

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THOMAS ROY YANNARELL	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
GBS CORPORATION	:	Case No. 2009CA00025
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: On Appeal from the Stark County Court of
Common Pleas, Case No. 2008CV03202

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 28, 2009

APPEARANCES:

For Plaintiff-Appellant

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Delaney, J.

{¶1} Plaintiff-Appellant Thomas Roy Yannarell appeals the January 26, 2009 judgment entry of the Stark County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee GBS Corporation on his age discrimination claim.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Yannarell began his employment with GBS in 1993 at the age of 52. GBS provides printing services to companies such as General Motors (“GM”) and Yannarell’s job focused on servicing those accounts. From 1993 to 1997, Yannarell managed the GM contract. GBS promoted Yannarell to Senior Vice President of Operations and Sales, reporting directly to the GBS president. In September 2001, Yannarell voluntarily left GBS due to a disagreement regarding Yannarell’s compensation structure.

{¶3} After expressing an interest in returning to GBS, GBS’s then CEO offered Yannarell the position of Director of National Accounts-Automotive. On June 21, 2004, Yannarell entered into an employment contract with GBS. Yannarell’s contract with GBS provided that he was an at-will employee. At the time he was rehired by GBS, Yannarell was 63 years old. As the Director of National Accounts-Automotive, Yannarell was responsible for the management of the GM and Delphi accounts, which were assigned to the GBS Detroit office. Yannarell worked with the GBS Detroit office team on the renewal of the GM and Delphi contracts. His responsibilities included managing the staff and the customer service representatives, creating sales strategies, and managing the expenses of the Detroit office. He oversaw a team of employees whose ages ranged from 49 years old to 64 years old. Yannarell was initially employed

with GBS on a part-time basis; however, once GBS was awarded the GM contract, Yannarell became a full-time employee.

{¶4} In June or July 2005, Yannarell began reporting to Nick Kitsonas, Executive Vice-President of Label Solutions. Kitsonas was 50 years old. On April 27, 2006, Kitsonas completed a Performance Appraisal of Yannarell. Kitsonas found that Yannarell met expectations as the Director of National Accounts and while Yannarell often acted independently, he had a good relationship with his staff.

{¶5} In December 2006, Kitsonas presented Yannarell with a job description for "Business Development Manager." GBS management determined that it needed to seek new business opportunities outside of GM and Delphi and thought Yannarell would be one of the best individuals to achieve this due to his success with GM and Delphi. As Business Development Manager, Yannarell maintained some of his responsibilities relative to the GM and Delphi contracts; however, one of the main objectives of his new position was to develop business outside of the GM and Delphi contracts. GBS also restructured Yannarell's compensation plan to promote the procurement of new business. Yannarell and Kitsonas negotiated the terms of Yannarell's new compensation plan and a final version was completed on January 18, 2007.

{¶6} Yannarell understood that developing new business was one of his objectives. In February 2007, he memorialized his changing duties to the GBS Detroit staff in a staff memo, explaining that his focus had been re-directed to development of personal sales and that his staff would have to take over some of his duties in regards to GM and Delphi. GBS management also reassigned some of Yannarell's administrative duties in managing the GBS Detroit team to Larry Furlow (age 61) and

Mike Shearer (age 50) of the GBS Detroit team to allow Yannarell to focus on his new sales duties.

{¶7} On July 5, 2007, Kitsonas announced to all GBS employees the organizational changes within the Label Solutions department to “provide increased level of support” to the “sales organization and attention on [GBS’s] key business growth initiatives.” The memo announced the positions of Regional Sales Managers and Business Development Managers who would report directly to Kitsonas. The Regional Sales Managers were Shearer and Geoff Latham. The Detroit sales team was to report to Shearer. Furlow, who had assumed the additional responsibility of Branch Manager of the Detroit office, oversaw the Customer Service personnel. Furlow reported to Shearer.

{¶8} The announcement further stated that Yannarell and Tim Gill would assume the positions of Business Development Managers. The statement said:

{¶9} “Tom will focus on key business initiatives that include an important role in securing signed contract extensions for GM and Delphi in 2007 along with leading the sales effort into the emerging market of Brand Protection for Label Solutions.”

{¶10} Tim Gill’s focus as Business Development Manager was to develop new business in the retail market.

{¶11} While Yannarell was to pursue the growth of new business for GBS, GBS also expected Yannarell to continue his work with the GM and Delphi contracts. As part of his relationship with GM, Yannarell worked with Susan Dorman, the GM Global Process Owner, Office Products and Forms Management. Dorman complained to GBS that she found Yannarell to be disrespectful and arrogant during her weekly conference

calls and he refused to address her concerns regarding GBS's business model for its contract with GM Canada. Other GBS employees complained to GBS management regarding their negative interactions with Yannarell.

{¶12} On May 1, 2007, Kitsonas completed Yannarell's annual performance appraisal in Yannarell's position of Business Development Manager. Kitsonas stated that Yannarell achieved the revenue and profitability goals assigned to him. Kitsonas rated Yannarell as "Below Expectations" for his interpersonal and communication skills. Kitsonas stated in the performance appraisal that, "Tom displays a very direct method of communication that often tends to offend others when his view differs from theirs. A number of co-workers report an abrasive method of communicating along with a condescending nature when Tom questions a position or does not agree with the information presented to him. Tom must work to respond to all situations in a professional manner." Kitsonas summarized that he was confident that Yannarell would exceed his objectives in securing new independent sales during 2007, but he must be willing to improve his internal relationships with his co-workers.

{¶13} Throughout 2007, while Yannarell and his GBS Detroit team successfully garnered a more lucrative contract with GM, Yannarell failed to make any independent sales calls outside of GM and Delphi. A large opportunity with GM regarding a new line of business called Brand Protection that Yannarell was to have secured fell through without explanation. In 2008, Kitsonas communicated his concerns to GBS management regarding Yannarell's negative attitude towards his Business Development Manager position. Kitsonas recommended that GBS move forward with Yannarell's separation from the company.

{¶14} On January 31, 2008, GBS terminated Yannarell's employment. Yannarell was 66 years old. GBS's letter to Yannarell regarding his termination stated that he was terminated due to the realignment of duties and responsibilities within the Labeling Group. During deposition and in response to interrogatories, GBS management stated that Yannarell was terminated because of his insufficient job performance as Business Development Manager and his negative demeanor at GBS.

{¶15} After Yannarell's termination, Yannarell's position of Business Development Manager was eliminated. Some of the job duties of the Business Development Manager described in the job description were eliminated and other duties were absorbed by Shearer, Furlow and Kitsonas.

{¶16} On July 22, 2008, Yannarell filed a Complaint against GBS alleging age discrimination, disability discrimination and breach of contract. Yannarell dismissed his disability discrimination claim on December 19, 2008.

{¶17} GBS filed a motion for summary judgment, requesting the trial court grant it judgment as a matter of law on Yannarell's claims for age discrimination and breach of contract. On January 26, 2009, the trial court granted summary judgment in part on GBS's motion that it was entitled to judgment as a matter of law on Yannarell's claim for age discrimination. The trial court found Yannarell could not establish a prima facie case of age discrimination nor could he establish GBS's legitimate, non-discriminatory reason for Yannarell's termination was pretext.

{¶18} The trial court denied GBS's motion for summary judgment on Yannarell's claim of breach of contract, finding there was a genuine issue of material fact as to whether GBS gave Yannarell the appropriate notice before his termination per his

employment contract. The trial court stated in its judgment entry that although it found there was a genuine issue of material fact as to the breach of contract claim, it found there was no just reason for delay pursuant to Civ.R. 54(B).

{¶19} It is from this decision Yannarell now appeals.

{¶20} Yannarell raises one Assignment of Error:

{¶21} “THE TRIAL COURT ERRED BY GRANTING DEFENDANT-APPELLEE’S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF-APPELLANT’S CLAIM FOR AGE DISCRIMINATION.”

{¶22} We review Yannarell’s Assignment of Error pursuant to the standard set forth in Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶23} “Civ.R. 56(C) 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 nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.”

{¶24} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same

standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶25} Under Ohio law, a prima facie case of age discrimination may be proved either directly or indirectly. An employee “may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent.” *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, paragraph one of the syllabus; *Smith v. E.G. Baldwin & Assoc., Inc.* (1997), 119 Ohio App.3d 410, 415. If, however, the employee is unable to establish a causal link or nexus between the employer's discriminatory statements or conduct and the act that allegedly violated the employee's rights under the statute, then the employee has not proved age discrimination by the direct method of proof. See *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125, cert. denied (1997), 521 U.S. 1104, 117 S.Ct. 2480. Without direct proof of discrimination, an employee may establish a prima facie claim of age discrimination indirectly by demonstrating 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 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, at ¶ 20.

{¶26} Once an employee establishes a prima facie case of age discrimination, the burden shifts to the employer to provide some legitimate, nondiscriminatory reason for the action taken. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 503. If the employer establishes a nondiscriminatory reason, the employee then bears the burden of showing the employer's proffered reason was a pretext for impermissible

discrimination. *Owens v. Boulevard Motel Corp.* (Nov. 5, 1998), Franklin App. No. 97APE12-1728; *Cruz v. South Dayton Urological Associates, Inc.* (1997), 121 Ohio App.3d 655, 659. The employee must prove the employer's nondiscriminatory reason was false and discrimination was the real reason for the action taken. *Wagner v. Allied Steel & Tractor Co.* (1995), 105 Ohio App.3d 611, 617. Mere conjecture the employer's proffered reason is pretext is insufficient to withstand a summary judgment motion. *Surry v. Cuyahoga Community College*, 149 Ohio App.3d 528, 2002-Ohio-5356, at ¶ 24. To avoid summary judgment, the plaintiff must produce some evidence the defendant's proffered reasons were factually untrue. *Id.* *Hershberger v. Altercare, Inc.*, Stark App. No. 2006CA00167, 2007-Ohio-1452, ¶¶62-63.

{¶27} In clarifying an element within R.C. 4112.14(A), the Ohio Supreme Court stated that the “prima facie case method ‘involv[es] the process of elimination, whereby the plaintiff may create an inference that an employment decision was more likely than not based on illegal discriminatory criteria.’” *Coryell*, supra at ¶ 22. It must be remembered the ultimate inquiry in an age discrimination case is whether the plaintiff was discharged on account of age. *Id.*

{¶28} The focus of the trial court’s analysis and the parties’ arguments on appeal is the whether Yannarell established age discrimination through indirect evidence, i.e. whether Yannarell established a prima facie case for age discrimination by demonstrating the existence of each of the four elements set forth in R.C. 4112.14(A). Upon our de novo review of the Civ.R. 56 evidence presented in support of the arguments, we agree with the trial court’s finding that reasonable minds can only reach one conclusion that Yannarell cannot establish a prima facie case of age

discrimination, nor can he establish GBS's legitimate non-discriminatory reasons for terminating Yannarell were pretextual.

{¶29} There is no dispute Yannarell meets some of the elements of an age discrimination claim in that he is a member of a statutorily protected class and that he was discharged from his employment. Yannarell was 66 years old at the time his employment with GBS was terminated. We find, however, Yannarell fails to meet the fourth element of R.C. 4112.14(A) because he was not replaced by, or the discharge did not permit the retention of, a person of substantially younger age.

{¶30} Yannarell argues that after his termination, he was "replaced" by Shearer, a male employee 17 years younger than Yannarell. The Civ.R. 56 evidence demonstrates that when Yannarell was given the new position of Business Development Manager to promote new business growth, Kitsonas reassigned some of Yannarell's former administrative job duties as Director of National Accounts-Automotive to Shearer and Furlow. Shearer's position was restructured as the Regional Sales Manager and Furlow reported to Shearer. After Yannarell's termination as Business Development Manager, the position of Business Development Manager was eliminated. Kitsonas testified in his deposition that some of the Business Development Manager job duties were eliminated and some were reassigned to Shearer, Furlow, and Kitsonas.

{¶31} Yannarell argues that it is not necessary to show that GBS hired a new employee of a substantially younger age to meet the fourth element of R.C. 4112.14(A), but rather can demonstrate that Yannarell's job duties were reassigned to a substantially younger employee in order to show "replacement." Assumption of duties

does not constitute replacement. *Valentine v. Westshore Primary Care Assoc.*, Cuyahoga App. No. 89999, 2008-Ohio-4450, ¶86 citing *Grosjean v. First Energy Corp.* (C.A.6, 2003), 349 F.3d 332, 335-336. “A ‘person is not replaced when another employee is assigned to perform the plaintiff’s duties in addition to other duties * * *. A person is replaced only when another employee is hired or reassigned to perform the plaintiff’s duties.” *Id.*, quoting *Barnes v. GenCorp Inc.* (C.A.6, 1990), 896 F.3d 1457, 1465. See, also, *Mendlovic v. Life Line Screening of Am., Ltd.*, 173 Ohio App.3d 46, 877 N.E.2d 377, 2007-Ohio-4674.

{¶32} We find the Civ.R. 56 evidence demonstrates that the job duties that were retained after Yannarell’s termination were reassigned to at least three different employees, in addition to their existing job duties. For example, Kitsonas, Furlow, Shearer, Donna Downes, and Jerry Matusak are now responsible for the GM and Delphi Performance Reviews as listed in Yannarell’s job description of Business Development Manager. Kitsonas, as Executive Vice President of Label Solutions, took on that job duty in addition to his own previous duties.

{¶33} Further, some of the job duties assigned to Shearer and Furlow were done before Yannarell was terminated as part of the GBS restructuring to promote new sales growth. In order to allow Yannarell to focus on new sales growth in his position as Business Development Manager, Shearer and Furlow were reassigned some of Yannarell’s duties in managing the GBS Detroit team in addition to their existing duties.

{¶34} We cannot find supporting Civ.R. 56 evidence in the record to support Yannarell’s conclusion that GBS repositioned Yannarell as the Business Development Manager in a scheme in which to phase Yannarell out of the company to permit the

retention of Shearer. There is no evidence that Shearer's position at GBS was in jeopardy before Yannarell's termination. Further, the evidence demonstrates that the restructuring and reassignment of job duties were part of an overall business plan to expand the growth of GBS's business beyond GM and Delphi to the retail market.

{¶35} Finally, Yannarell argues the evidence shows that GBS treated substantially younger employees with the same negative behaviors as Yannarell differently in that those employees were not terminated for their behavior. Yannarell points to the deposition of Kitsonas to show that Kitsonas tolerated disrespectful behavior from Shearer and Gill while terminating Yannarell for the same behaviors.

{¶36} In *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1116 (6th Cir. 2001), the court held that employees must be treated similarly if they are "similarly situated in all respects." *Id.*, citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992) ("[T]he individuals with whom the plaintiff seeks to compare his/her treatment 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.").

{¶37} Upon our review of the record, we find there is no Civ.R. 56 evidence to demonstrate that Gill and Shearer were similarly situated to Yannarell in all regards. Shearer held a different managerial position than Yannarell. Gill was also a Business Development Manager, but he was responsible for a different account and the record is undeveloped as to Gill's employment history with GBS. Kitsonas commented on Yannarell's interpersonal communication skills in an annual performance review

submitted to the court as Civ.R. 56 evidence. No such Civ.R. 56 evidence was presented to the court regarding Shearer or Gill to lead this court to find a genuine issue of material fact exists as to whether these employees were similarly situated with respect to the severity and frequency of their negative behaviors as to Yannarell.

{¶38} This leads the analysis to the next argument before this Court that the legitimate nondiscriminatory reasons for Yannarell's termination were merely pretext. The trial court found that GBS established a legitimate nondiscriminatory basis for Yannarell's termination because evidence was presented that Yannarell did not meet all of the objectives of his position of Business Development Manager. While Yannarell secured the GM and Delphi contracts, it was uncontroverted that Yannarell did not generate any new business sales outside the GM and Delphi contracts.

{¶39} Mere conjecture that the employer's proffered reasons are pretextual is insufficient to withstand a summary judgment motion. See *Surry v. Cuyahoga Community College*, 149 Ohio App.3d 528, 2002-Ohio-5356, 778 N.E.2d 91, ¶ 24. To avoid summary judgment, an employee must produce some evidence that the employer's proffered reasons were factually untrue. *Id.*

{¶40} Yannarell states that throughout the litigation of this matter, GBS has propounded varying legitimate nondiscriminatory business reasons for terminating Yannarell. GBS's letter to Yannarell regarding his termination stated that he was terminated due to the realignment of duties and responsibilities within the Labeling Group. During deposition and in response to interrogatories, GBS management stated that Yannarell was terminated because of his insufficient job performance as Business

Development Manager and his negative demeanor at GBS. Yannarell argues that GBS's changing explanations are evidence of pretext.

{¶41} In support of his argument, Yannarell refers this Court to *Cichewicz v. Unova Indus. Auto. Sys.* (6th Cir. 2004), 92 Fed. Appx. 215, 220. In that case, the court found the employer's changing explanations for terminating the plaintiff raised the inference of pretext. When analyzing those changing explanations in light of all the Civ.R. 56 evidence presented to support the elements of age discrimination, the court found the additional evidence of the employer's changing explanations for its reason for terminating the plaintiff tended to support a finding that a genuine issue of material fact existed as to whether the plaintiff was discriminated against because of his age.

{¶42} While we find that GBS did offer different explanations for Yannarell's termination, we do not find that GBS's proffered reasons were factually untrue.

{¶43} GBS stated that Yannarell was terminated because he did not generate new business sales outside of the GM and Delphi contracts as required through his position of Business Development Manager. Yannarell's compensation package reflected the expectation that Yannarell would generate new sales in that his commission relative to the GM and Delphi contracts were reduced and there was an increase in his commission and a bonus potential for business generated outside of those contracts. Yannarell was aware that he was being asked to devote a considerable amount of time in sales outside of GM and Delphi, Yannarell did not put forth such sales effort as expected by GBS. Yannarell admitted in his deposition that he did not make any new sales calls to customers. Yannarell did work on the Brand

Protection program that was considered to be a new sale to GM; but the sale fell through without explanation.

{¶44} GBS also stated that it terminated Yannarell's employment because of his negative interpersonal communications with staff and customers. GBS's concerns regarding Yannarell's attitude was evidenced by the May 2007 performance review completed by Kitsonas where Yannarell received a "Below Expectations" in that area. Further, deposition testimony was provided by Susan Dorman, GBS's contact with their major customer, the GM Corporation. Dorman testified that she had negative conversations with Yannarell on a weekly basis wherein he refused to address her concerns about the management of an important aspect of the GM contract. During those conversations, she found Yannarell to be insulting, abrasive and disrespectful. Dorman took her complaints to GBS management.

{¶45} We find the evidence presented demonstrates there are no genuine issues of material fact that GBS had legitimate nondiscriminatory reasons for terminating Yannarell's employment and those reasons were not pretextual.

{¶46} Accordingly, we overrule Appellant's sole Assignment of Error.

{¶47} The judgment of the Stark County Court of Common Pleas is affirmed.

By Delaney, J.

Gwin, P. J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

PAD:kgb

