

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CYNTHIA HEALEY

C.A. No. 25296

Appellant

v.

THE GOODYEAR TIRE & RUBBER
COMPANY, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2009 04 3320

Appellees

DECISION AND JOURNAL ENTRY

Dated: November 10, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Cynthia Healey is a former employee of Goodyear Tire and Rubber Company. After she was laid off by Goodyear and several other companies declined to hire her, she sued Goodyear and Barbara Medkeff, her former supervisor, for post-employment retaliation, alleging that Ms. Medkeff had given her bad references because she had complained about gender discrimination while working for Goodyear. The trial court granted summary judgment to Goodyear and Ms. Medkeff, concluding that Ms. Healey's claims failed as a matter of law because she had not presented any admissible evidence that Ms. Medkeff had given her bad references. Ms. Healey has appealed, arguing that the trial court incorrectly entered summary judgment for Goodyear and Ms. Medkeff. We affirm because Ms. Healey failed to offer any non-hearsay evidence that Ms. Medkeff gave her bad references and because she failed to

present any evidence that a causal relationship existed between the alleged bad references and her gender discrimination complaints.

POST-EMPLOYMENT RETALIATION

{¶2} Ms. Healey’s assignment of error is that the trial court incorrectly granted Goodyear and Ms. Medkeff’s motion for summary judgment. In reviewing a ruling on a motion for summary judgment, we apply the same standard that the trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶3} Under Section 4112.02(I) of the Ohio Revised Code, it is “an unlawful discriminatory practice . . . [f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice” “To establish a case of retaliation, a claimant must prove that (1) she engaged in a protected activity, (2) the defending party was aware that the claimant had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and (4) there is a causal connection between the protected activity and adverse action.” *Greer-Burger v. Temesi*, 116 Ohio St. 3d 324, 2007-Ohio-6442, at ¶13. “If a complainant establishes a prima facie case, the burden then shifts to the employer to ‘articulate some legitimate, nondiscriminatory reason’ for its actions.” *Id.* at ¶14 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). “If the employer satisfies this burden, the burden shifts back to the complainant to demonstrate ‘that the proffered reason was not the true reason for the employment decision.’” *Id.* (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Retaliatory

conduct is prohibited even after the end of the employment relationship. See *id.* at paragraph one of the syllabus (noting that alleged retaliatory act was against former employee).

{¶4} Ms. Healey has argued that she presented evidence that Ms. Medkeff engaged in post-employment retaliation. At her deposition, Ms. Healey testified that a secretary who worked for one of the companies to whom she applied for work told her that Ms. Medkeff had given her a bad reference. The secretary was not in charge of making the hiring decision, but was in charge of checking Ms. Healey's references. According to Ms. Healey, the secretary told her that the company really wanted to hire her, but asked if she had any other supervisors who could give her a recommendation to replace the poor one she received from Ms. Medkeff.

{¶5} The trial court concluded that the secretary's alleged statements about Ms. Medkeff's bad recommendation did not create a genuine issue of material fact regarding whether Goodyear and Ms. Medkeff took an adverse employment action against Ms. Healey because they were inadmissible hearsay. Ms. Healey has argued that the statements were admissible under the present sense impression and then existing mental, emotional, and physical condition exceptions to the hearsay rule.

{¶6} Under Rule 802 of the Ohio Rules of Evidence, "[h]earsay is not admissible except as otherwise provided by . . . these rules" "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid. R. 801(C).

{¶7} Evidence Rule 803 provides a number of exceptions to the hearsay rule. Under Rule 803(1), a present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness." The Staff Notes to Evidence

Rule 803(1) indicate that “[p]resent sense impressions are those declarations made by an observer at the time the event is being perceived.” “The circumstantial guaranty of trustworthiness is derived from the fact that the statement is contemporaneous and there is little risk of faulty recollection” *Id.* “[I]t is limited to observations about the event that is taking place.” *Id.*

{¶8} The secretary did not tell Ms. Healey what Ms. Medkeff said to her while she was still talking to Ms. Medkeff or immediately thereafter. She was merely relating what Ms. Medkeff had told her at some unidentified point in the past. Accordingly, her statement about Ms. Medkeff’s alleged bad reference was not “describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” Evid. R. 803(1). The trial court, therefore, correctly concluded that it did not fall within the present sense impression hearsay exception.

{¶9} Under Evidence Rule 803(3), a statement regarding “[t]hen existing, mental, emotional, or physical condition” is “[a] statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.” According to the Staff Notes for Rule 803(3), “the exception does not include statements of belief of past events by declarant. To include statements of belief about a past event would negate the entire proscription against hearsay evidence.”

{¶10} Ms. Healey’s argument fails because she is attempting to use the state of mind exception to testify about the secretary’s belief about a past event, specifically, what Ms. Medkeff told her during a previous telephone conversation. The trial court, therefore, correctly

concluded that the exception did not apply to Ms. Healey's deposition testimony. Ms. Healey has not pointed to any other evidence in the record that creates a genuine issue of material fact regarding whether Ms. Medkeff gave a bad reference to one of her prospective employers.

{¶11} We further note that, even if Ms. Medkeff provided a bad reference for Ms. Healey, there is no evidence in the record to demonstrate that it was causally connected to Ms. Healey's engagement in a protected activity. According to Ms. Healey, while she worked for Goodyear, she complained about a coworker who had engaged in discriminatory conduct toward her. In her brief in opposition to Goodyear and Ms. Medkeff's motion for summary judgment, she argued that the reason Ms. Medkeff retaliated against her was because Ms. Medkeff was romantically involved with that coworker. There is no evidence in the record, however, to support that argument. Ms. Healey testified at her deposition that Ms. Medkeff told her that she had been romantically involved with one of their coworkers, but it was a different coworker than the one Ms. Healey accused of discrimination.

{¶12} The trial court correctly concluded that Ms. Healey failed to establish a prima facie case of post-employment retaliation. Ms. Healey's assignment of error is overruled.

CONCLUSION

{¶13} The trial court correctly granted summary judgment to Goodyear and Ms. Medkeff. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

JOHN F. MYERS, attorney at law, for appellant.

BRIAN J. KELLY, attorney at law, for appellees.