[Cite as *Blake v. Beachwood City Schools Bd. of Edn.*, 2011-Ohio-1099.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95295

TIMOTHY BLAKE

PLAINTIFF-APPELLANT

vs.

BEACHWOOD CITY SCHOOLS BOARD OF EDUCATION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-689707

BEFORE: Celebrezze, P.J., Jones, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 10, 2011

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FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellant, Timothy Blake, seeks reversal of summary judgment in favor of appellee, the Beachwood City Schools Board of Education ("Beachwood" or the "Board"), terminating appellant's employment discrimination claim. After a thorough review of the record and pertinent law, we affirm the grant of summary judgment.

{¶ 2} Appellant worked for Beachwood for more than 20 years. He started his career as a cleaner and worked his way up to head custodian of Hilltop Elementary School ("Hilltop") in Beachwood, Ohio. Appellant worked the day shift and oversaw the evening custodial staff members, custodian Jay Schachtel and cleaner Tara Ming. The evening cleaning duties were divided between these two with Schachtel cleaning one-half

of the school and Ming cleaning the other. Schachtel approached appellant sometime very early in 2008 and complained that he thought the cleaning duties were divided unfairly. Appellant advised him that he would look into it.

{¶ 3} Approximately one month later, in February 2008, Schachtel went to appellant's supervisor, Jeff Smith, building and grounds supervisor for Beachwood. Schachtel complained about the uneven cleaning duties. Smith advised him to talk to appellant, his supervisor, to sort out the situation. Appellant had determined at this point to rotate the assignments each month, but wanted to wait until the end of the school year to implement the policy. He did not inform Schachtel of his decision.

{¶ 4} After nothing changed, Schachtel again talked to Smith in March 2008 and indicated that Ming had "lots of extra time on her hands," meaning she was taking excessive breaks while at work. Each custodial employee received two 15-minute breaks and one half-hour break for lunch during each eight-hour shift.

{¶ 5} Smith looked into these allegations by visiting Hilltop at various times of the day over a two- or three-day period. He saw Ming seated at a table in the boiler room at Hilltop on numerous occasions, but was not able to establish if she was abusing any workplace policy. She claimed each time that she was on a break or taking her lunch. Smith had no way to verify the length of the breaks.

{¶ 6} To further investigate Schachtel's allegation, Smith asked the Beachwood Superintendent, Richard Markwardt, for permission to install two hidden surveillance cameras in the boiler room. His request was approved, and on March 30, 2008, two hidden cameras were installed, which were activated on April 1, 2008.

{¶ 7} The boiler room area contained a restroom, a break area, and an electrical room. One camera was located by the door leading into the boiler room and focused on the break area at the far end, where a lunch table was located. Another camera was placed in an electrical room, showing the computer set up inside as well as the small refrigerator employees used to store their lunches. Appellant used the electrical room as his office and had set up a desk and computer within. This room also contained a locker where employees could store their coats and personal things while working.

{¶ 8} Smith reviewed the hidden camera footage with Ron Matuszak, Beachwood's Information Technology Director. The two documented several instances where Ming took extended breaks, including playing Solitaire on the computer, and violated Beachwood's anti-tobacco policy by smoking in the boiler room. While reviewing the footage, the pair noticed that appellant was also visible on the film for extended periods of time. The two logged the time appellant spent "relaxing" in his office and came up with an average daily break time of three hours and 19 minutes over a seven-day period. One break even lasted four hours and 40 minutes.

{¶ 9} Superintendent Markwardt and the principal of Hilltop, Michael Molnar, met with appellant and Ming on April 17, 2008. When asked what he considered an abuse of the break policy, appellant responded more than four hours in an eight-hour shift. Ming denied taking excessive breaks and smoking on school grounds. Markwardt informed appellant at a second meeting on April 24, 2008 that he would recommend to the school board that appellant be demoted to cleaner and that Ming be fired. On April

28, 2008, the Board voted unanimously to terminate Ming's employment and to demote appellant two levels to cleaner.

{¶ 10} During the April 24th meeting, Ming indicated that Schachtel also took long breaks by going home to have dinner with his family and walk his dogs. In his deposition, Smith testified that this was the first time he had heard any break policy accusation regarding Schachtel.

{¶ 11} Appellant challenged his demotion before the city of Beachwood Civil Service Commission (the "Commission"). On September 2, 2008, a hearing was held before the Commission, which found that Beachwood acted properly in demoting appellant. Appellant then filed the instant action alleging racial discrimination. Based on the transcript and evidence from the Commission hearing, depositions, and briefs, Beachwood moved for summary judgment, which appellant opposed, and he filed his own motion for partial summary judgment. On May 21, 2010, the trial court granted Beachwood's motion. Appellant appeals that determination to this court, citing two assignments of error.

Law and Analysis

Summary Judgment

{¶ 12} Appellant first argues that "[t]he trial court erred in granting summary judgment in favor of appellee because reasonable minds could conclude that appellee discriminated against appellant, at least in part, based on his race." Appellant asserts that there are genuine issues of fact that make summary judgment inappropriate to dispose of his claim.

{¶ 13} "Civ.R. 56(C) 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 that party." *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 14} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.*" (Emphasis sic.) Id. at 296. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 15} This court reviews the lower court's granting of summary judgment de novo. *Brown v. Scioto Bd. of Cty. Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party. * * * [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24.

{¶ 16} R.C. 4112.02(A) provides that it shall be an unlawful discriminatory practice 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 indirectly related to employment" because of race.

{¶ 17} Appellant argues that he was demoted based on racial animus because only African American custodial employees were the subject of video surveillance. He and Ming, both African American, were the only two employees disciplined as a result of the installation of cameras, even though Ming reported that Schachtel took extended breaks as well. Appellant argues that if Beachwood truly wished to ferret out break policy violations, it would have placed surveillance cameras monitoring the doorways where Schachtel allegedly frequently left to go home during his lunch break.

{¶ 18} Here, appellant wishes to establish a prima facie case of racial discrimination using indirect evidence. A four-prong test established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, is used to determine whether indirect evidence sufficiently demonstrates an impermissible

discriminatory employment action. See *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196-197, 421 N.E.2d 128.

{¶ 19} "Generally, a prima facie case of racial discrimination under *McDonnell Douglas* requires a plaintiff to establish that she: (1) is a member of a protected class; (2) suffered an adverse employment action; (3) was qualified for the position lost or not gained; and (4) that the position remained open or was filled by a person not of the protected class. *McDonnell Douglas*, supra at 802. In disparate treatment cases, the fourth element may be replaced with the requirement that the plaintiff show she was treated differently from similarly-situated individuals. *Mitchell v. Toledo Hosp.* (6th Cir.1992), 964 F.2d 577, 582." *Means v. Cuyahoga Cty. Dept. of Justice Affairs*, Cuyahoga App. No. 87303, 2006-Ohio-4123, ¶12.

{¶ 20} If this burden is met, then the employer must demonstrate that its actions were motivated by a legitimate, non-discriminatory reason. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207. The plaintiff then has the opportunity to show that the stated justification is mere pretext for unlawful discrimination. *Means* at ¶13.

{¶ 21} Here, the parties do not dispute that appellant is a member of a protected class, that he suffered an adverse employment action, or that he was qualified for the position lost. Beachwood argues that appellant was not replaced by a person from a non-protected class and that he has not demonstrated that a similarly situated, non-protected individual was treated differently than he.

Replacement by a Non-protected Person

{¶ 22} According to representatives of Beachwood and their deposition testimony, the head custodian position remained open for approximately one year after appellant's demotion so that Beachwood would not be placed in the position of promoting an employee only to demote him or her should the Commission find appellant's demotion improper. Therefore, while appellant's case remained pending before the Commission, a substitute custodian filled appellant's vacant position without taking on any supervisory duties. Smith performed appellant's former supervisory duties at Hilltop, as well as ordering supplies and scheduling, until a permanent replacement was appointed in July 2009. This replacement, John Susong, is African American.

{¶ 23} "A person is considered 'replaced' when another employee is hired or reassigned to perform the plaintiff's duties." *Clevidence v. Wayne Sav. Community Bank* (N.D. Ohio 2001), 143 F.Supp.2d 901, 908, citing *Barnes v. GenCorp Inc.* (C.A.6, 1990), 896 F.2d 1457, 1465. Mere "assumption of [some] duties does not constitute replacement." *Grosjean v. First Energy Corp*. (C.A.6, 2003), 349 F.3d 332, 335-336. Where an employee assumes only some of the protected individual's responsibilities, that person is not a replacement. *Mendlovic v. Life Line Screening of Am., Ltd.*, 173 Ohio App.3d 46, 2007-Ohio-4674, 877 N.E.2d 377, ¶33. However, when another takes on the former responsibilities of the plaintiff, designating the person "temporary" does not defeat an argument regarding the fourth element. *Tuttle v. Metro. Govt. of Nashville* (C.A.6, 2007), 474 F.3d 307, 318.

{¶ 24} Here, appellant's responsibilities were divided among Smith and another custodian already working for Beachwood as a substitute custodian. Therefore, appellant

was not replaced by this substitute custodian since he did not perform substantially similar job duties as appellant. This custodian had no supervisory authority and did not order supplies. Appellant eventually was replaced by Susong, who assumed all of appellant's former duties in July 2009. Susong is a member of the same protected class as appellant. Therefore, appellant has not satisfied the fourth element of the *McDonnell Douglas* analysis by showing he was replaced with a non-protected individual.

Disparate Treatment

{¶ 25} Appellant may still satisfy the fourth element by showing disparate treatment. His claim of disparate treatment rests entirely on the treatment Schachtel received after allegations of abuse of the break policy surfaced. First, appellant tries to demonstrate that he and Schachtel were similarly situated.

{¶ 26} In analyzing whether two individual are similarly situated, the Sixth Circuit has noted that "if the non-protected employee to whom the plaintiff compares himself or herself must be identically situated to the plaintiff in every single aspect of their employment, a plaintiff whose job responsibilities are unique to his or her position will never successfully establish a prima facie case." *Ercegovich v. Goodyear Tire & Rubber Co.* (C.A.6, 1998), 154 F.3d 344, 353. To that end, this court has noted that "[t]here must be 'enough common factors between a plaintiff and a comparator — and few enough confounding ones — to allow for a meaningful comparison in order to divine whether discrimination was at play.'" *Birch v. Cuyahoga Cty. Probate Court*, 173 Ohio App.3d 696, 2007-Ohio-6189, 880 N.E.2d 132, ¶34 (Slaby, J., concurring in part and dissenting in part), quoting *Barricks v. Eli Lilly & Co.* (C.A.7, 2007), 481 F.3d 556, 560.

We further held that the comparator "'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.'" *Valentine v. Westshore Primary Care Assoc.*, Cuyahoga App. No. 89999, 2008-Ohio-4450, ¶89, quoting *Atkinson v. Akron Bd. of Edn.*, Summit App. No. 22805, 2006-Ohio-1032, ¶28, citing *Mitchell v. Toledo Hosp*. (C.A.6, 1992), 964 F.2d 577, 583.

{¶ 27} Here, appellant and Schachtel were not similarly situated. Appellant was Schachtel's supervisor and in a position of authority and greater trust. This, alone, is a significant factor in justifying any disparate treatment between the two. Further, if Ming and Schachtel were taking extended breaks, this was a failing of appellant's management duties.

{¶ 28} The allegations against Schachtel were also different. Schachtel was not taking breaks of two, three, and four hour durations. Schachtel admitted to returning to work ten to 15 minutes late twice. There is no other evidence in the record to contradict this admission. Further, there is no evidence in the record that Beachwood knew of these allegations at the time the cameras were installed. Ming had complained to appellant that Schachtel was going home during their shift, but appellant never told any of his superiors about these allegations. There is no evidence that Ming told anyone else at Beachwood until she was confronted about break policy violations on April 17, 2008. At that point, Smith addressed the situation with Schachtel, who came clean and was verbally reprimanded.

{¶ 29} Appellant argues they were similarly situated, and if Beachwood truly wished to enforce the break policy, they would have installed cameras monitoring the doors Schachtel usually left from to go home when taking his lunch break.[1] However, there is no evidence that Smith had any notice that Schachtel was taking extended breaks at the time the cameras were installed. Smith talked to Schachtel about the allegation, and Schachtel explained that he had been ten to 15 minutes late returning from his lunch break on two occasions because once, one of his dogs had gotten loose, and the other time his car wouldn't start. Smith gave Schachtel a verbal warning and left it at that. There was no evidence that Schachtel took, on average, three hours of breaks per work day. Schachtel, along with several other employees, was seen on the video footage in the boiler room, but he was not seen taking extended breaks. Smith did not give appellant a verbal warning about the break policy violations, but Smith had incontrovertible evidence that appellant was egregiously abusing workplace policy, an offense for which he could be fired.[2]

{¶ 30} Finally, there is no evidence that appellant was treated differently from Schachtel. Appellant was not the subject of the investigation. While a camera was placed in the electrical room where appellant had his office, that room was also used for breaks and to store employee lunches, and Schachtel testified that he stored his coat and other personal items in there. The room also had a television employees could utilize. It

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[1] It is not against Beachwood's policy for an employee to leave school premises for a lunch break.

[2] The employee handbook listed several infractions that could result in immediate termination, this being one of them.

was reasonable for Beachwood to place a camera in this area that was used for breaks. The electrical room was not exclusively appellant's office. Others used the refrigerator, computer, and television inside.

{¶ 31} Appellant and Schachtel were not similarly situated employees under the test above and, even if they were, appellant has not demonstrated that they were treated differently. Being 15 minutes late on a few occasion is substantially different from laying back reclined in a chair for three hours "relaxing." An investigation into allegations that Ming was taking excessive breaks inadvertently netted appellant for the same infraction of workplace policy. Appellant has failed to demonstrate that his demotion was racially motivated.

Examination of the Evidence

{¶ 32} Appellant argues in his second assignment of error that "[t]he trial court erred when it construed the evidence in a light most favorable to [Beachwood] when ruling on [Beachwood's] motion for summary judgment." However, there is no evidence that the trial court improperly construed the evidence in Beachwood's favor.

{¶ 33} Appellant first claims that the trial court construed the evidence as to the length of breaks Schachtel took more favorably to Beachwood. The only evidence in the record that speaks to the length of any alleged breaks was what Schachtel admitted to, which was being ten to 15 minutes late a few times. Appellant presented no evidence to contradict this admission.

{¶ 34} Appellant also asserts that the trial court ignored his central argument in this case: that Beachwood engaged in discriminatory conduct by installing cameras only

where African American employees took their breaks. The cameras were placed to survey an area where Beachwood had provided employees with an area to take breaks, use a computer, watch television, and eat their meals. Many employees used these areas, including the electrical room, for these purposes. Appellant has failed to demonstrate that a genuine issue of material fact exists regarding the decision to place cameras in an area where employees take their breaks to investigate allegations of break policy abuses.

Conclusion

{¶ 35} The trial court did not err in granting summary judgment in favor of Beachwood where appellant failed to offer evidence that cameras were placed in a break area to investigate allegations of violations of workplace break time policy with a racial animus or intent, and appellant was not treated differently from a similarly situated, non-protected individual. Appellant has failed to set forth a prima facie showing of racial discrimination. Summary judgment was therefore appropriate.

Judgment affirmed.

It is ordered that appellees recover of appellant 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.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

LARRY A. JONES, J., and

SEAN C. GALLAGHER, J., CONCUR