of material fact exist.

{¶3} "The trial court erroneously decided plaintiff's claim of retaliation based on summary judgment while genuine issues of material fact exist.

{¶4} "The trial court erroneously decided plaintiff's claim of age discrimination based on summary judgment while genuine issues of material fact exist."

{¶5} After reviewing the facts and the pertinent law, we affirm the decision of the trial court. The apposite facts follow.

{¶6} Montague is 54 years old and commenced working at Oakwood in 1973 and continued to work there for 27 years before his employment was terminated. During the course of his employment Montague received several promotions and eventually became the superintendent of the golf course. He was paid in excess of $90,000, plus housing, benefits, and other perks. Additionally, he

was one of five superintendents worldwide who achieved the Master Greenskeeper Certificate as sanctioned by the British and International Golf Greenskeepers Association.

{¶7} The basis for the underlying lawsuit stems from an incident on or about July 17, 2000. After lunch that day, Montague and Dick Lojewski, a fellow employee, were walking to the shop area. Montague had a small ball peen hammer in his hand. Montague struck Timothy O'Linn, also a fellow employee, on his hard hat as O'Linn placed the hard hat on his head. Montague claims he was playing the game common to the workers known as "flinching."[1] He further claimed he did so in a joking manner and intended no harm.

{¶8} O'Linn testified via deposition that immediately after the incident he continued to work. He further stated he informed James Lee, assistant superintendent, of the incident. He asked Lee for Tylenol. O'Linn did not miss work but did seek treatment on July 19, 2000. He was diagnosed with a concussion.[2]

{¶9} After review, a decision was made to terminate Montague's employment based on the incident with O'Linn. In an attempt to amicably terminate the relationship, Oakwood offered Montague a severance package which included three months of salary, health benefits, and housing; it also offered not to contest his

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[1]In the game of "flinch," an individual punches another individual in the arm if they move or flinch. O'Linn admits he invented the game.

[2]O'Linn maintains the incident occurred on July 18, 2000; Montague, however, maintains it occurred on July 17, 2000. The date of the incident is not crucial to Montague's age discrimination claim.

entitlement to receive unemployment benefits should he agree to the offer. Montague declined the offer and instead applied for unemployment benefits, which Oakwood contested. Montague was eventually awarded benefits.

{¶10} Five months after Montague was fired, Oakwood hired Travis Livingston. Livingston is approximately thirty years old. He was hired at an annual salary of $65,000 with no housing benefit. He is not a Master Greenskeeper.

{¶11} Following these events, Montague filed a lawsuit against Oakwood and Claudio Caviglia, general manager, claiming age discrimination, retaliation, tortious violation of public policy, and intentional infliction of emotional distress. Oakwood and Caviglia filed a joint motion for summary judgment, which the court granted. This timely appeal followed.

{¶12} This court reviews the lower court's summary judgment de novo.[3] An appellate court applies the same test as a trial court, as set forth in Civ.R. 56(C), which specifically provides that before summary judgment may be granted it must be determined that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to

[3]*Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

that party.[4]

{¶13} Moreover, it is well-settled that the party seeking summary judgment bears the burden of showing that no genuine issue of material fact exists for trial.[5] Doubts must be resolved in favor of the nonmoving party.[6]

{¶14} In accordance with Civ.R. 56(E), "a nonmovant may not rest on the mere allegations or denials of his pleading but must set forth specific facts showing there is a genuine issue for trial."[7] The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial.[8]

{¶15} In his first assigned error, Montague argues the trial court erred in granting summary judgment on his claim of age discrimination. It is an unlawful discriminatory practice "[f]or any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or

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[4]*Temple v. Wean United Inc.* (1977), 50 Ohio St.2d 317, 327.

[5] *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.

[6]*Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359.

[7]*Chaney v. Clark Cty. Agricultural Soc.* (1993), 90 Ohio App.3d 421, 424.

[8]*Dresher*, supra; *Celotex*, supra at 322.

indirectly related to employment."[9]

{¶16} Further, "No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee."[10]

{¶17} We generally apply federal case law interpreting Title VII of the Civil Rights Act of 1964 to cases involving alleged violations of R.C. Chapter 4112.[11] In *McDonnell Douglas Corp. v. Green*,[12] the United States Supreme Court "established a flexible formula to ferret out impermissible discrimination in the hiring, firing, promoting, and demoting of employees."[13] We adopt this formula to fit the specific circumstances of each case.[14]

{¶18} Both parties concede Montague fails to produce direct evidence of age discrimination. He does, however, establish

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[9]R.C. 4112.02(A).

[10]R.C. 4112.14(A).

[11]*Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192.

[12](1973) 411 U.S. 792.

[13]*Plumbers & Steamfitters Joint Apprenticeship Commt.*, supra at 197.

[14]*McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, n.13 ("The facts necessarily will vary in [employment discrimination] cases, and the specification above the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

a prima facie case because he is a member of a statutorily protected class; he was fired; he was qualified for the position, and his replacement does not belong to the protected class.[15] If the plaintiff establishes a prima facie case of discrimination, a presumption of unlawful discrimination arises.[16] The burden then shifts to the employer to set forth a legitimate, nondiscriminatory reason for discharging the plaintiff.[17]

{¶19} Oakwood maintains the basis for Montague's discharge was the incident with O'Linn. Montague, a supervisor, struck a subordinate employee on the head with a ball peen hammer. During the proceedings below, Montague never claimed the incident occurred during a round of "flinch." In fact, when deposed he stated he never played "flinch."[18] Further, when asked why he was fired, he agreed it was because of the O'Linn incident.[19] Additionally, Rule 55 in the employee handbook defines rules of conduct. It specifically prohibits "threat of bodily harm, fighting, physical altercation or disorderly conduct on Club property." Montague was provided a copy of the handbook.

{¶20} Montague claims Oakwood's proffered basis for

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[15]*Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146.

[16]*Sheridan v. Drs. Alperin & Ruch, D.D.S., Inc.* (Dec. 20, 1997), Cuyahoga App. No. 70813, citing *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 506.

[17]*Sheridan* at 6; *McDonnell-Douglas Corp.* at 802.

[18]Monatgue depo. at 134.

[19]Id. at 153.

termination is pretextual because he was treated differently than similarly situated employees who engaged in "behavior much more dangerous than Plaintiff's."[20] While a legal basis exists for finding discrimination based on dissimilar treatment of employees, such other employees must be similarly situated to the plaintiff in all respects.[21] To establish the proper comparison, the plaintiff must demonstrate he and the other employees "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."[22]

{¶21} In support of his claim, Montague cites to the following examples:

{¶22} "A General Manager, Mr. Arpagas threw a butcher knife in a fit of rage. The hurled knife struck a waitress, Arlene (last name unknown), and inflicted serious and permanent injury to her by cutting her tendon. Mr. Arpagas was *not* terminated over this incident.

{¶23} "A tennis-pro Felix (last name unknown) left a golf cart unattended with the key in the ignition of the cart. Subsequently, a child who was a guest of the club defendant, entered the cart and drove it into a building. The child was

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[20]Complaint, par. 22.

[21]*Mitchell v. Toledo Hosp.* (C.A.6, 1992), 964 F.2d 577.

[22]Id.

injured and the tennis-pro was *not* discharged over this incident.

{¶24} "Two employees of the club, Joe and John Eliser, became embattled in a fist fight on club property. These employees both suffered physical injuries. *Neither employee was terminated* because of this fistfight on club property."[23]

{¶25} This claim fails because (1) Caviglia, Montague's supervisor, had no involvement with the above incidents, (2) Montague failed to offer evidence that a younger employee engaged in similar conduct to his, (3) he did not witness any of these incidents, (4) he did not know the ages of any of the individuals involved, (5) he did not know if they were reprimanded, and (6) he was unsure if the governing board members were the same. Therefore, we conclude Montague failed to prove Oakwood's basis for his termination was pretextual and we overruled this assigned error.

{¶26} In his second assigned error, Montague argues Oakwood retaliated against him when he retained counsel by opposing his request for unemployment compensation. We disagree.

{¶27} To prove retaliation, an employee must establish he was engaged in a protected activity, the activity was known to the employer, the employer took adverse employment action against the employee and stated reasons that were not the true retaliatory reason, and a causal connection existed between the protected

[23]Complaint at 4; emphasis added in the original.

activity and the adverse employment action.[24]

{¶28} In support of his claim, Montague relies on R.C. 4141.32(A), which invalidates an agreement by an employee that waives his right to benefits. This is an inappropriate application of the statute. Oakwood did not ask Montague to forego his right to unemployment benefits; rather, Oakwood was willing to relinquish its statutory right to contest the application for such benefits. In any event, Montague fails to meet the elements to establish a claim for retaliation. The protected activity Montague claims he was engaged in was retaining counsel regarding the severance agreement. The failure of an employer to voluntarily pay severance pay or benefits to an employee who refuses to sign a severance agreement does not constitute adverse employment action as a matter of law.[25] Accordingly, Montague failed to state a claim for retaliation and his second assigned error is overruled.

{¶29} We now turn to whether Oakwood violated public policy in terminating Montague's employment. A claim for wrongful discharge in violation of public policy exists if the plaintiff can demonstrate (1) the existence of a clear public policy manifested in a state or federal constitution, statute or administrative regulation, or in common law; (2) the employee's termination would jeopardize that public policy; (3) the employee's termination was

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[24]*Mack v. B.F. Goodrich Co.* (1997), 121 Ohio App.3d 99, 104.

[25]*Many v. Erieview Joint Venture* (June 7, 2001), Cuyahoga App. No. 78281 at 8. See also *Jackson v. Lyons Falls Pulp & Paper, Inc.* (N.D.N.Y. 1994), 865 F.Supp. 87, 95.

motivated by conduct related to that public policy; and (4) the employer lacked an overriding legitimate business justification.[26]

{¶30} Although the public policy against terminating employees based upon age-related discrimination is manifest in R.C. Chapter 4112, Montague did not establish any other element of the tort. The record does not demonstrate that Montague's termination would jeopardize public policy disfavoring age-related discrimination or that Oakwood's underlying motivation was related to such public policy. Finally, Montague admitted he was terminated because he struck O'Linn on the head with a ball peen hammer, an activity expressly prohibited in the employee handbook. Accordingly, Montague failed to establish that Oakwood violated public policy.

{¶31} For the foregoing reasons, we conclude the trial court did not err in granting Oakwood's motion for summary judgment. Accordingly, the third assigned error is without merit.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[26] *Collins v. Rizkana* (1995), 73 Ohio St.3d 65.

ANN DYKE, J., and

TIMOTHY E. MCMONAGLE, J., CONCUR.

PATRICIA ANN BLACKMON
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).