[Cite as *Mellinger v. Quality Casing Co., Inc.*, 2023-Ohio-2403.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JOHN MELLINGER,	:	APPEAL NO. C-220342 TRIAL NO. A-2002272
Plaintiff-Appellant,	:	
vs.	:	*O P I N I O N.*
QUALITY CASING CO., INC.,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 14, 2023

Croskery Law Offices and *Robert F. Croskery*, for Plaintiff-Appellant,

Cors and Bassett, LLC, and *Curtis L. Cornett*, for Defendant-Appellee.

ZAYAS, Presiding Judge.

{¶1} Plaintiff-appellant John Mellinger appeals from the judgment of the Hamilton County Court of Common Pleas granting summary judgment in favor of defendant-appellee Quality Casing Co., Inc., ("QCC"). For the following reasons, we affirm the judgment of the trial court.

I. Procedural History

{¶2} Mellinger filed the instant action on June 23, 2020, alleging disability discrimination through wrongful termination in violation of Ky.Rev.Stat.Ann. 344.040.[1] The complaint asserted that he was fired from his position with QCC after the president of the company learned that he had multiple sclerosis ("MS"). QCC subsequently moved for summary judgment, arguing that, based on the evidence presented, Mellinger could not meet the elements for a claim of disability discrimination under Ky.Rev.Stat.Ann. 344.040. After responsive briefing, the trial court agreed with QCC and entered judgment in its favor. Mellinger now appeals, arguing in a single assignment of error that the trial court erred in granting summary judgment in favor of QCC.

II. Facts Viewed in a Light Most Favorable to Mellinger

{¶3} QCC is a small company located in Hebron, Kentucky. The company is involved in the distribution of natural and artificial casings to wrap sausages, as well as certain packaging products used in the casing industry. Robert Novachich is the sole owner and president of QCC. Mellinger—who was diagnosed with MS in 2012—began working for QCC as a sales representative on March 3, 2019. At the time he was hired, Mellinger was "quite established" in the casing industry with a very successful

[1] Mellinger's complaint initially included an additional cause of action for disability discrimination in violation of R.C. 4112.99 against QCC and the company president, Robert Novachich. However, this cause of action was subsequently dismissed with prejudice against both parties.

sales record. Scott Fuller, the vice president of sales at QCC, was Mellinger's immediate supervisor, while Novachich was his "ultimate" supervisor.

{¶4} Fuller was previously employed with QCC in 2014 for around two years. When he started at QCC in 2014, the company sold only natural and artificial casings. However, QCC soon began selling flexible packaging as well, including bags, pouches, and film. QCC did not stop selling these products during Fuller's initial employment term with QCC. However, QCC stopped selling film sometime in 2016 or 2017. Fuller returned to QCC in 2019 shortly before Mellinger was hired. To his knowledge, QCC was still selling the same products that it was during his initial employment term. More specifically, it was Fuller's understanding that QCC was still selling film. No one ever told Fuller that QCC stopped selling film.

{¶5} Although neither Fuller nor Mellinger ever actually sold any film during their employment with QCC in 2019, Mellinger did attempt to sell film while he was there. Mellinger was under the impression that QCC sold film because Fuller told him so. Mellinger also mentioned a customer's need for film to Novachich when discussing a sales call, and Novachich told him, "Good job." Novachich never told Mellinger that QCC did not sell film. Mellinger requested pricing for the film from Fuller, but never received a response as he was terminated on April 17, 2019, shortly after his discussion with Novachich about the sales call. The termination letter from Novachich stated:

> We are writing to inform you that we have come to the decision to server your employment with Quality Casing Company.
>
> When we discussed you joining our company we were under the impression that you were quite established in the casing industry and were ready to get back into the business but over the last 6 weeks we have been surprised by the lack of orders coming into the office.

> When reviewing the last few weeks of correspondence we came upon a few emails dealing with sales for film. We were very surprised to see this. Our company does not sell film and we are disappointed that we found this to be occurring.
>
> * * *
>
> We had hoped for this partnership to have been successful but that was not the case.
>
> We do wish you the best in your future endeavors.

{¶6} After receiving the termination letter, Mellinger sent several emails in response. The first email was sent to Fuller and stated, "What the hell is this?! I've been working with you on the film this whole time. Please get back to me ASAP!" This was followed by several emails to QCC's headquarters, one of which stated:

> If you only want me to sell natural casings I'll do that. I don't know what to say other than I've been doing my job and creating relationships with my old accounts as their rep for Quality Casing Company. If this has something to do with my MS we have to talk; Otherwise I'll be speaking with my lawyer.

Mellinger did not receive a response to any of these emails. He found out a few days later that Fuller was terminated from QCC the day before he was.

{¶7} No one ever told Mellinger that he needed to increase his sales or counseled Mellinger on his poor sales performance. Mellinger's sales during the entirety of his employment term with QCC totaled $14,926.37. Total sales for the other QCC sales employees during the same time period were $232,168.75, $209,666.28, $171,605.64, and $105,703.73. Mellinger attributed his lack of significant sales to overcoming QCC's poor reputation and establishing customer relations. He was the

only new sales employee at QCC at the time and was the only outside salesperson at QCC.

{¶8} No one at QCC ever said anything to Mellinger about his MS and he never brought it up. He never requested any sort of accommodation because he never told QCC that he had MS. However, Novachich somehow knew that Mellinger had MS and told Fuller that he was "concerned about it" on two separate occasions towards the end of Fuller's second term of employment, which was also near the end of Mellinger's employment with QCC.

III. Law and Analysis

A. Standard of Review

{¶9} A party against whom a claim is asserted may move for summary judgment in the party's favor as to all or part of the claim. Civ.R. 56(B). Summary judgment should be rendered in the party's favor if the timely filed Civ.R. 56(C) permissible evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The permissible evidence for the trial court to consider includes the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. *Id.* No other evidence or stipulation may be considered except as stated in Civ.R. 56. *Id.* Summary judgment "shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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." *Id.*

{¶10} In other words, to obtain summary judgment, the moving party must show that (1) there is no genuine issue of material fact, (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 when reviewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). The moving party has the initial burden of informing the trial court of the basis for the party's motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 294 (1996). If the moving party meets this initial burden, the nonmoving party then bears the burden of setting forth "specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). If the nonmoving party does not do so, then summary judgment is appropriate and must be entered against the nonmoving party. *Id.* This court reviews a trial court's grant of summary judgment de novo. *Mid-Century Ins. Co. v. Stites*, 1st Dist. Hamilton No. C-200421, 2021-Ohio-3839, ¶ 10.

B. Applicable Law

{¶11} Ky.Rev.Stat.Ann. 344.040(1)(a) provides that it is unlawful for an employer to discharge any individual on the basis that the person is a qualified individual with a disability. A plaintiff may establish a violation of Ky.Rev.Stat.Ann. 344.040(1)(a) through either direct evidence of a discriminatory animus or, in the absence of direct evidence, by satisfying the burden-shifting test laid out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct.1817, 36 L.Ed.2d 668 (1973), which allows a plaintiff to establish discrimination through inferential or circumstantial evidence. *See Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky.2005).

{¶12} Direct evidence of discrimination is evidence that does not require the factfinder to draw any inferences when concluding that the employer acted with an

improper motive. *Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 576 (Ky.2016), quoting *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir.2004). To qualify, the evidence—standing alone—must link the motivating animus to the adverse employment action, without the use of inferences. *Id.* at 577. Direct evidence does not include "stray remarks in the workplace, statements by decision-makers unrelated to the decisional process itself, or statements by non-decision makers." *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 710 (Ky.App.2004), citing *Crock v. Sears, Roebuck & Co.*, 261 F.Supp.2d 1101, 1114 (S.D.Iowa 2003).

{¶13} In the absence of direct evidence, the evidence of discrimination must be analyzed under the *McDonnell Douglas* framework. *See Charalambakis* at 577. Under this framework, the plaintiff has the initial burden to establish a prima facie case of discrimination by showing that the plaintiff was: (1) a member of a protected class, (2) discharged, (3) qualified for the position from which the plaintiff was discharged, and (4) replaced by an individual outside a protected class or treated less favorably than a similarly situated employee outside a protected class. *See id.*; *Commonwealth v. Solly*, 253 S.W.3d 537, 541 (Ky.2008).

{¶14} If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. *Charalambakis* at 577. If the employer provides such a reason, the burden moves back to the plaintiff to produce evidence sufficient to persuade the trier of fact, by a preponderance of the evidence, that the employer's given reason is merely a pretext, masking its true discriminatory motive. *Id.* at 578. Stated differently, the plaintiff must produce sufficient evidence from which a trier of fact could reject the employer's explanation. *Williams*, 184 S.W.3d at 497.

C. Arguments Presented in the Trial Court

{¶15} In its motion for summary judgment, QCC argued that Mellinger had no evidence of direct discrimination, could not make a prima facie case of discrimination under the *McDonnel Douglas* framework as no evidence established that an employee without a disability was treated more favorably, and—even assuming a prima facie case of discrimination—could not prove that QCC's legitimate, nondiscriminatory reasons for his discharge—poor sales performance and attempts to sell product that the company did not offer—were pretextual. Mellinger responded in opposition to QCC's motion for summary judgment, arguing that Novachich's statements to Fuller—that he was concerned about Mellinger's MS— were direct evidence of discrimination, a prima facie case of discrimination was established where other employees with poor sales performance were employed with QCC for months with worse sales records, and QCC's offered legitimate reason for his discharge was clearly pretextual as his sales numbers were "very good for the five week point," he learned about film sales from Fuller, and he discussed the film sales with Novachich without any pushback.

D. Direct Evidence of a Discriminatory Animus

{¶16} Mellinger first argues that Novachich's alleged statements to Fuller—that he was concerned about Mellinger's MS—constitute direct evidence of a discriminatory animus. We disagree. Even if Novachich did make such statements, looking at the alleged statements alone, there is simply no way to link the stated "concern" to Mellinger's termination without the use of inferences. Therefore, we hold that these statements do not constitute direct evidence of discrimination under Kentucky law as they do not, standing alone, connect any motivating animus to any adverse employment action. *See Charalambakis*, 488 S.W.3d at 576-577.

E. *McDonnell Douglas* Analysis

{¶17} Mellinger next argues that, even in the absence of direct evidence, he should prevail on summary judgment under the *McDonnell Douglas* framework. We disagree and hold that, even assuming—without deciding—that Mellinger could meet his initial burden of showing a prima facie case of discrimination, he failed to put forth sufficient evidence to show that he could meet his ultimate burden to prove, by a preponderance of the evidence, that QCC's offered reasons for his termination were merely pretextual.

{¶18} QCC's proffered reasons for Mellinger's termination were poor sales performance and attempting to sell products that QCC did not offer. This proffer sufficed to shift the burden back to Mellinger to produce sufficient evidence from which the trier of fact could find, by a preponderance of the evidence, that QCC's provided rationale was merely a pretext for discrimination. *See, e.g., Williams*, 184 S.W.3d at 497 ("The defendant bears only the burden of production and this involves no credibility assessments."); *Schroeder v. Atria Mgt.*, Ky.App. No. 2005-CA-000894-MR, 2007 Ky.App.Unpub. LEXIS 304, 10 (Feb. 2, 2007) ("[T]he burden of refuting the prima facie case need not be met by persuasion; the employer need only articulate with clarity and reasonable specificity, a reason unrelated to a discriminatory motive, and is not required to persuade the trier of fact that the action was lawful.").

{¶19} Pretext may be established by showing: (1) the proffered reasons are false; (2) the proffered reasons did not actually motivate the decision; or (3) the proffered reasons were insufficient to motivate the decision. *E.g.*, *Charalambakis v. Asbury College*, Ky.App. No. 2012-CA-00242-MR, 2014 Ky.App.Unpub. LEXIS 831, 14 (Jan. 31, 2014). A plaintiff may only avoid summary judgment where "specific

evidence of pretext is shown." *Mayberry v. Park Duvalle Community Health Ctr., Inc.*, Ky.App. No. 2017-CA-001321-MR, 2018 Ky.App.Unpub. LEXIS 789, 12 (Nov. 9, 2018), citing *Harker v. Fed. Land Bank of Louisville*, 679 S.W.2d 226, 230 (Ky.1984). The plaintiff must present "cold hard facts" which create an inference to show that the plaintiff's protected status was a determining factor in the adverse employment decision. *Asbury College* at 14, quoting *Flock v. Brown-Forman Corp.*, 344 S.W.3d 111, 116 (Ky.App.2010); *accord, e.g., Schroeder* at 11. Thus, the necessary inquiry on summary judgment is whether the evidence is sufficient to permit a rational trier of fact to find that the employer unlawfully discriminated against the plaintiff. *Id.*, citing *Williams*, 184 S.W.3d at 500; *see generally Norton Healthcare, Inc. v. Disselkamp*, 600 S.W.3d 696, 725 (Ky.2020) (holding that the ultimate question is whether the employer engaged in unlawful discrimination). Conclusory allegations and subjective beliefs are insufficient to survive summary judgment. *Stauble v. Montgomery Imports, LLC*, Ky.App. No. 2010-CA-00533-MR, 2011 Ky.App.Unpub. LEXIS 456, 17 (May 27, 2011), citing *Humana of Ky., Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky.1990); *accord, e.g.*, *Schroeder* at 13; *Asbury College* at 14.

{¶20} QCC's first rationale for Mellinger's termination was poor sales performance. In support of this assertion, QCC put forth evidence showing that Mellinger's total sales for his period of employment were far lower than the total sales for the other QCC sales employees during the same time period. Mellinger argues that this reasoning was clearly false as he was performing well for a salesperson who had only been employed for a short period of time. In support of this argument, he points to Fuller's depositional testimony where he said that Mellinger's performance was "good to excellent" for the short period that he was employed. However, at most, the evidence supports a difference of opinion on whether Mellinger performed as expected

for someone with extensive prior experience in the industry. This evidence does not, by itself, negate QCC's assertion that Mellinger did not perform as QCC expected, based on his established sales history in the industry.

{¶21} He further argues that poor sales performance was clearly not what motivated QCC's termination decision as QCC kept on an employee, Stephens, who had prior sales experience, with monthly totals lower than Mellinger's in the fourth, fifth, and sixth months. The record does reflect that QCC retained Stephens as an employee despite having numbers lower than Mellinger's in his fourth, fifth, and sixth month of employment. However, Stephens did not have previous sales experience in the casing industry like Mellinger. Novachich testified that Stephens was a truck driver with experience in "selling," but no experience with selling QCC's product.

{¶22} QCC also reasoned that Mellinger was terminated for selling a product that QCC did not offer. Mellinger argues this reasoning was also clearly false as he learned about film sales from Fuller and he discussed the film sales with Novachich without any pushback. Thus, he implies that QCC did sell film at the time of his employment. Novachich admitted in his depositional testimony that QCC sold film during Fuller's initial term of employment with QCC between 2014 to 2016. However, he said that QCC stopped selling film sometime in 2016 or 2017 and Mellinger did not put forth any evidence to establish that, despite this assertion, QCC was in fact selling film during Mellinger's employment with QCC in 2019. The record, at most, supports a finding that Fuller was simply unaware that QCC stopped selling film and incidentally told Mellinger that QCC sold film when it did not. Additionally, Mellinger was terminated shortly after his discussion with Novachich about the sales call and Fuller was terminated the day prior to Mellinger. While Mellinger implies that Fuller was terminated for telling Mellinger about Novachich's statements pertaining to his

MS, there is nothing in the record to support this assertion. Fuller testified in his deposition that he was told by Novachich that he was being terminated because of an email communication with a company called ABX Films. He denied knowing why this email was a concern and said that he felt this was not the valid reason for his termination. However, when asked why he believed he was fired, the only other rationale he provided was that Novachich rethought wanting to sell the company to Fuller. When he was asked in his deposition whether he had any impression that his termination was linked to Mellinger's termination, he said no. He also denied knowing why Mellinger was terminated.

{¶23} While the record clearly shows some dispute as to Mellinger's expected initial sales performance and what products Mellinger was expected and/or permitted to sell during his employment, we are not persuaded that these factual discrepancies are sufficient evidence from which a trier of fact could reasonably find pretext and reject QCC's nondiscriminatory explanation for Mellinger's termination. *See Hughes v. Norton Healthcare, Inc.*, Ky.App. No. 2019-CA-0222-MR, 2020 Ky.App.Unpub. LEXIS 794, 32 (Dec. 11, 2020), quoting *Braithwaite v. Timken Co.*, 258 F.3d 488, 493-494 (6th Cir.2001) ("It is not enough for a plaintiff to show that the employer was mistaken or there is dispute 'over the facts upon which the discharge was based.' "). We hold that Mellinger failed to meet his reciprocal burden on summary judgment of producing evidence sufficient to show that a genuine issue of material fact remained as to whether discrimination was the motivating factor in Mellinger's termination. Therefore, the trial court properly granted summary judgment in favor of QCC, and we overrule Mellinger's assignment of error.

IV. Conclusion

{¶24} Having overruled Mellinger's sole assignment of error, we affirm the judgment of the trial court.

Judgment affirmed.

BOCK and **KINSLEY, JJ.,** concur.

Please note:

The court has recorded its own entry this date.