[Cite as *Stover v. Myocare Nursing Home Inc.*, 2016-Ohio-2729.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103580

PAULA STOVER

PLAINTIFF-APPELLANT

vs.

MYOCARE NURSING HOME INC.

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-831894

BEFORE: Kilbane, J., Keough, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: April 28, 2016

ATTORNEY FOR APPELLANT

Murray Richelson
David A. Katz Co. L.P.A.
50 Public Square
842 Terminal Tower
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Vincent T. Norwillo
Matthew Golish
Gonzalez Saggio & Harlan L.L.P.
526 Superior Avenue - Suite 620
Cleveland, Ohio 44114

MARY EILEEN KILBANE, J.:

{¶1} Plaintiff-appellant, Paula Stover ("Stover"), appeals from the trial court's decision granting summary judgment in favor of defendant-appellee, Myocare Nursing Home Inc., d.b.a. Westpark Neurology & Rehabilitation Care Center ("Westpark"). For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

{¶2} Stover, who is 68 years old, was employed by Westpark as a receptionist and a receptionist supervisor from 1995 until her termination on June 26, 2014. Myocare Nursing Home, Inc. ("Myocare") is the operating company for Westpark, Aristocrat West ("Aristocrat") and Crestmont North ("Crestmont"), which consists of a nursing home, a skilled nursing facility, and a rehabilitation facility. In June 2014, Myocare consolidated the operations of Aristocrat with Westpark. At that time, Westpark announced a reduction in force ("RIF") and eliminated Stover's full-time position and that of the other full-time receptionist at Aristocrat, who was 19 years old, and retained five existing part-time receptionists from both facilities to fill the consolidated receptionist position. The retained employees were either Stover's age or older than Stover. Westpark then filled the full-time receptionist position, one business day after Stover was RIF'd, with My'Col Stewart ("Stewart"), a 25-year-old receptionist from the other Myocare facility, Crestmont, which was not affected by the RIF. In August 2014, Stover filed suit against

Westpark alleging age discrimination. Westpark filed an answer denying all of the allegations in Stover's complaint.

{¶3} After completing discovery, Westpark moved for summary judgment, arguing that Stover had been terminated as part of a RIF. Stover opposed, arguing that Westpark failed to present evidence demonstrating a RIF. The trial court granted Westpark's motion, finding that:

> [Stover] failed to set forth a prima facie case of age discrimination. Evidence of a work force reduction was presented by [Westpark]. When a plaintiff's position is eliminated as part of a work force reduction, the fourth element of the prima facie case requires plaintiff to come forward with additional evidence to establish that the employer singled her out because of her age. *See Karsnak v. Chess Fin. Corp.*, 2012-Ohio-1359, (8th Dist.), *Lascu v. Apex Paper Box Co.*, 2011-Ohio-4407 (8th Dist.). In the instant case, [Stover] failed to show that she was treated differently or less favorably than similarly situated younger employees during the reduction-in-force. Further, even if [Stover] had established a prima facie case of discrimination, the record is devoid of any credible evidence that [Westpark's] reason for [Stover's] discharge was merely pretextual. Therefore, there is no genuine issue of material fact and [Westpark] is entitled to judgment as a matter of law.

{¶4} It is from this order that Stover appeals, raising the following single assignment of error for review.

Assignment of Error

> The trial court erred in granting summary judgment where there are genuine issues of material fact.

{¶5} In her sole assignment of error, Stover argues that Westpark's motion for summary judgment fails because it did not demonstrate evidence of a RIF.

{¶6} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998). In *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, the Ohio Supreme Court set forth the appropriate test as follows:

> Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party 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 nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

{¶7} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶8} Absent direct evidence of age discrimination, in order to establish a prima facie case of age discrimination, a plaintiff must demonstrate that he or she "(1) was a

member of the statutorily protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by, or that the discharge permitted the retention of, a person of substantially younger age." *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, paragraph one of the syllabus, modifying and explaining *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501, 575 N.E.2d 439 (1991).

{¶9} "Once a plaintiff establishes a prima facie case, a presumption of age discrimination is created." *Ahern v. Ameritech Corp.*, 137 Ohio App.3d 754, 770, 739 N.E.2d 1184 (8th Dist. 2000). The burden of proof then shifts to the employer to come forward with evidence of a legitimate, nondiscriminatory reason for the plaintiff's discharge. *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146, 451 N.E.2d 807 (1983), paragraph one of the syllabus. Plaintiff must then "be allowed to show that the rationale set forth by defendant was only a pretext for unlawful discrimination." *Id.*

{¶10} In the instant case, Westpark concedes that Stover meets the first three prongs of the prima facie test: she was a member of the protected class (over 40 years of age), was discharged, and was qualified for the position of receptionist supervisor. Westpark argues, however, that Stover's discharge was the result of a RIF, in which a new employee is not hired to replace the terminated employee and the terminated employee's duties are spread out among the remaining employees. *Karsnak v. Chess Fin. Corp.*, 8th Dist. Cuyahoga No. 97312, 2012-Ohio-1359, ¶ 25, citing *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 690 (7th Cir.2006).

{¶11} In RIF cases, the fourth prong of the prima facie test is modified to require the employee to offer additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled him or her out for impermissible reasons. *Ramacciato v. Argo-Tech Corp.*, 8th Dist. Cuyahoga No. 84557, 2005-Ohio-506, ¶ 29, *discretionary appeal not allowed*, 2005-Ohio-3490, citing *Skalka v. Fernald Environmental Restoration Mgt. Corp.*, 178 F.3d 414 (6th Cir.1999). This prong "'may be established through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the reduction-in-force."' *Southworth v. N. Trust Sec., Inc.*, 195 Ohio App.3d 357, 2011-Ohio-3467, 960 N.E.2d 473, ¶ 25 (8th Dist.), quoting *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir.1988). The purpose of this additional evidence requirement is to ensure that the plaintiff has presented evidence to demonstrate that there is a chance the RIF is not the reason for the termination. *Id.*, citing *Asmo v. Keane, Inc.*, 471 F.3d 588, 593 (6th Cir.2006).

{¶12} Westpark contends that it did not replace Stover after she was RIF'd on June 26, 2014. Rather, it claims that her duties were spread out among five remaining receptionists from Westpark and Aristocrat, all of whom were in the age-protected class. However, according to Stover and another Westpark employee, one business day after Stover's RIF, Stover was replaced by Stewart, a 25-year-old receptionist from Crestmont. The five part-time receptionists' employment with Westpark was short-lived because the longest period of time any of the receptionists continued to work at Westpark was one month after the RIF. Two resigned the day after Stover was RIF'd, one was discharged

less than a week later, and the remaining receptionists resigned on July 16 and July 31, 2014. Stover contends in her affidavit attached to her brief in opposition to Westpark's motion for summary judgment that two receptionists did not voluntarily resign; rather they were fired.

{¶13} In *Karsnak*, 8th Dist. Cuyahoga No. 97312, 2012-Ohio-1359, we recognized that

> "[a] work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties."

Id. at ¶ 28, quoting *Kundtz v. AT&T Solutions, Inc.*, 10th Dist. Franklin No. 05AP-1045, 2007-Ohio-1462, ¶ 24, citing *Barnes v. GenCorp. Inc.*, 896 F.2d 1457, 1465 (6th Cir.1990).

{¶14} Here, Eli Coury ("Coury"), the owner of Myocare, testified that Myocare, Crestmont and Westpark are all separate legal entities. At the time of the RIF, Stewart was employed with Crestmont, which was not affected by the RIF. Because Crestmont is a separate legal entity, Stover's duties were not redistributed to employees within the same company. Rather, Stover was replaced by a 25-year-old new hire from another company. Based on the timing of Stover's discharge and the subsequent resignation of the part-time receptionist, reasonable minds could come to the conclusion that a new

employee (Stewart) was hired to replace the terminated employee (Stover), instead of the terminated employee's duties being spread out amongst the remaining employees as required by a RIF. Therefore, genuine issues of material fact exist with regard to whether Westpark's discharge of Stover meets the RIF criteria. As a result, Westpark is not entitled to judgment as a matter of law.

{¶15} Even if we consider Westpark's argument that Stover's duties were distributed to Stewart, we still find that Westpark is not entitled to judgment as a matter of law because Westpark failed to demonstrate evidence of a legitimate, nondiscriminatory reason for Stover's discharge.

{¶16} Stover's evidence demonstrates that she was better qualified for the receptionist position. At the time of the RIF, there were two full-time receptionists and five part-time receptionists. Stover's (68 years old) and the other full-time receptionist's (19 years old) positions were terminated. The existing five part-time receptionists either immediately resigned or were discharged while attempting to perform Stover's duties. One business day after Stover was RIF'd, Westpark brought in Stewart (25 years old) as the full-time receptionist. Stewart testified that she had almost one year of experience as a receptionist at Crestmont before starting her position at Westpark at $9.00 per hour. Whereas, Stover had been employed, first with Crestmont as a receptionist and then with Westpark, for a total of 24 years. She was earning $11.45 per hour at the time of the RIF. During her tenure, she was also employed as a receptionist supervisor. When Stover's duties were distributed among the part-time receptionists, these receptionists

either did not want to take on the additional work load or were discharged from the company, which is evidenced by the resignation of two receptionists and the discharge of three others. Based on these facts, Stover demonstrated that she was better qualified for the position.

{¶17} Having demonstrated that she was more qualified than the younger worker (Stewart), Stover has satisfied the fourth prong of the prima facie test and raised the inference that she was singled out for impermissible reasons. Therefore, the burden shifts to Westpark to articulate a lawful reason for including Stover in the RIF. *Barker*, 6 Ohio St.3d 146, 451 N.E.2d 807. Westpark offers Stover's deposition testimony as evidence of its financial problems, noting that Stover was aware of financial concerns involving Westpark and the other facility. Stover testified that she was aware that other employees lost their jobs, employees were now required to obtain preapproval for overtime, and the company was reducing employees' salaries.

{¶18} This court, in *Lascu v. Apex Paper Box Co.*, 8th Dist. Cuyahoga No. 95091, 2011-Ohio-4407, recognized a RIF because of economic necessity as a legitimate reason for discharge, provided that the employer presented some version of its financial records detailing the economic loss. *Id.* at ¶ 25, citing *Langlois v. W.P. Hickman Sys., Inc.*, 8th Dist. Cuyahoga No. 86930, 2006-Ohio-3737. In *Lascu*, the employer demonstrated

> [that it] lost $800,000 and sales decreased by 9.3% [in 2008]. The 2009 projections were much worse. The company made the choice to reduce its pool of employees in order to survive the difficult economic period.

> In January 2009, [the employer] eliminated 28 positions (6 female, 22 male). In 2009, [the employer] lost $1.5 million in the first quarter, with total sales decreased by 42.7%. Despite [the employer's] hope that one round of eliminations would suffice, the company was forced to eliminate an additional 12 positions (4 females, 8 males) in February 2009. It was during the second round of eliminations that [plaintiff] was terminated. [Plaintiff] herself conceded in her brief that [the employer] was in "a dire financial condition" at the time of the reduction.

Id. at ¶ 25-26.

{¶19} Unlike in *Lascu*, in the instant case, Westpark relies solely on Stover's deposition testimony in support of its legitimate reason for discharge. Westpark's reliance on the testimony of its receptionist as evidence of its financial concerns is insufficient for Westpark to sustain its burden. As its receptionist, Stover had no firsthand knowledge of Westpark's financial condition. When asked by Stover's counsel as to the financial condition of Westpark, Coury refused to answer the questions. The following exchange took place at Coury's deposition:

> [STOVER'S ATTORNEY:] There is some rumor going around that you might be selling one or all of these facilities?
>
> [COURY:] There is a rumor going around, yeah.
>
> [STOVER'S ATTORNEY:] And can you tell us what the status is of that?
>
> [OBJECTION BY DEFENSE ATTORNEY]
>
> [COURY:] Do I have to answer that? I'm not comfortable answering that. It's nobody's business and it's not relevant to this.
>
> [STOVER'S ATTORNEY:] Well, I do believe —
>
> [COURY:] I'm not going to answer it, so go on to the next question.
>
> [STOVER'S ATTORNEY:] Well, it is —

[COURY:] It's not pertinent to this case.

* * *

[STOVER'S ATTORNEY:] Well, let me just ask it directly: Is Myocare up for sale?

[OBJECTION BY DEFENSE ATTORNEY]

[COURY:] I'm not going to answer the question. You can ask me a thousand times and it's not going to be answered.

[STOVER'S ATTORNEY:] Is Westpark up for sale?

[COURY:] You're not going to get an answer.

[STOVER'S ATTORNEY:] Whatever answer you want to provide.

[COURY:] That was my answer.

[STOVER'S ATTORNEY:] Is Crestmont up for sale?

[COURY:] You're not going to get an answer.

[STOVER'S ATTORNEY:] Is Aristocrat West up for sale?

[COURY:] Same as before.

{¶20} To meet its burden, Westpark needed to provide firsthand evidence of its financial condition to sustain its burden. Having failed to do so, we find that Westpark failed to articulate a lawful reason for including Stover in its alleged RIF. Therefore, Westpark is not entitled to summary judgment on Stover's age discrimination claim.

{¶21} Accordingly, the sole assignment of error is sustained.

{¶22} Judgment is reversed and the matter is remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee 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.

MARY EILEEN KILBANE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
SEAN C. GALLAGHER, J., CONCUR