[Cite as *Ksiazek v. Columbiana Cty. Port Auth.*, 2021-Ohio-1267.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

DIANE KSIAZEK,

Plaintiff-Appellant,

v.

COLUMBIANA COUNTY PORT AUTHORITY,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 20 CO 0010

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2019 CV 221

BEFORE:
Carol Ann Robb, Cheryl Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Michael W. DeWitt, DeWitt Law, LLC, 4200 Regent Street, Suite 200, Columbus, Ohio 43219 for Plaintiff-Appellant and

Atty. Joseph J. Brennan, *Atty. Rina R. Russo,* WALTER | HAVERFIELD LLP, The Tower at Erieview, 1301 East Ninth Street, Suite 3500, Cleveland, Ohio 44114 for Defendant-Appellee.

Dated: March 22, 2021

Robb, J.

{¶1} Plaintiff-Appellant Diane Ksiazek appeals the decision of the Columbiana County Common Pleas Court granting summary judgment in favor of Defendant-Appellee Columbiana County Port Authority. Appellant alleged both an age discrimination and retaliation claim against Appellee. The issue in this appeal is whether the trial court's grant of summary judgment in Appellee's favor was correct. For the reasons expressed below, the decision of the trial court is affirmed.

Statement of the Case

{¶2} Appellee hired Appellant in August 2013 as the Manager of Finance and Administration. When Appellant was hired, Penny Traina was a member of Appellee's Board of Directors. Approximately 2 years after Appellant was hired, the contract for Appellee's executive director was not renewed. Appellant was named interim executive director. Traina, who no longer was a board member, applied for the position of executive director and was hired in March 2016.

{¶3} The record before this court indicates Traina began to have issues with Appellant's performance in 2017. It is undisputed that in 2017 Appellant faced multiple personal issues, such as her husband being diagnosed and treated for cancer and the death of two close family members. Traina and Appellant discussed her 2017 performance and agreed they would put the issues behind them and move forward.

{¶4} Traina indicated that despite this conversation, Appellant's work performance did not improve and Appellant's hostile and confrontational behavior continued. Appellant, conversely, stated their relationship was always a back and forth, but acknowledged something did change during this time-period.

{¶5} In August 2017 the long time secretary for Appellee retired, Appellee began changing its accounting system to a cash base system, and Appellee began preparing to take over the Columbiana County's Community Development Block Grants. Under the new accounting system, the secretary would be in charge of entering raw accounting data into the system. Rather than replace the secretary, Appellee hired Brittany Smith to enter

the raw accounting data and to do the grant work. Smith was an employee of the Columbiana County Economic Development Department (County) and was already working as a grant coordinator for the County. Smith's official title when she was hired by Appellee in January 2018 was Grants Coordinator and Finance Assistant. This was a newly created position and the secretary was not replaced.

{¶6} Appellee reached out to the County about its decision to hire Smith. An arrangement was reached between the two organizations; Smith would start working for Appellee in 2018 and until that time she would remain an employee of the County, but would sometimes come to Appellee's office to learn the new accounting data entry system. She would be paid by the County until the commencement of her employment with Appellee in January 2018.

{¶7} Smith began her employment with Appellee in January 2018, but remained in her County office until Appellee moved its location. In January 2018, Appellee was in the process of selling its headquarters in East Liverpool and anticipated moving to another location in Leetonia. The arrangement of Smith's work location was approved by the County.

{¶8} Sometime in late fall 2017 or early winter 2018, Appellant expressed her concerns regarding Smith's employment arrangement to Traina. Appellant indicated that she thought there may be some potential illegality in the arrangement. Traina talked to Appellee's legal counsel and it was determined there was no merit with the concerns raised. There is nothing in the record to suggest Appellant re-raised this claim again.

{¶9} In spring 2018, Appellee was close to selling the headquarters in East Liverpool. This transaction began in 2016. Throughout that period, Appellant consistently told Traina there was not a lien on the property. However, that statement was incorrect. Weeks before the transaction in April 2018, Appellant informed Traina there was a lien on the property. The bank removed the lien days before the closing ensuring the transaction occurred.

{¶10} Traina indicated this was not the only problem with Appellant's work performance in 2018. Traina indicated that at a meeting with a member of Appellee's board to discuss ways to join forces with the County to grow its services, and to branch out into other areas, Appellant dismissed all the ideas as foolish and questioned Traina

and the Board member's skills. In addition, Appellant allegedly instructed Smith to deposit payroll withholding tax on a monthly basis instead of bi-weekly causing Appellee to incur IRS penalties and fees. Appellant also allegedly misquoted rental terms for a tenant, provided incorrect copies of the budget to the Board, and failed to pay a disputed invoice resulting in the telephone service being disconnected. The dispute concerning the telephone invoice was discovered to be unfounded, the bill was paid, and the telephone service restored.

{¶11} At the end of 2018, Appellee and the County created a formal Economic Development Consortium to join forces to benefit Columbiana County in both the private and public sectors. With the Consortium, Appellee needed a new employment position – the Business Retention and Expansion Coordinator. This was a position Appellant had wanted for years; this position focused on marketing and expansion. The employee holding this position was to assist with recruitment, and go out and talk to businesses. It was routinely discussed and understood Appellant would assume this role if the job ultimately opened. On January 4, 2019 Traina held a meeting to announce Appellant would fill the position and she would be expected to go to 15 businesses a month. Appellant refused to follow the directive of going to 15 businesses a month and stated she would only go to 2 businesses a month. Appellant also challenged Traina's strategy for the Consortium at that meeting.

{¶12} Following that meeting, on January 7, 2019, Traina met with Appellant to discuss her behavior and her performance. The next day, Traina left a letter on Appellant's desk summarizing the meeting. The letter was a written reprimand and indicated Appellant's performance and attitude must improve. Appellant was asked to sign a receipt of that letter and return it to Traina by January 11, 2019. Appellant did not return it, but informed Traina she needed a few more days to draft a response letter. At that point, Traina decided Appellant's employment should be terminated. On January 14, 2019, a meeting was held between Appellant, Traina, and Appellee's counsel. During that meeting Appellant was informed her employment was terminated, effective immediately. Appellant refused to sign her formal termination letter.

{¶13} In May 2019, Appellant sued Appellee alleging age discrimination and retaliation. In her age discrimination claim, she alleged she was replaced by Brittany

Smith, who was substantially younger than she and less qualified. Her retaliation claim was based upon her comment to Traina about the legality of Smith's work situation when she began working for Appellee at the end of 2017/beginning of 2018. 5/1/19 Complaint.

{¶14} Appellee answered the complaint and following discovery filed a motion for summary judgment. 7/2/19 Answer to Complaint; 2/26/20 Appellee Motion for Summary Judgment. In the motion for summary judgment, Appellee asserted there are no disputed facts and it is entitled to judgment as a matter of law. Appellee argued Appellant was terminated due to her antagonistic attitude, refusal to perform assigned tasks, and poor performance. This was a legitimate non-discriminatory reason for terminating her. Also, it asserted Smith was not retained to replace Appellant. Rather, she was hired to do part of the retiring secretary's position and to do grants; Smith was doing the grants for the County and had experience in that area. Furthermore, at the time of her termination, Appellant was the Retention and Expansion Coordinator. Smith is not the Retention and Expansion Coordinator. That position remains vacant and all of Appellant's remaining duties were absorbed by existing employees.

{¶15} As to retaliation, in the summary judgment motion, Appellee argued Appellant only mentioned once her concern about the legality of Smith training with Appellee while at the same time being paid by the County and the legality of Smith not moving to Appellee's building in 2018 when she officially began working for Appellee. Smith stayed in her office at the County until Appellee moved from its location in East Liverpool to Leetonia. Traina spoke with legal counsel and it was determined there was no issue. Following that statement in late 2017/early 2018, Appellant did not discuss the matter with anyone else. She was not terminated until January 2019. That one time comment does not constitute a protected activity and there is not a causal connection given the approximate 12 to 15 month delay between the comment and her termination. 2/26/20 Appellee Motion for Summary Judgment.

{¶16} Appellee responded to the summary judgment motion asserting there are genuine issues of fact. She argued Smith did replace her by doing the grant work, which was originally what she was doing. She also asserted she was retaliated against for raising issues with how Smith was being paid and the fact she was still working at the

County's office while being paid by Appellee. 3/17/20 Plaintiff Response in Opposition to Motion for Summary Judgment.

{¶17} The trial court granted summary judgment for Appellee. The court concluded there was no direct evidence of age discrimination; in order to prevail Appellant was required to establish a prima facie case of age discrimination. The trial court focused on the third and fourth prongs of the prima facie case – was she qualified for the position and was she replaced by a person not belonging to the protected class? As to qualification, it concluded her performance issues in 2017 through her termination indicated she was not qualified. It relied on an Eighth Appellate District case, which indicated she must prove she was performing her job at a level which met her employer's legitimate expectations. As to replacement by a person not belonging to a protected class, it reasoned this element was not met because Smith, although not in a protected class, was hired in January 2018 as Grant Coordinator and Finance Assistant. Smith assumed some of the retiring secretary's jobs. When Appellant was terminated her work was redistributed among other existing employees. The position of Retention and Expansion Coordinator has not been filled. 4/29/20 Summary Judgment J.E.

{¶18} As to retaliation, the trial court found Appellant also failed to establish a case of retaliation. The trial court focused on the first prong of a retaliation claim – protected activity. The trial court concluded Appellant's one statement was a vague charge that as a matter of law did not rise to the level of protected activity; Appellant "was unable to frame her complaint to relate to any age discrimination concerns." 4/29/20 Summary Judgment J.E.

{¶19} Appellant timely appealed the trial court's decision raising two assignments of error. However, prior to addressing those assignments, we will first set forth the standard of review for summary judgment.

Summary Judgment Standard of Review

{¶20} An appellate court reviews a summary judgment ruling de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. A court may grant summary judgment only when (1) no genuine issue of material fact exists;

(2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. Civ.R. 56(C).

Age Discrimination

First Assignment of Error

"The Common Pleas Court committed reversible error when it granted Summary Judgment in favor of CCPA on Ms. Ksiazek age discrimination claim under R.C. 4112."

{¶21} R.C. 4112.02(A) makes it an unlawful discriminatory practice, "[f]or any employer, because of the * * * age * * * 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." "To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent" and may establish such intent through either direct or indirect methods of proof. *Ricker v. John Deere Ins. Co.*, 133 Ohio App.3d 759, 766, 729 N.E.2d 1202 (10th Dist.1998), citing *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 583, 664 N.E.2d 1272 (1996).

{¶22} Although we are not bound to apply federal court interpretation of federal statutes to analogous Ohio statutes, Ohio state courts have looked to federal case law when considering claims of employment discrimination brought under the Ohio Revised Code. *Coryell v. Bank One Tr. Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, ¶ 15. *See also Campbell v. PMI Food Equip. Group, Inc.*, 509 F.3d 776, 785 (6th Cir. 2007); *Blizzard v. Marion Technical College*, 698 F.3d 275, 283 (6th Cir. 2012) ("Age discrimination claims brought under the Ohio statute are analyzed under the same standards as federal claims brought under the [ADEA]."), quoting *Wharton v. Gorman-Rupp Co.*, 309 Fed.Appx. 990, 995 (6th Cir.2009); *Frick v. Potash of Sask, Inc.*, 3d Dist. Allen No. 1-09-59, 2010-Ohio-4292, ¶ 16 ("In interpreting the Ohio anti-discrimination statutes, Ohio courts have consistently looked to federal cases interpreting federal civil rights and age discrimination legislation in addition to Ohio case law."), citing *Mauzy*, 75 Ohio St.3d at 582.

{¶23} Age discrimination is proven either by direct evidence that a termination or other adverse employment decision was motivated by age or indirectly, by circumstantial evidence, using the burden-shifting method articulated by the United States Supreme

Court in *McDonnell Douglas* and adopted by the Ohio Supreme Court in *Barker* and modified in *Kohnmescher* and *Coryell*. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146, 451 N.E.2d 807 (1983); modified by *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501, 575 N.E.2d 439 (1991) and *Coryell*, 101 Ohio St.3d 175. This is the first step of the *McDonnell Douglas* analysis - establishing the prima facie case of age discrimination. If a prima facie case is not established, the analysis ends.

{¶24} However, if the prima facie case is established, in order to avoid an adverse finding, under the second step of *McDonnell Douglas,* the employer must provide a legitimate, nondiscriminatory reason for plaintiff's discharge. *Barker*, 6 Ohio St.3d at 148, different holding modified by *Kohmescher*, 61 Ohio St.3d 501; *McDonnell Douglas*, 411 U.S. 792. If the employer does advance permissible grounds for dismissal, the burden then shifts to the plaintiff to prove by a preponderance of the evidence that the reasons articulated by the employer for termination were pretext for unlawful discrimination. *Barker*, citing *McDonnell Douglas.*

{¶25} In arguing she was discriminated against due to her age, Appellant does not claim there is direct evidence of discrimination. Rather, she asserts there is indirect evidence.

{¶26} Absent direct evidence of age discrimination, in order to establish a prima facie case of a violation of R.C. 4112.14(A) in an employment discharge action, a plaintiff-employee 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 the discharge permitted the retention of, a person of substantially younger age. *Coryell*, 101 Ohio St.3d 175 at ¶ 20. The statutorily-protected class includes persons age 40 or older. R.C. 4112.14(A).

{¶27} Appellant argues when the evidence is viewed in the light most favorable to her there are issues of material fact and summary judgment should not have been granted. She contends there is no dispute she is over 40 years of age and was terminated. She claims the disputed facts concern whether she was **qualified** for the position and whether she was **replaced** by a person who was not a member of a protected class. Appellee agrees there is no dispute over the first two elements and the arguments

and issues raised in this case concern the third and fourth elements of qualification and replacement. Each will be, respectively, discussed.

1. Qualified for the Position

{¶28} As to the issue of whether Appellant was qualified for the position, she contends the issue of her qualification was raised sua sponte by the court. While Appellee did indicate Appellant had performed poorly prior to her termination, Appellee did not clearly argue she was not qualified for her position. Appellant asserts the trial court should not have raised that issue sua sponte. Furthermore, she asserts the reasons the trial court found her to not be qualified for the position were disputed facts. She asserts the trial court relied on the failure to close or transfer a water suppression line, the failure to prepare a budget, and improperly quoting terms of a lease to a new tenant. In addition to those reasons, the trial court also relied on the failure to pay the telephone bill causing it to be shut off and for Appellee to incur reinstatement fees, and the failing to properly pay payroll deductions causing IRS penalties. Appellant claimed, as to the telephone issue, she was terminated before she was able to determine why the phones were disconnected. As for the IRS penalties, she states she was never given the IRS notices, but was blamed for the problem.

{¶29} Appellee counters asserting the trial court did not raise the issue of qualification sua sponte. It contends the argument in its motion for summary judgment was Appellant failed at her job responsibilities and she was terminated due to poor performance. In response, Appellant denied the above in her opposition motion, but admitted she made some mistakes. Appellee replied asserting Appellant was not "qualified" for the position due to her poor performance. Thus, Appellee asserts the issue was raised to the trial Court. Regardless, Appellee contends trial courts have inherent authority to raises issues sua sponte when granting summary judgment.

{¶30} Appellee further asserts in addition to the qualification issues raised by the trial court and mentioned in Appellant's arguments, Appellant also failed to inform Appellee and Traina of the lien on the St. George property until shortly before closing. This mistake, of incorrectly informing Traina of a lien when asked, occurred for years.

{¶31} At the outset, we note that despite arguments to the contrary, the trial court did not sua sponte raise the issue of qualification. As Appellee points out, the argument

was raised when Appellee argued she was terminated due to her poor performance. The qualification assertion was not based on a lack of education, but rather was based on a lack of performance to the standards the employer reasonably expected. Regardless, as Appellee points out a trial court has inherent authority to raise issues sua sponte when granting summary judgment. *State ex rel. Todd v. Canfield*, 7th Dist. Mahoning No. 11 MA 209, 2014-Ohio-569, ¶ 16 ("Despite the department's failure to respond to the initial request and the fact that the department did not raise overbreadth as a defense or in an argument in support of its cross-motion for summary judgment, we affirmed the trial court's *sua sponte* decision that the request was overbroad and unenforceable as a matter of law.").

{¶32} The key issue for this court under this argument is what does "qualified for the position" mean when establishing a prima facie case of age discrimination.

{¶33} The Tenth Appellate District has stated that at the prima facie stage of the analysis, qualification is reviewed objectively:

> "The only relevant inquiry at the *prima facie* stage of the analysis is whether the employee was objectively qualified for the position, taking into consideration the employee's education, experience, and skills." (Emphasis sic.) *Id.* At this stage, "'[a] court must evaluate whether a plaintiff established his qualifications independent of the employer's proffered nondiscriminatory reasons for discharge.'" *Erwin v. Village of Morrow*, S.D.Ohio No. 1:16-cv-1166, (Apr. 4, 2019), quoting *Cicero v. Borg-Warner Auto., Inc.*, 280 F.3d 579, 585 (6th Cir.2002). Put another way, "a court cannot conflate the *prima facie* analysis with the second stage of the *McDonnell Douglas* inquiry." *Leib at *30* citing *Wexler* at 575-76. Rather, "the focus at this point should be on Plaintiff's objective qualifications, such as his experience in the industry and demonstrated possession of the required general skills." *Chitwood v. Dunbar Armored, Inc.*, 267 F.Supp.2d 751, 756 (S.D.Ohio 2003), citing *Wexler* at 575-76. "The *prima facie* burden of showing that a plaintiff is qualified can therefore be met by presenting credible evidence that his or her qualifications are at least equivalent to the minimum objective criteria required for employment in the relevant field." *Wexler* at 575-76.

Brehm v. MacIntosh Co., 10th Dist. Franklin No. 19AP-19, 2019-Ohio-5322, ¶ 19.

{¶34} In that case, the only argument regarding the prima facie case concerned the third prong of the *McDonnell Douglas* - qualification. *Id.* at ¶ 18. The employer argued the employee was not qualified for the position because under his leadership as the administrator of one of their nursing homes, the facility's financial performance declined, and the employee was unable to demonstrate he understood the reasons for the decline and could not suggest a plan to reverse it. *Id.* The employer argued the employee failed to meet the employer's "legitimate expectations." *Id.*

{¶35} In analyzing under an objective standard, the appellate court explained the record indicated the employee possessed a four-year degree from Muskingum College, completed a nine-month administrator-in-training course, and obtained his nursing home administrator license. *Id.* at ¶ 20. Also, prior to working for employer, he had been an administrator at several other skilled nursing care centers and assisted living facilities for 6 years and had worked for more than 30 years in various senior management positions in the health care industry, employee benefits industry, and managed care industry. *Id.* While working in those capacities, he had dealt with complex budgets and oversaw large operations. *Id.* The appellate court held this evidence objectively demonstrated he was qualified for the position, and as such, the employee had established a prima facie case of age discrimination. *Id.* at ¶ 20-21.

{¶36} The Eleventh Appellate District also has held that qualification is analyzed objectively, but further explained that possessing the required skills refers not only to capability, but meeting the employers legitimate expectations. *McGlumphy v. Cty. Fire Protection Inc.*, 2016-Ohio-8114, 74 N.E.3d 986, ¶ 23-24 (11th Dist.). "The plaintiff's performance must be 'up to the standard that the employer is entitled to expect from an employee at that experience and responsibility level.'" *Id.* at ¶ 24 quoting *Neubauer v. A.M. McGregor Home Corp.,* 8th Dist. Cuyahoga No. 65579 (May 19, 1994); *see also Landon v. ABB Automation, Inc.,* 11th Dist. Lake No. 2001–L–154, 2002-Ohio-3376, 2002 WL 1401710, ¶ 15 ("In order to demonstrate qualification for a position, a plaintiff must show he or she has the capability of performing the work and that he or she is meeting the employer's legitimate expectations.").

{¶37} However, when assessing this at the prima facie stage of a termination case, a court must examine the evidence independent of the nondiscriminatory reason the defense provides as its reason for terminating plaintiff. *McGlumphy* at ¶ 25. *See also Pattison v. W.W. Grainger, Inc.,* 8th Dist. Cuyahoga No. 93648, 2010-Ohio-2484, ¶ 28. The *McGlumphy* court explained:

> "While a plaintiff may very well lose on summary judgment because she fails to proffer evidence on [the] 'ultimate issue,' a court misapplies the structure of *McDonnell Douglas* by holding that she fails at the prima facie stage due to defendant's nondiscriminatory reason." "[T]his determination will often involve assessing whether the plaintiff was meeting the employer's expectations *prior to* the onset of the events that the employer cites as its reason for the termination[.]"

(Internal citations omitted). *McGlumphy* at ¶ 25.

{¶38} In *McGlumphy*, the trial court considered the documented deficiencies (poor performance and poor attitude) in the employee's job performance when it determined the employee was not qualified for the position. *Id*. at ¶ 26. The appellate court found this reliance to be erroneous because those were the same deficiencies the employer relied on as their nondiscriminatory reason for terminating the employee. *Id*. However, the appellate court in upholding the grant of summary judgment also stated it was not necessary to determine whether the employee established a genuine issue of material fact as to her qualification. *Id*. at ¶ 27. It "assumed, without deciding" that the employee established a prima facie case sufficient to raise a presumption of discrimination, but that the employer submitted evidentiary material sufficient to show a legitimate nondiscriminatory basis for termination and the employee did not present any evidence that created a genuine issue regarding whether this reason was pretextual. *Id*. Thus, it affirmed summary judgment on the basis of the second and third steps of the *McDonnell Douglas* test.

{¶39} Here, the trial court in analyzing this issue cited two cases from the Eighth Appellate District – *Wilson* and *Smith*. *Wilson v. Precision Envtl. Co.*, 8th Dist. Cuyahoga

No. 81932, 2003-Ohio-2873; *Smith v. Greater Cleveland Regional Transit. Auth.*, 8th Dist. Cuyahoga No. 78274 (May 24, 2001).

{¶40} In *Wilson*, the court cites to *Smith* for the proposition if the employee is not meeting the employer's reasonable expectations, then he is not qualified. The employee in *Wilson* was terminated due to his job performance. *Wilson* at ¶ 33. There were many complaints against the employee by managers, supervisors, and other field and shop employees. The employee was tardy in his delivery of materials to job sites, performed substandard work due to his exhaustion, continued his unauthorized use of the company vehicle, misused asbestos materials for disposal, and failed to obtain his CDL as requested several times by his employer. *Id.*

{¶41} In *Smith*, the Eighth Appellate District Court upheld the trial court's grant of summary judgment for the employer based on lack of qualification. *Smith*, 8th Dist. Cuyahoga No. 78274. The court explained the employee was not meeting the employer's legitimate expectations in his performance as a janitor. *Id.* For instance, the employee failed to clean and restock the bathrooms. *Id.* The Court noted that although the employee contended he had actually done the work, and that the work had been sabotaged by his co-worker, he failed to present any evidence to substantiate the claim. *Id.* It concluded the supervisor's failure to investigate the matter was justified. *Id.* The court concluded the employee failed to present specific facts to show a genuine issue at trial as to qualification. *Id.*

{¶42} In these earlier cases from the Eighth Appellate District, the court did not discuss viewing qualification objectively as was done in the Tenth and Eleventh Appellate District cases cited above. However, in more recent cases, the Eighth Appellate District has engaged in that type of analysis. For instance, in a 2010 case, it provided the following analysis for finding a prima facie case of age discrimination was established:

> In granting summary judgment in favor of Grainger, the trial court found that Pattison was not qualified for the position because he failed to meet company's sales goals for five consecutive years. We note that Pattison's alleged failure to meet sales goals was Grainger's stated reason for terminating Pattison.

> However, “[w]hen assessing whether a plaintiff has met his employer's legitimate expectations at the prima facie stage, * * * a court must examine the plaintiff's evidence independent of the nondiscriminatory reason ‘produced’ by the defense as its reason for terminating plaintiff.” See *Cline v. Catholic Diocese of Toledo* (6th Cir., 2000), 206 F.3d 651, 657. Here, the trial court judged Pattison's qualifications by using Grainger's discharge justification as evidence that Pattison was not qualified.
>
> Our review of the record reveals that after graduating from college in 1975, Pattison began his employment with the family-owned business that was later acquired by Grainger. In total, Pattison spent 27 years with Grainger and its predecessor companies. Pattison moved up through the ranks to become a Territory Manager and held that position for 12 years before being terminated.
>
> In addition, prior to his termination, Pattison generated $3.5 million dollars in revenue and was responsible for 2400 accounts. The record reveals that several of Pattison's customers spoke highly of his qualification, efficiency, and dependability. Several of these customers indicated that they were disappointed with Pattison's replacement, and at least two indicated that they have purchased significantly less from Grainger since Pattison's termination. One former customer stopped purchasing from Grainger after Pattison was terminated.
>
> When viewed independently of Grainger's proffered reason, Pattison offers sufficient evidence for a reasonable jury to find that he was qualified for his position. As such, Pattison established a prima facie case of age discrimination.

Pattison v. W.W. Grainger, Inc., 8th Dist. Cuyahoga No. 93648, 2010-Ohio-2484, ¶ 27-31.

{¶43} Therefore, while the earlier decisions of the Eighth Appellate District may not have stated a court must examine the plaintiff's evidence independent of the

nondiscriminatory reason produced by the defense as its reason for terminating plaintiff or analyzed it in that manner, the most recent cases do. Furthermore, in *Wilson,* part of the reason to terminate the employee was failure to obtain a CDL. A CDL may be a qualification to obtain the job and thus, the failure to have a valid CDL would mean the employee is not qualified. Poor job performance aside, the failure to have a CDL would mean the employee was not qualified.

{¶44} In the case at hand, the stated reasons for her termination were the accumulation of insubordination to her boss and poor performance. The specific instances of poor performance were failing to notify her boss about a lien on the St. George property, failing to properly transfer the utilities when Appellee moved which resulted in the phone being shut off, and a budget not being prepared correctly. The specific instances of insubordination discussed were Appellant's questioning her boss' directives and indicating the way Traina did things would not be the way she did things. In response to those allegations, Appellant asserted her relationship with Traina was a devil's advocate type of relationship and they had worked well together. She testified at her deposition she did not think she had performance issues. She further indicated any mistakes she made were minor. For instance, the lien on the St. George property was removed prior to closing and did not delay closing.

{¶45} The review of the record indicates Appellant had been in the banking industry for 30 years prior to being hired by Appellee. She was hired for the position of Manager of Finance and Administration due to her financial background. Both Traina and Appellant acknowledged Appellant was interested in going out to businesses and explaining what Appellee could do for them, which is what the position of Retention and Expansion Coordinator does. Appellant testified at her deposition that she believed she would move into that position and she desired to have that role. Traina's deposition testimony also indicated Appellant wanted to be the Retention and Expansion Coordinator. There is nothing in the record to indicate Appellant did not have the education or experience to make her qualified for the Retention and Expansion Coordinator position or for the Manager of Finance and Administration position.

{¶46} Considering the above, viewed objectively, Appellant established the qualification prong of the *McDonnell Douglas* test. Or, in other words, the trial court

conflated the qualification prong of prima facie analysis with the second stage of the *McDonnell Douglas* inquiry. It relied on the stated reasons for termination to find that Appellant was not qualified. It should have evaluated whether Appellant established qualifications for the position independent of Appellee's proffered nondiscriminatory reasons for discharge. The focus should have been on the objective qualifications, such as experience in the industry and demonstrated possession of the required general skills. Thus, the trial court incorrectly determined Appellant was not qualified for the position.

{¶47} Our determination that the trial court erred in finding Appellant was not qualified for the position does not mean summary judgment will necessarily be reversed. As stated above, the fourth prong (replacement) of the prima facie case is also at issue in this case.

2. Replacement

{¶48} As stated above, the trial court determined, as a matter of law, Appellant was not replaced by Brittany Smith. Smith was hired to a new position, Grant Coordinator and Financial Assistant and was approximately twenty-eight years old when hired. Appellant claims the assertion she was not replaced places form over substance. She argues grant coordinator was part of her job description until Smith was hired. Appellant admits she was moved to the Retention and Expansion Coordinator position prior to her termination, but she claims there is disputed evidence that there was ever any intention of allowing her to take the position.

{¶49} Appellee counters the above argument asserting Appellant was not replaced as the word is defined by law. Smith was hired to do the grant work, which could possibly be considered part of Appellant's job, and to do data entry work that was being performed by the retiring secretary. Furthermore, at the time of her termination, Appellant was not Manager of Finance and Administration. Instead, she had been hired to fill the position of Business Retention and Expansion Coordinator. That position was not filled; those duties were redistributed to other employees performing similar work.

{¶50} In order to prove under R.C. 4112.02 an employee was replaced by a person of a substantially younger age, a plaintiff must present evidence that another employee actually replaced her by assuming a "substantial portion" of her duties. *Mittler v. OhioHealth Corp.,* 10th Dist. Franklin No. 12AP–119, 2013–Ohio–1634, ¶ 25, citing

Mazzitti v. Garden City Group, Inc., 10th Dist. Franklin No. 06AP–850, 2007–Ohio–3285, ¶ 22. An employee is replaced when another employee is hired or reassigned to perform those duties. *Ryncarz v. Belmont Cty. Court of Common Pleas Juvenile Court Div.*, 2017-Ohio-4423, 93 N.E.3d 190, ¶ 13 (7th Dist.). An employee is not considered 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. *Id.* It is well-established that "[s]preading the former duties of a terminated employee among the remaining employees does not constitute replacement." *Nist v. Nexeo Sols., L.L.C.*, 10th Dist. Franklin No. 14AP-854, 2015-Ohio-3363, ¶ 35, quoting *Lilley v. BTM Corp.,* 958 F.2d 746, 752 (6th Cir.1992).

{¶51} Appellant's argument focuses on Brittany Smith taking over the grants when she was hired in January 2018. Appellant admitted tasks related to grants was only a portion of her job. Her other duties, according to her, were to oversee the day-to-day operation, ensure accurate and appropriate recording of revenue and expenses, reconcile bank accounts, prepare monthly financial statements, prepare an annual budget and manage that budget throughout the year, ensure Appellee was compliant with federal, state, and local laws, and coordinate and oversee state and federal audits. Traina explained that while Appellant was employed with Appellee there were no new grants obtained and the most that occurred with grants was the annual reporting. Appellant does not provide any evidence that a substantial amount of her time was spent on grant tasks. Rather, it appears to be a minimal part of her job responsibilities as Manager of Finance and Administration.

{¶52} Brittany Smith was also hired to do data entry for the new accounting system, which was not part of Appellant's job, but rather the job of the retiring secretary. Admittedly, there is evidence Appellant did data entry while Smith was on maternity leave. However, it is undisputed this was not part of her regular job duties. Therefore, the portion of Appellant's job that Smith took over when she was hired was minimal and/or Appellant failed to provide evidence it was substantial.

{¶53} Furthermore, at the time of her termination, Appellant was the Business Retention and Expansion Coordinator. There is no evidence in the record Smith assumed

any or all of those job responsibilities. The record at most shows the position has not been filled and the job responsibilities have been absorbed by many employees.

{¶54} Admittedly, Appellant does claim it was not the intention of Appellee to ever allow her to take the Business Retention and Expansion Coordinator position. She claims there is evidence to support her position; however, she does not reference it. Furthermore, the record does not indicate there was no intention on the part of Appellee to allow her to take that position. All evidence indicates it was the intention to move her to that position and she was moved to that position.

{¶55} As to Appellant's previous job responsibilities as Manager of Finance and Administration, those responsibilities have been absorbed by multiple employees. For instance, Tad Harold took over financials. Consequently, there is no evidence Smith took over all the job duties of Appellant's prior position.

{¶56} Accordingly, for those reasons, Appellant has not established the fourth element of a prima facie case of age discrimination. The trial court's determination that Appellant could not establish the fourth prong of the prima facie case of age discrimination was correct. Consequently, the trial court's grant of summary judgment on the age discrimination claim is affirmed on that basis alone.

Pretext

{¶57} As an alternative argument, it is asserted there is a genuine issue of material fact as to whether the stated reason for her termination were pretext. Appellant asserts two of the reasons for discharge happened long before she was terminated and were minor offenses. These reasons were the lien on the St. George property that Appellant failed to inform Traina about until shortly before closing and for leaving during work hours for personal matters. She contends the lien issue happened months before her termination and was a minor issue. As to leaving work for personal matters that only consisted of an hour or two, she contends all employees have left work for personal matters, including Traina. Thus, according to her, those reasons were pretextual.

{¶58} The other two reasons were the payroll tax mistake and the phone being disconnected for failure to pay. As stated above, she asserts the payroll mistake was not brought to her attention until a month or so later and it was far removed from the time of

termination. As to the phone being disconnected, she contends it was due to Appellee moving two times in one year. Thus, she asserts both of these reasons were also pretext.

{¶59} Appellee, addressing the pretext arguments, claims Appellant's poor job performance was a legitimate, nondiscriminatory reason for her termination. Appellee contends Appellant's argument fails to take into consideration Appellee did not assert any single incident was the sole basis for discharge. Rather, it was a culmination of two years of performance issues and interpersonal conflicts. Furthermore, Appellant admits she made errors, specifically regarding the lien, but contends they were minor mistakes that were correctable. This admission, according to Appellee, undercuts her pretext arguments.

{¶60} Although Appellant has failed to establish a prima facie case of age discrimination, and for that reason alone, the trial court's grant of summary judgment on the age discrimination claim can be affirmed, in the interest of justice, we will address the pretext arguments. Typically, when reviewing courts review summary judgment rulings, we only review the legal theories presented by the parties below to the extent that they were addressed by the trial court. *Hanick v. Ferrara*, 7th Dist. Mahoning No. 19 MA 0074, 2020-Ohio-5019, ¶ 69, citing *Yoskey v. Eric Petroleum Corp.*, 7th Dist. Columbiana No. 13 CO 42, 2014-Ohio-3790, ¶ 40-41 (if the trial court did not reach alternative arguments, we need not reach those arguments before reversing the entry of summary judgment on the ground relied upon by the trial court). Appellate courts generally refrain from ruling on arguments that were unaddressed by the trial court on the theory the issues are not ripe for review when the trial court proceeded as if they were moot due to another ruling. *Hanick,* citing *Jefferis Real Estate Oil & Gas Holdings LLC v. Schaffner Law Offices LPA*, 2018-Ohio-3733, 109 N.E.3d 1265, ¶ 41 (7th Dist.).

{¶61} The trial court did not squarely address the issue of pretext in its decision. It granted summary judgment finding Appellant did not establish a prima facie case of age discrimination. However, in addressing qualifications, the trial court did address pretext. As we stated above, the trial court conflated the qualification prong of prima facie analysis with the second stage (pretext stage) of the *McDonnell Douglas* inquiry.

{¶62} The trial court's reasoning was correct and indicated the reason for discharge was not pretext. The evidence indicated there was no single incident for

discharge. Rather, it was the accumulation of many incidents including insubordination, questioning Traina's competency, and the lien on the St. George property, to name a few. Appellant did not dispute she had a back and forth relationship with Taina and admitted that at some point it changed for the worse. She did not deny she failed to inform Appellee about the lien on the St. George property until a few days before closing and had previously said there was no lien. Although she contends it was a minor mistake and corrected, it was still an admitted mistake. Therefore, Appellant also failed to demonstrate a genuine issue of material fact on the second prong of the *McDonnell Douglas* test.

Conclusion

{¶63} In conclusion, the first assignment of error lacks merit. Although, the trial court's analysis and conclusion on qualification was incorrect, the trial court's conclusion on replacement was correct. Appellant did not establish she was replaced by Smith. Therefore, the trial court properly granted summary judgment on the age discrimination case; Appellant did not establish a prima facie case of age discrimination.

Retaliation

Second Assignment of Error

"The Common Pleas Court committed reversible error when it granted summary judgment in favor of CCPA [Appellee] on Ms. Ksiazek's R.C. 4112 retaliation claim."

{¶64} R.C. 4112.02(I) prohibits discrimination under the following two situations: (1) where an employee has opposed any unlawful discriminatory practice (opposition clause); and (2) where an employee 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 (participation clause). Further, "'[i]n order to engage in a protected opposition activity * * * a plaintiff must make an overt stand against suspected illegal discriminatory action.'" *Coch v. Gem Indus., Inc.,* 6th Dist. Lucas No. L–04–1357, 2005–Ohio–3045, ¶ 32, quoting *Comiskey v. Automotive Industry Action Group*, 40 F.Supp.2d 877, 898 (E.D.Mich.1999).

{¶65} In order to establish a prima facie case of retaliation, the claimant must prove that (1) she engaged in a protected activity, (2) the employer was aware that the claimant had engaged in that activity, (3) the employer 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, 879 N.E.2d 174, ¶ 13.

{¶66} The trial court found her claims of discrimination were vague complaints about the changing relationship between herself and Traina and do not qualify as protected activity under R.C. 4112(I).

{¶67} Appellant asserts that statement ignores her evidence of retaliation as she thought she was being pushed to quit. She claims her protected activity was when she made the complaint about Smith being hired in the manner she was while at the same time working for the County. She asserts this was a complaint about age discrimination. She argues, at minimum, there were genuine issues of material fact regarding the retaliation claim.

{¶68} Appellee counters, arguing Appellant cannot establish the first (and by extension the second) and fourth elements for a prima facie case of retaliation. Starting with the first element of protected activity, Appellee asserts the one comment Appellant made to Traina regarding the hiring of Brittany Smith does not qualify as protected activity because it did not consist of allegations of unlawful discriminatory conduct under thestatute. The comment did not contain an allegation of discrimination and the comment was not an opposition to an unlawful discriminatory practice. Thus, it asserts the retaliation claim as pled fails. The failure to establish the first element means the second element, employer notice, also fails.

{¶69} Appellee also asserts the fourth element (causal connection) fails. Appellee argues there is no evidence of causal connection because there was 15 months between the time Appellant commented on Smith's employment circumstances and her termination. That length of time is too attenuated to establish causation.

{¶70} Our analysis will address both the first and fourth elements, separately.

1. Protected Activity

{¶71} As stated above there are two types of protected activity under R.C. 411.02(I) – opposition and participation. Here, the comment made by Appellant about the legality of Smith's employment would most be in line with opposition activity; she was allegedly opposing an unlawful discriminatory practice.

{¶72} The problem is the comment that both she and Traina testified Appellant made did not concern unlawful discriminatory practice, but rather concerned the legality of the work situation. Smith, in the beginning, was still being paid by the County, but she was coming to Appellee's office to be trained. Then, in January 2018, when she officially started her position with Appellee, she was physically working from the County office's the majority of the time and was not working at Appellee's offices. This statement is not about a discriminatory practice (age or otherwise), but rather about the legality of the situation. Furthermore, it was one statement. Traina discussed it with legal counsel and found it was not illegal. By accounts of both Traina and Appellant, the issue was never raised again by Appellant.

{¶73} A mere assertion of a grievance, not based upon opposition to discrimination, does not constitute protected activity. *Motley v. Ohio Civ. Rights Comm.*, 10th Dist. Franklin No. 07AP-923, 2008-Ohio-2306, ¶ 16. Furthermore, it is well established a vague charge of discrimination is insufficient to constitute opposition to an unlawful employment practice for purposes of a claim of retaliation in employment. *Sullivan v. IKEA*, 12th Dist. Butler No. CA2019-09-150, 2020-Ohio-6661, ¶ 27, citing *Fox v. Eagle Distrib. Co.*, 510 F.3d 587 (6th Cir.2007); *Balding-Margolis v. Cleveland Arcade*, 352 Fed.Appx. 35 (6th Cir.2009).

{¶74} The Ohio Supreme Court has held that "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e), *et seq.,* Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Little Forest Medical Ctr. of Akron v. Ohio Civ. Rights Comm.*, 61 Ohio St.3d 607, 609–610, 575 N.E.2d 1164 (1991). Federal courts have concluded the filing of a union grievance that does not raise Title VII issues (e.g., discrimination) does not constitute "protected activity." *Motley*, 2008-Ohio-2306 at ¶ 15, citing *Gonzalez v. New York City Transit Auth.*, No. 00 Civ. 4293 (S.D.N.Y.2001) ("A union grievance hearing about overtime pay, unrelated to discrimination, is simply not a Title VII 'protected activity' that could give rise to a cognizable Title VII retaliation claim") and *Tiedeman v. Nebraska Dept. of Corr.*, 144 Fed.Appx. 565, 566 (8th Cir.2005) (complaint by plaintiff that her union contract was not being honored did not implicate protected activity "because it does not involve a practice 'made an unlawful employment practice' under Title VII") and *Moore v. United Parcel*

Service, Inc., 150 Fed.Appx. 315, 319 (5th Cir. 2005) (plaintiff's filing of grievance for his disqualification as a driver did not involve engaging in protected activity, "as his grievance did not oppose or protest racial discrimination or any other unlawful employment practice under Title VII") and *Castro v. New York City Bd. of Edn. Personnel*, No. 96 Civ. 6314 (S.D.N.Y.1998) (where none of plaintiff's union grievances included charges of discrimination, "the lodging of these grievances does not constitute a 'protected activity' within the meaning of the discrimination laws and, therefore, does not give rise to a claim of retaliation") and *Saviano v. Town of Westport*, No. 3:04–CV–522 (W.D.Conn.2007) ("A plaintiff does not engage in protected activity when he files a union grievance that does not specifically allege discrimination").

{¶75} Therefore, the claimed statement that is the basis for retaliation does not establish a prima facie case of retaliation because the statement was not a grievance alleging discrimination.

2. Causal Connection

{¶76} Even if we were to assume Appellant established that she engaged in a protected activity, she would still be required to show a "causal connection" between the termination and the statement.

{¶77} The Twelfth Appellate District has recently explained:

> A causal connection can be shown through direct evidence or through knowledge coupled with a closeness in time that creates an inference of causation. Close temporal proximity between the employer's knowledge of the protected activity and the adverse employment action alone may be significant enough to constitute evidence of a causal connection, but only if the adverse employment action occurs very close in time after an employer learns of a protected activity. However, where some time elapses between when the employer learns of the protected activity and the subsequent adverse employment action is taken, the employee must produce other evidence of retaliatory conduct to establish causation.

(Internal citations omitted). *Sullivan*, 12th Dist. Butler No. CA2019-09-150, 2020-Ohio-6661 at ¶ 37.

{¶78} In the instant case, the comment complained of was made sometime between September 2017 to February 2018. Appellant was discharged in January 2019. Thus, the comment was made anywhere from 17 months to 11 months prior to her termination. Courts have found much lesser periods of time did not demonstrate a causal connection. *Id.* at ¶ 38 (no inference of causation could be deduced from the 4-month interval between complaint and termination); *Spitulski v. Toledo School Dist. Bd. Of Edn.*, 2018-Ohio-3984, 121 N.E.3d 41, ¶ 78 (6th Dist.) (2 months); *Motley,* 10th Dist. Franklin No. 07AP–923, 2008–Ohio–2306 at ¶ 18 (over 2 years); *Mendlovic v. Life Line Screening of Am., Ltd.*, 173 Ohio App.3d 46, 2007-Ohio-4674, 877 N.E.2d 377, ¶ 41 (8th Dist.) (2 to 3 months); *Aycox v. Columbus Bd. Of Edn.*, 10th Dist. Franklin No. 03AP-1285, 2005-Ohio-69, ¶ 23 (more than a year); *Balletti v. Sun–Sentinel Co.*, 909 F.Supp. 1539, 1549 (S.D.Fla.1995) (6 months); *Reeves v. Digital Equip. Corp.*, 710 F.Supp. 675, 677 (N.D.Ohio 1989) (3 months); *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272–1273 (6th Cir.1986) (4 months).

{¶79} Appellant did not submit any other evidence of retaliatory conduct between the time of the statement to Traina until her termination. Thus, the trial court did not err in finding Appellant failed to establish the "causal connection" element of the retaliation claim.

{¶80} For those reasons, this assignment of error lacks merit.

Conclusion

{¶81} Both assignments of error lack merit. The trial court's grant of summary judgment for Appellee on the age discrimination and retaliation claims is affirmed.

Waite, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.