

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

NORMAN S. BUTLER,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2014-L-104
THE LUBRIZOL CORPORATION, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 13 CV 002365.

Judgment: Affirmed.

Richard T. Seman, Jr., 7537 Mentor Avenue, Suite 207D, Mentor, OH 44060 (For Plaintiff-Appellant).

Christopher F. Carino and Elizabeth A. Grove, The Lubrizol Corporation, 29400 Lakeland Boulevard, Wickliffe, OH 44092 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Norman S. Butler, appeals from the Lake County Court of Common Pleas’ grant of summary judgment in favor of appellees, The Lubrizol Corporation (“Lubrizol”; appellant’s former employer) and Mark Decker (appellant’s former supervisor), on appellant’s claims for disparate treatment race discrimination and retaliatory discrimination.

{¶2} Appellant, a white male, was hired by Lubrizol in 2004. His complaint alleges he received disparate treatment from Lubrizol as related to Bryan Stewart, a

black male co-worker. Stewart was employed by Lubrizol for many years prior to appellant. Appellant contends he initially had a supervisor with whom he worked well, but that supervisor was replaced by Decker. Allegedly, Decker allowed Stewart to enjoy better work conditions than appellant. Appellant was terminated in March 2012 after issues concerning his failure to follow safety procedures in the repair of a Ball House pump.

{¶3} Appellees moved for summary judgment and submitted evidentiary material that showed appellant had a history of safety violations, that those violations were the primary reason appellant was not promoted or given raises, and that appellant was terminated because of his failure to follow a lockout/tagout safety procedure that was known to appellant.

{¶4} In response to the motion, appellant submitted an affidavit and a supplemental affidavit. In those affidavits, appellant relates, among other things, hearsay of a conversation he had with another former employee about being terminated and appellant's "memory" of what occurred with regard to his unemployment compensation claim.

{¶5} After review, the trial court determined that, because there were no genuine issues of material fact, and construing the evidentiary material in a manner most favorable to appellant, appellees were entitled to judgment in their favor as a matter of law.

{¶6} Appellant timely appeals and presents six assignments of error for our review. Although the trial court granted summary judgment in favor of appellees on all of appellant's causes of action, including wrongful discharge in violation of public policy

and intentional infliction of emotional distress, all assignments of error relate to the trial court's grant of summary judgment with regard to the claims of disparate treatment race discrimination and retaliatory discrimination.

{¶7} We review a trial court's decision on a motion for summary judgment de novo. *Fed. Home Loan Mtge. Corp. v. Zuga*, 11th Dist. Trumbull No. 2012-T-0038, 2013-Ohio-2838, ¶13. Under Civil Rule 56(C), summary judgment is proper if:

- (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., 50 Ohio St.2d 317, 327 (1977).

{¶8} The moving party bears the initial burden to demonstrate from the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, that there is no genuine issue of material fact to be resolved in the case. *Zuga, supra*, at ¶12, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). "If this initial burden is met, the nonmoving party then bears the reciprocal burden to set forth specific facts which prove there remains a genuine issue to be litigated, pursuant to Civ.R. 56(E)." *Id.*

{¶9} We initially note the Ohio Supreme Court has stated that "discrimination cases brought in state courts should be construed and decided in accordance with federal guidelines and requirements." *Hunt v. Trumbull Community Action Program*, 11th Dist. Trumbull No. 2005-T-0036, 2006-Ohio-1698, ¶21, citing *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146, 147 (1983).

{¶10} Appellant's first three assignments of error relate to the trial court's granting of summary judgment in favor of appellees on appellant's disparate treatment race discrimination claim:

[1.] The trial court committed prejudicial error in granting Defendants-Appellees' Motion for Summary Judgment on Plaintiff-Appellant's Disparate Treatment Race Discrimination claim based upon its opinion that an Evid.R. 801(D)(2)(b) admission by omission or adoptive admission cannot be used as the basis of a direct evidence method of proving disparate treatment based on Race.

[2.] The trial court committed prejudicial error in granting Defendants-Appellees' Motion for Summary Judgment on Plaintiff-Appellant's Disparate Treatment Race Discrimination claim based upon its opinion the Plaintiff-Appellant must show that Defendants-Appellees are "the unusual employers who discriminated against non-minority employees."

[3.] The trial court committed prejudicial error in granting Defendants-Appellees' Motion for Summary Judgment on Plaintiff-Appellant's Disparate Treatment Race Discrimination claim based upon its opinion that Plaintiff-Appellant suffered no adverse personnel action because, per the trial court's opinion, Plaintiff-Appellant experienced no material change in the terms and conditions of employment.

{¶11} Appellant's claim of disparate treatment race discrimination, here a "reverse" race discrimination case, is brought pursuant to R.C. 4112.02(A), which provides that it is an unlawful discriminatory practice:

For any employer, because of the race * * * 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 indirectly related to employment.

{¶12} A discrimination claim under R.C. 4112.02 may be proved by a preponderance of either direct or indirect evidence "that the employer was motivated by improper animus when it took the challenged employment action." *Mitchell v. Lemmie*,

2d Dist. Montgomery No. 21511, 2007-Ohio-5757, ¶102. Where there is no direct evidence of discriminatory motivation, the Supreme Court of Ohio has adopted the burden-shifting exercise set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Barker, supra*; *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268.

{¶13} The first step under the *McDonnell Douglas* Test is for the plaintiff to raise a presumption of discrimination by establishing a prima facie case of discrimination using indirect evidence. *Wescott v. Assoc. Estates Realty Corp.*, 11th Dist. Lake Nos. 2003-L-059 & 2003-L-060, 2004-Ohio-6183, ¶32. The basic elements of a reverse discrimination case are as follows:

- (1) background circumstances supporting the inference that the plaintiff's employer was the unusual employer who discriminated against non-minority employees;
- (2) that the employer took an action adverse to the plaintiff's employment;
- (3) that the plaintiff was qualified for the position; and
- (4) that the employer treated the plaintiff disparately from similarly situated minority employees.

Mowery v. Columbus, 10th Dist. Franklin No. 05AP-266, 2006-Ohio-1153, ¶44; see also *Koehler v. Ohio Civ. Rights Comm.*, 11th Dist. Trumbull No. 2005-T-0149, 2006-Ohio-5178, ¶11, fn.2.

{¶14} Once the plaintiff establishes a prima facie case of reverse discrimination, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the adverse employment action. *Wescott, supra*, at ¶33. Finally, if the defendant meets this burden, the plaintiff "must demonstrate that the reasons offered by [the defendant] were not the true reasons, but were a pretext for discrimination." *Id.* The plaintiff always carries the burden of persuasion. *James v. Bob Ross Buick, Inc.*, 167 Ohio App.3d 338, 2006-Ohio-2638 (2d Dist.), ¶30.

{¶15} Under his first assignment of error, appellant challenges the trial court's holding that he did not present direct evidence of reverse race discrimination. Specifically, appellant states the trial court erred by declining "to hold that a direct evidence method of proof can be made in a discrimination case based on an 'admission by omission' * * *." His argument is that although Decker never admitted to making decisions based on race, he also never denied it, and that the lack of a denial can be used as direct evidence that the accusations are in fact true. Appellees respond that appellant "confuses direct evidence for evidentiary purposes with direct evidence of discrimination."

{¶16} In the context of discrimination claims, ""direct evidence" refers to a type of evidence which, if true, would require no inferential leap in order for a court to find discrimination." *Mitchell, supra*, at ¶102, quoting *Bass v. Bd. of Cty. Commrs., Orange Cty., Fla.*, 256 F.3d 1095, 1111 (11th Cir.2001). It "does not refer to whether evidence is direct or circumstantial in the ordinary evidentiary sense * * *." *Id.*

{¶17} In its entry, the trial court stated that appellant's evidence of Decker's silence "would require the finder of fact to infer solely from Decker's failure to directly address the accusation of race discrimination that the accusation is true." Upon de novo review of the record, we agree with the trial court that appellant did not present any direct evidence of race discrimination.

{¶18} Appellant's first assignment of error is without merit.

{¶19} Appellant's second and third assignments of error challenge the trial court's holding that he did not raise a presumption of discrimination. He specifically asserts error with regard to the trial court's holding on the first and second elements of a

prima facie case of reverse race discrimination: (1) that appellees are not the unusual employer who discriminates against non-minority employees and (2) that appellees did not take an action adverse to appellant's employment.

{¶20} Under his second assignment of error, appellant asserts the trial court erred in holding he was required to show, for purposes of indirect evidence of discrimination, that appellees are “the unusual employers who discriminated against non-minority employees.” Appellant alleges this is not an element of the legal standard as adopted by this court in *Hunt*, 2006-Ohio-1698. In other words, appellant does not argue that appellees failed to meet their burden to show no genuine issue of material fact existed on this element; rather, he argues the trial court applied the wrong legal standard. This is an argument we review de novo.

{¶21} In *Hunt*, we stated the “basic framework” of a discrimination case required a showing that the employee was (1) a member of a statutorily-protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by a person who did not belong to the protected class. *Hunt, supra*, at ¶24. We also stated that “[c]ourts have modified the basic * * * framework in order to address various types of discrimination.” *Id.* at ¶27. The “basic framework” has been so modified in order to address alleged discrimination against non-minorities, and the modification was adopted by this court in *Koehler* subsequent to our decision in *Hunt*. See *Koehler, supra*, at ¶11, fn. 2, following *Courie v. ALCOA*, 162 Ohio App.3d 133, 2005-Ohio-3483 (8th Dist.); *Grooms v. Supporting Council of Preventative Effort*, 157 Ohio App.3d 55, 2004-Ohio-2034 (2d Dist.); and *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir.1985). The *McDonnell Douglas* Test is intended to be “[t]he starting point for judicial

inquiry into complaints alleging disparate treatment on the basis of race * * *. *McDonnell* established a flexible formula to ferret out impermissible discrimination in the hiring, firing, promoting, and demoting of employees.” *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 197 (1981).

{¶22} Accordingly, the modified test, as stated in *Koehler*, is the controlling precedent in this jurisdiction. Further, after a de novo review of the record, we find that appellant did not present any competent evidence of background circumstances supporting the inference that appellees were the unusual employers who discriminated against non-minority employees. Therefore, no genuine issue of material fact exists on this element.

{¶23} Appellant’s second assignment of error is without merit.

{¶24} In his third assignment of error, appellant states the trial court erred in holding that he did not suffer an adverse employment action. An adverse employment action is a “materially adverse change in the terms and conditions of [the plaintiff’s] employment.” *Perez v. Theller*, 6th Dist. Sandusky No. S-10-053, 2011-Ohio-2176, ¶14, quoting *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999). An adverse employment action

‘need not result in pecuniary loss, but must materially affect the plaintiff’s terms and conditions of employment. Factors to consider when determining whether an employment action was materially adverse include “termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.” Changes in employment conditions that result in merely inconvenience or an alteration of job responsibilities are not disruptive enough to constitute an adverse employment action.’

Lennon v. Cuyahoga Cty. Juvenile Court, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587, ¶10, quoting *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 727 (10th Dist.1999) (citations omitted).

{¶25} Appellant alleges that he experienced a materially adverse change when Decker became his supervisor and his workload dramatically increased. He testified that his previous supervisor helped with Stewart's workload and that when Decker took over, he did not help; therefore, Stewart's unfinished work fell to appellant. However, he also testified that he was treated unfairly as compared to 15 other people in the department, all of whom, except Stewart, are white. Even assuming appellant's allegation of an increased workload is true, if the alleged disparate treatment was also disparate as to other white employees, it is not an adverse change in employment sufficient to support a claim of reverse race discrimination. See *Courie, supra*, at ¶21 (holding that when the plaintiff demonstrated only that he was treated differently than all other employees, and not that he was treated differently than employees of other races, he was unable to establish a prima facie case of reverse race discrimination). Accordingly, no genuine issue of material fact exists on this element.

{¶26} Appellant's third assignment of error is without merit.

{¶27} We hold that the trial court did not err when it granted summary judgment in favor of appellees on appellant's reverse race discrimination claim. Appellees were entitled to judgment as a matter of law: appellant did not submit direct evidence of discrimination nor did he raise a presumption of discrimination by establishing a prima facie case of reverse race discrimination.

{¶28} The remainder of appellant's brief assigns error regarding the trial court's holding on his retaliatory discrimination claim:

[4.] The trial court committed prejudicial error in granting Defendants-Appellees' Motion for Summary Judgment on Plaintiff-Appellant's Retaliatory Discrimination claim based upon its opinion that approximately two weeks between protected activity and an adverse employment action [is] insufficient, in and of itself, to establish a showing of the "causal connection" element of a prima facie case of Retaliatory Discrimination.

[5.] The trial court committed prejudicial error in granting Defendants-Appellees' Motion for Summary Judgment on Plaintiff-Appellant's Retaliatory Discrimination claim based upon its opinion that Plaintiff-Appellant has not raised a genuine issue of material fact regarding whether Defendants-Appellees' claimed legitimate non-discriminatory reason for the adverse personnel action of termination of Plaintiff-Appellant's employment is mere pretext because either (a) any such proffered reason had no basis in fact, and/or (b) any such proffered reasons did not actually motivate the adverse employment action, and/or (c) any such proffered reasons were insufficient to motivate the adverse employment action.

[6.] The trial court committed prejudicial error in granting Defendants-Appellees' Motion for Summary Judgment on Plaintiff-Appellant's Retaliatory Discrimination claim based upon its opinion that unemployment finding of no just cause for Defendants-Appellees' termination of Plaintiff-Appellant's employment is not relevant to Plaintiff-Appellant's claim for Retaliatory Discrimination.

{¶29} Appellant's claim of retaliatory discrimination is brought pursuant to R.C. 4112.02(I), which provides that it is an unlawful discriminatory practice:

For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

{¶30} To establish a prima facie case of retaliatory discrimination, "a claimant must prove that (1) [he] 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, ¶13. If a plaintiff establishes a prima facie case, the burden then shifts to the employers to articulate a legitimate nondiscriminatory reason for their action. *Id.* at ¶14, quoting *McDonnell, supra*, at 802. “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.*, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

{¶31} Under his fourth assignment of error, appellant challenges the trial court’s holding that he did not show a genuine issue of material fact as to a “causal connection” between appellant complaining to appellees that Stewart was receiving preferential treatment due to his race and appellant’s subsequent termination. Specifically, appellant states the trial court erred by finding that the two-week time period between these two events was “insufficient for the causal connection element to be based on temporal proximity alone.”

{¶32} “Generally, mere temporal proximity between a protected activity and a materially adverse action without other indicia of retaliatory conduct is not sufficient to establish the causal connection element of a retaliation claim. * * * [T]his is particularly true when the evidence demonstrates intervening performance concerns.” *Putney v. Contract Bldg. Components*, 3d Dist. Union No. 14-09-21, 2009-Ohio-6718, ¶52, quoting *Nguyen v. Cleveland*, 229 F.3d 559, 566-567 (6th Cir.2000); see also *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 230 (6th Cir.1987).

{¶33} Appellant was terminated on March 20, 2012. In an affidavit attached to his brief in opposition to summary judgment, appellant alleges that he “complained to Mark Decker about allegations of being treated differently than Bryan Stewart[t] * * * because of Race * * * [a]pproximately three to ten working days * * * before I was fired * * *.” He argues that this temporal proximity is sufficient to establish, in and of itself, a causal connection between his complaint and his termination.

{¶34} However, a review of the record reveals that there were intervening performance concerns related to appellant’s termination. Specifically, on March 9, 2012, there was an incident in which appellant violated the company’s safety procedures regarding energy source lockout/tagout. Attached to appellees’ motion for summary judgment is a copy of Lubrizol’s “Responsible Care Management System Work Instructions for Energy Source Lockout/Tagout,” which states: “Failure to comply with this procedure is a violation of a cardinal rule as referenced in employee accountability work instruction (GMS No. 03-4.40-300-0010) and could result in disciplinary action.” The record also reveals that this procedure was reviewed with company employees, including appellant, at meetings in January 2012 and February 2012. According to the meeting minutes attached to Decker’s affidavit, one of the items discussed at the January meeting was that there was to be a zero tolerance approach to safety issues. Appellant did not refute this statement in his affidavits. Further, appellees presented evidence that appellant had a history of safety violations.

{¶35} Due to this intervening performance concern, we find that appellant did not present competent evidence establishing a causal connection between any alleged protected activity and appellant’s termination.

{¶36} Appellant's fourth assignment of error is without merit.

{¶37} Under his fifth assignment of error, appellant argues the trial court erred in finding that the proffered reason for appellant's termination, i.e. the March 9, 2012 safety violation, was a "legitimate nondiscriminatory reason" and not "mere pretext."

{¶38} Because we find, under the fourth assignment of error, that appellant did not present competent evidence establishing a causal connection between the alleged protected activity and his termination, he did not present a prima facie case of retaliation. Therefore, the burden never shifted to appellees to "articulate a legitimate nondiscriminatory reason for their action."

{¶39} Appellant's fifth assignment of error is not well taken.

{¶40} Under his sixth assignment of error, appellant argues the trial court erred in holding that a finding of "no just cause" for termination by the Ohio Unemployment Compensation Review Commission is not relevant to appellant's retaliation claim. Appellant provides no case law or evidence in support of this argument. See App.R. 16(A)(7).

{¶41} Appellant merely states in his self-serving supplemental affidavit that "[his] memory is that" his application for unemployment compensation was originally denied, but that after providing more information, "a determination was made that [he] was NOT fired for 'just cause.'" However, as the trial court noted and as an independent review of the record reveals, "there is no indication that the unemployment compensation decision was based on a finding that the defendants retaliated against the plaintiff."

{¶42} In addition, appellant does not make any argument that the legal standard in determining eligibility for unemployment equates in any way to the legal standard to

justify termination from at-will employment. Consequently, it is not relevant nor does it create a genuine issue of material fact as to whether appellant was terminated as a result of retaliation.

{¶43} Appellant's sixth assignment of error is without merit.

{¶44} We conclude the trial court did not err in granting summary judgment in favor of appellees on the claim of retaliation. Appellees were entitled to judgment as a matter of law.

{¶45} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

THOMAS R. WRIGHT, J.,

concur.