

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Suleiman A. Refaei,	:	
Plaintiff-Appellant,	:	No. 10AP-1193
v.	:	(C.C. No. 2008-01529)
Ohio State University Hospital,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on December 27, 2011

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*Jacobs, Kleinman, Seibel & McNally, and Mark J. Byrne, for appellant.*

*Michael DeWine, Attorney General, Randall W. Knutti and Jennifer A. Adair, for appellee.*

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APPEAL from the Court of Claims of Ohio.

BRYANT, P.J.

{¶1} Plaintiff-appellant, Suleiman A. Refaei, appeals from a judgment of the Court of Claims of Ohio finding no liability on the part of defendant-appellee, Ohio State University Hospital ("OSU") on plaintiff's claim of discrimination under R.C. 4112.02. Plaintiff assigns a single error:

**THE TRIAL COURT ERRED IN RULING THAT OSU'S FAILURE TO SELECT PLAINTIFF FOR THE MANAGER POSITIONS THAT EXISTED IN SPRING AND SUMMER**

**OF 2004 WAS NOT DUE TO HIS RACE AND NATIONAL  
ORIGIN IN VIOLATION OF OHIO REVISED CODE §§  
4112.02(A) AND 4112.99.**

Because competent, credible evidence supports the Court of Claims' determination that OSU did not discriminate against plaintiff in violation of R.C. 4112.02, rendering the relief available under R.C. 4112.99 inapplicable, we affirm.

### **I. Facts and Procedural History**

{¶2} Plaintiff, identifying himself as "of Arabian, Jordanian descent and a Muslim," holds a Bachelor of Science degree in Nuclear Medicine Technology from Wheeling Jesuit University and a Master of Science in Health Physics from University of Cincinnati. (Tr. 119.) At the time of trial, his pertinent work experience included approximately 12 years in managerial positions at hospitals in Ohio, Saudi Arabia, and Jordan. According to plaintiff's resume and testimony, his specialties are nuclear medicine and radiology, but individuals with his background "understand the basic sciences of all modalities of [image] generating equipment." (Tr. 115.)

{¶3} In early 2004, plaintiff responded to an internet job posting at OSU's Main Hospital for the position bearing the "Job Title" of Radiology Manager, and a "Working Title" of Diagnostic Radiology and CT Manager. The posting included the following:

Minimum Qualifications

For Hire: Bachelor of Science degree, A.R.R.T. registry; minimum 4 years management experience, good knowledge of imaging equipment/operations required.

Excellent communication and organizational skills preferred.

On going: Maintains registry/licensing status; meets mandatory education and health surveillance requirements.

Demonstrates competence in technical, interpersonal, and cognitive skills required to meet essential job functions.

(OSU's Exhibit A, Job Posting for Radiology Manager, 3).

{¶4} In response to plaintiff's application, OSU set up an in-person interview in the spring of 2004. As Senior Director of Imaging Services, Bruce Lauer was charged with shepherding plaintiff and other candidates through the interview process. According to both parties, plaintiff's meeting with management and staff went well; he met with six to eight staff members and had several conversations with Lauer throughout the process. At the conclusion of the formal interview, Lauer took plaintiff to lunch where the two discussed elements of their respective backgrounds, including plaintiff's experiences living in the Middle East and his belief-based dietary restrictions.

{¶5} OSU ultimately chose another candidate for the available position, but Lauer encouraged plaintiff to apply for a similar position that soon would become available at OSU's East Hospital. The advertisement for the East Hospital position nearly was identical to the earlier posting, with two exceptions. The "Working Title" in the East Hospital description of qualifications simply repeated the "Job Title" of "Radiology Manager." In addition, the "Minimum Qualifications" section stated "Bachelor of Science degree or an equivalent educational background, A.R.R.T. registry or comparative Allied Health certification." Plaintiff again submitted his application, and Lauer again contacted him for an in-person interview.

{¶6} Plaintiff's interview once more went well. Although Lauer determined another candidate to be the first choice for the East Hospital position, the candidate declined an offer, and Lauer turned his attention to plaintiff. The details of Lauer's

subsequent communications with plaintiff are central to the dispute between the parties, but the parties generally agree plaintiff and Lauer spoke on several occasions and discussed potential salary figures.

{¶7} According to Lauer, at some point a few weeks into his back-and-forth discussions with plaintiff, he determined plaintiff required more money than OSU could offer. Concluding he already had offered plaintiff as much as was permitted under the salary range he received from the Human Resources department, he decided to move on to the next candidate on his list. Plaintiff, by contrast, claims he never was made an offer, was anticipating a final offer in the form of a letter, and was surprised when he contacted Lauer on July 12, 2004 to express his continued interest and was informed the position no longer was available. Plaintiff contacted the Human Resources department and was told on July 14, 2004 that the position remained open. Although plaintiff waited to hear further, the position was offered to the third-choice candidate on July 30, 2004. On August 3, 2004, OSU issued plaintiff a form rejection letter advising the position had been filled.

{¶8} After filing a complaint with the Ohio Civil Rights Commission, plaintiff filed a pro se complaint in the Court of Claims on October 24, 2005, which he voluntarily dismissed on February 8, 2007. Plaintiff re-filed his complaint in the Court of Claims on January 22, 2008 pursuant to R.C. 2305.19(A), alleging discrimination in both hiring decisions. Following a trial in the Court of Claims, the court, in a decision entered November 17, 2010, rendered judgment for OSU, finding plaintiff failed to prove either of his claims of discrimination by a preponderance of the evidence.

## II. Assignment of Error

{¶9} Plaintiff's single assignment of error contends the Court of Claims improperly resolved his claim of hiring discrimination based on race, national origin or religion at OSU Main Hospital and OSU East Hospital. Plaintiff, in effect, asserts the Court of Claims' judgment is against the manifest weight of the evidence.

### A. Applicable Law

{¶10} "Civil [j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Cunningham v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-330, 2008-Ohio-6911, ¶20, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. When considering whether a civil judgment is against the manifest weight of the evidence, an appellate court is guided by a presumption that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80. As a result, "[i]f the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." Id. at fn.3, quoting 5 Ohio Jurisprudence 3d (1978) 191-92, Appellate Review, Section 603.

{¶11} Plaintiff's discrimination claims are based on R.C. 4112.02(A) and 4112.99. R.C. 4112.02(A) states that "[i]t shall be an unlawful discriminatory practice \* \* \* [f]or any employer, because of the \* \* \* race \* \* \* religion \* \* \* [or] national origin \* \* \* of any person \* \* \* to refuse to hire, or otherwise to discriminate against that person with respect to hire." R.C. 4112.99 authorizes civil actions and relief for violations of R.C. Chapter 4112. Ohio

courts examine state employment discrimination claims under the guidance of federal case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 et seq. *Coryell v. Bank One Trust Co., N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723. Title VII jurisprudence imposes upon plaintiff the burden of establishing discrimination.

{¶12} "[A] plaintiff may establish a prima facie case of \* \* \* 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 Servs.* (1996), 75 Ohio St.3d 578, paragraph one of syllabus. Alternatively, a plaintiff may establish a prima facie case of discrimination indirectly through the first part of the *McDonnell Douglas* three-part, burden-shifting approach, to create an inference of discriminatory intent. *Id.* *Bucher v. Sibcy Cline, Inc.* (2000), 137 Ohio App.3d 230, 239, citing *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, 93 S.Ct. 1817, 1824. Under the latter approach, a plaintiff must prove by a preponderance of the evidence that (1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position in question; and (4) comparable, non-protected persons were treated more favorably. *Saha v. The Ohio State Univ.*, 10th Dist. No. 10AP-1139, 2011-Ohio-3824, citing *Clark v. Dublin*, 10th Dist. No. 01AP-458, 2002-Ohio-1440, following *McDonnell Douglas*.

{¶13} Once a prima facie case is established, a rebuttable presumption shifts the burden to the defendant to articulate clearly a legitimate, nondiscriminatory reason for the adverse action supporting a finding that unlawful discrimination was not the cause of the challenged employment action. *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 510, 113 S.Ct. 2742, 2749. OSU's burden is one of production; "defendant need not prove a

nondiscriminatory reason" for the employment action adverse to plaintiff, "but need merely articulate a valid rationale." *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶14, quoting *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 254, 101 S.Ct. 1089, 1094; *Hartsel v. Keys* (C.A.6, 1996), 87 F.3d 795, 800, citing *St. Mary's Honor Ctr.*, 509 U.S. at 514, 113 S.Ct. at 2751.

{¶14} If the employer carries its burden, then the plaintiff must have the opportunity to demonstrate that the reason the employer offered for taking the adverse employment action is actually a pretext for discrimination. *Boyd v. Ohio Dept. of Mental Health*, 10th Dist. No. 10AP-906, 2011-Ohio-3596, ¶27, citing *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. A plaintiff cannot establish that a proffered reason is pretext for discrimination unless the plaintiff shows "both that the reason was false, and that discrimination was the real reason." Id., quoting *St. Mary's Honor Ctr.*, 509 U.S. at 515, 113 S.Ct. at 2572. If successful in persuading the trier of fact that the employer's proffered reason is pretext for illegal discrimination, a plaintiff satisfies his or her ultimate burden. Id., citing *St. Mary's Honor Ctr.*, 509 U.S. at 511, 113 S.Ct. at 2749.

#### B. OSU's Main Hospital

{¶15} Plaintiff initially contends he presented direct evidence of discrimination regarding OSU's decision to offer the position at the Main Hospital to someone else. Pointing to his post-interview lunch with Lauer, plaintiff claimed at trial that he was "surprised that we talked about the cultural things more than the job" and sensed "the feeling was somewhat changed, the tone" after lunch. (Tr. 124.) Plaintiff, however, acknowledged he never told Lauer he did not want to discuss his personal beliefs or heritage and conceded they discussed their backgrounds generally, including that they

both lived for a time in Cincinnati. Moreover, plaintiff's resume reflects plaintiff's work at hospitals in Saudi Arabia and Jordan for the four years leading up to 2004, so some discussion of plaintiff's relationship with the region would be expected as it relates to his professional experience. The record supports the Court of Claims' conclusion that plaintiff did not provide sufficient direct evidence to demonstrate OSU "more likely than not was motivated by discriminatory intent." *Byrnes v. LCI Comm. Holdings Co.* (1996), 77 Ohio St.3d 125, 128-29.

{¶16} In terms of indirect evidence, the Court of Claims found plaintiff satisfied the elements of a prima facie case for discrimination. To meet OSU's ensuing obligations per step two of the *McDonnell Douglas* test, Lauer stated that his decision was based upon his belief that the other candidate was better qualified than plaintiff for the position of Radiology Manager, since the other candidate had extensive "hands-on" experience performing computed tomography ("CT") scans, was licensed to perform CT scans by the Ohio Department of Health, and was registered with the American Registry of Radiologic Technologists ("A.R.R.T."). By contrast, plaintiff was not licensed to perform CT scans in Ohio, was not registered with A.R.R.T. and, in Lauer's estimation, had less experience than the other candidate in performing such scans.

{¶17} The Court of Claims concluded OSU presented a legitimate, non-discriminatory reason for selecting the other candidate, and the evidence OSU cites, including Lauer's testimony, supports that conclusion. The relevant question on appeal resolves to whether plaintiff demonstrated OSU's proffered reason for its hiring decision was a pretext for illegal discrimination. Plaintiff demonstrated pretext if he established, by a preponderance of the evidence, that OSU's proffered reason (1) had no basis in fact,

(2) did not actually motivate the challenged conduct, or (3) was insufficient to warrant the challenged conduct or motivate the adverse employment action. *Dews v. A.B. Dick Co.* (C.A.6, 2000), 231 F.3d 1016, 1021; *E.E.O.C. v. Yenkin-Majestic Paint Corp.* (C.A.6, 1997), 112 F.3d 831, 834.

{¶18} Plaintiff presents several contentions directed at establishing that OSU's reasons have no basis in fact. Plaintiff's own testimony, however, reveals that his professional experience and specialties, extensive though they may be, did not focus on CT work. By contrast, the other candidate's resume, as well as Lauer's testimony about the other candidate's experience, reflected the other candidate's comprehensive background in the technology. Accordingly, the record evidence, if believed, demonstrates the other candidate had more experience directly dealing with CT technology. Apparently recognizing such evidence, plaintiff also attempts to establish that Lauer's stated reason did not drive his decision because (1) OSU's reasoning and actions have been inconsistent and changed over time and (2) comparisons of plaintiff's qualifications to those of the successful candidate and Lauer's hiring criteria support a finding of pretext.

#### 1. Inconsistent reasoning and actions

{¶19} The Sixth Circuit held that a changing justification reveals a genuine issue of fact about whether the defendant's proffered reason not only was false, but also a pretext for discrimination. See *Cicero v. Borg-Warner Automotive, Inc.* (C.A.6, 2002), 280 F.3d 579, 589 (concluding the trial court should not have granted summary judgment to defendant because justifications which shift over time call "the credibility of those justifications into question"). Plaintiff's case, however, does not involve summary

judgment. Equally as significant, the Court of Claims, after hearing plaintiff's case in full, did not find that OSU changed its justification for hiring the other candidate. Competent, credible evidence supports the court's determination.

{¶20} To support his claim that OSU's reasoning and actions were inconsistent, plaintiff initially claims nothing listed throughout the entire job posting identifies "hands-on" experience in CT and diagnostic radiology as a critical qualification for the job. Plaintiff contends that if hands-on experience were a decisive factor, the job's duties would have included a significant emphasis on patient care; instead the listed duties leaned heavily toward administrative work. OSU responded, at trial, with evidence that hands-on experience was valuable for the added perspective it brought to the noted managerial duties, not because the manager will continue to routinely perform the procedures. The Court of Claims reasonably could find persuasive OSU's contention that the manager's prior experiences in working directly with patients would be valuable in spite of a new role removed from day-to-day patient care.

{¶21} The Court of Claims also heard testimony from Lauer that directly contradicted plaintiff's contention that Lauer never informed him of the importance that would be placed on CT and diagnostic experience in the final hiring decision. Lauer testified he was "looking for a person with hands-on experience in those areas, especially CT experience," and that he "informed Mr. Refaei of that in the interview." (Tr. 46.) Lauer further explained his interest in plaintiff despite the position's focus on areas outside plaintiff's expertise, stating that "[a]lthough Mr. Refaei's experience was primarily in nuclear medicine technology, I still considered him a viable candidate because of his recent experience managing a multi-modality department." (Tr. 46.)

{¶22} Plaintiff next asserts that "until trial, five years after the hiring decision was made, the Defendant never argued that the lack of ARRT certification was a reason for Refaei's rejection." (Appellant's brief, 20.) He claims OSU changed its argument when OSU raised, as it cross-examined plaintiff, the point that plaintiff did not have a registration from A.R.R.T., suggesting it precluded "his further consideration for this position." (Appellant's brief, 20.)

{¶23} Preliminarily, counsel's questions are not evidence. Moreover, nowhere in the trial does OSU, through counsel, claim plaintiff's lack of registration disqualified him from further consideration. Although the cross-examination at issue is subject to differing interpretations, the trial court could conclude the most likely reason for noting plaintiff's lack of A.R.R.T. registration was to highlight another reason OSU would find the other candidate better qualified. Regardless of defense counsel's intention in highlighting plaintiff's lack of A.R.R.T. registration, the trial court was justified in concluding OSU did not change its articulated reasons for not hiring plaintiff.

{¶24} Even had the Court of Claims found OSU changed its justification over time, the court nevertheless retained the discretion to determine whether the false justification was a pretext for discrimination. Although *St. Mary's Honor Ctr.* held that an employer's changing reasons for its decision can evidence discrimination, the case also held such facts do not compel the trier of fact to decide for plaintiff. *Id.*, 509 U.S. at 511, 113 S.Ct. at 2749 (noting to hold otherwise would disregard "the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion' ").

{¶25} Plaintiff also claims that the "lack of 'hands-on' care and ARRT certification could not have been a disqualifying factor since Lauer obtained a salary quote for plaintiff from HR on March 2, 2004." (Appellant's brief, 21.) Plaintiff asserts that "[a]ccording to Lauer, a salary quote is only obtained in the event he intends to offer the job after the interview of the respective candidate." (Appellant's brief, 21.)

{¶26} Plaintiff's argument is unpersuasive for two reasons. Initially, OSU does not contend plaintiff was disqualified from consideration because he lacked hands-on care experience or A.R.R.T. registration. Moreover, Lauer explained he had two viable candidates and may have asked for two salary quotes at the same time. The evidence, if believed, thus supports Lauer's explanation of his practice, demonstrates Lauer obtained salary quotes for plaintiff and the other candidate at the same time, and does nothing to prove OSU changed its reasons or to disprove that OSU found the other candidate to be better qualified.

{¶27} The record thus contains competent, credible evidence that OSU was consistent in the reasons for their decision.

## 2. Comparison of Qualifications

{¶28} Plaintiff also contends he "was clearly more qualified than" the other candidate. He attempts to demonstrate OSU's proffered reason was not legitimate, arguing that neither the other candidate's hands-on experience nor his qualifications, when compared to plaintiff's, could have been sufficiently different or superior to make him a better choice for the position.

{¶29} In that context, plaintiff initially contends the other candidate was not qualified because he lacked a college degree; Lauer testified the other candidate's

comparable experience made up for his lack of degree. Plaintiff responded at trial that Lauer could have checked a box, and could have used language in the posting, to so indicate if comparable qualifications would have been adequate. Plaintiff pointed out that, to the contrary, the posting's "Minimum Qualifications" section included "bachelor's of science degree" with no indication that experience was an acceptable substitute. (Tr. 36.)

{¶30} Documentary evidence in the record supports OSU's contention that it intended from the beginning for equivalent experience to be an acceptable substitute for a Bachelor of Science degree. See Plaintiff's Exhibit 30 (including a drop-down menu for "Minimum Education Requirement" that has a checked box for "or equivalent educ/exp"). Moreover, competent, credible evidence reflects that, although plaintiff had a college degree, he lacked at least one other qualification the other candidate possessed, A.R.R.T. registration, the second minimum qualification listed after Bachelor of Science degree.

{¶31} Although plaintiff focuses on the other candidate's educational weakness, he dismisses his own deficiency by contending he could become A.R.R.T. registered with little extra effort. The Court of Claims, however, observed that although plaintiff testified "he could obtain ARRT registration within a matter of days, Lauer stated that it would have taken plaintiff at least two years." (Decision, 5.) The court, within its discretion as trier of fact, reasonably could find Lauer's testimony more credible.

{¶32} Plaintiff next contends the other candidate "had less than four years of management experience. Again, this was less than the four year management experience qualification listed in the job description." (Appellant's brief, 18, citing Tr. 40.) The Court of Claims found, and the record supports, that the other candidate "served in a

supervisory role from December 1999 until the time of his hiring in March 2004." (Decision, 5, citing Plaintiff's Exhibit 28, Resume of Donald Adamson.) Lauer's testimony confirmed the other candidate, due to his role as "chief technician," had at the time of his hire approximately four and a half years of management experience.

{¶33} In the end, both candidates fulfilled one of the two leading qualifications, both had four years of management experience, and both undisputedly had a strong understanding of the imaging equipment and systems. "The employer had discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Burdine*, 450 U.S. at 259, 101 S.Ct. at 1096. See also *Ullmann v. State*, 10th Dist. No. 03AP-184, 2004-Ohio-1622, ¶33, quoting *Ackerman v. Diamond Shamrock Corp.* (C.A.6, 1982), 670 F.2d 66, 70 (noting "[a]n employer may make a subjective judgment regarding an employee for any reason that is not discriminatory, and this is 'especially true when \* \* \* a management level job is involved'"). *Burdine*, 450 U.S. at 259, 101 S.Ct. at 1096 (noting Title VII "was not intended to diminish traditional management prerogatives"). (Internal citations omitted.) Competent, credible evidence supports the Court of Claims' conclusion that plaintiff failed to prove the reasons OSU articulated for its hiring decision was merely pretext for discrimination based on plaintiff's national origin, religion, or race.

{¶34} Plaintiff's assignment of error as directed to OSU's Main Hospital is overruled.

### C. OSU's East Hospital

{¶35} Plaintiff contends he presented direct evidence of discrimination in statements he claims Lauer made in the presence of a small group of staff members who

were asking plaintiff interview questions. According to plaintiff, the interview ended abruptly, and when he asked why, Lauer "said something like, all of you have the same trend." (Tr. 142.) Plaintiff "took it as either the Jordanian or Arabic or Islamic, I mean, that's -- I tried to take some -- you know, tried to understand what he's talking about. But he would not elaborate on that. And as a matter of fact, the staff, they are -- when he finished that interview, they were all stunned." (Tr. 142.)

{¶36} Lauer denied making the remark. Credibility being a matter for the trier of fact, the Court of Claims apparently found Lauer to be more credible in that regard. Even if we assume Lauer made the contested statement, the comment would not meet the requirements necessary to constitute direct evidence of discrimination. Comments that are vague, ambiguous or isolated do not support a finding of discrimination and cannot be used as direct evidence to establish that an adverse action was motivated by discriminatory intent. *Tessmer v. Nationwide Life Ins. Co.* (Sept. 30, 1999), 10th Dist. No. 98AP-1278, citing *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125, 130; see also *Smith v. E.G. Baldwin & Assoc., Inc.* (1997), 119 Ohio App.3d 410, 416. Even plaintiff admits he could only speculate to what Lauer was referring to, and, without supporting proof, the alleged comment could mean any number of things.

{¶37} As to plaintiff's indirect proof, the Court of Claims concluded plaintiff failed to establish a prima facie case against OSU concerning the Radiology Manager position at OSU's East Hospital. The court determined plaintiff proved no actionable adverse employment action because, whether OSU "used the word 'offer,' or whether plaintiff believed they should have made an offer only in writing, it is clear that Lauer informed plaintiff that the position was available to him." (Decision, 7.) The court further concluded

the offer "remained available for several weeks while the parties negotiated compensation terms. By plaintiff's own admission, even after Lauer ceased negotiation with him, [Diane] Gordon asked him if he would 'accept' the position with a salary of \$65,000." (Decision, 7.)

{¶38} Generally, an "adverse employment action" is a materially adverse change in the terms and conditions of the plaintiff's employment. *Canady v. Rekau & Rekau, Inc.*, 10th Dist. No. 09AP-32, 2009-Ohio-4974, ¶25, citing *Michael v. Caterpillar Financial Servs. Corp.* (C.A.6, 2007), 496 F.3d 584, 593. The action must constitute "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth* (1998), 524 U.S. 742, 761, 118 S.Ct. 2257, 2268.

{¶39} In that regard, OSU presented the affidavits of Lauer and Gordon explicitly averring that each had at least one conversation with plaintiff where they believed they made clear to plaintiff that OSU was offering the position to him. OSU further provided email messages between Lauer and other staff members in which Lauer represented he already offered plaintiff the position at \$63,000 a year and at \$65,000 a year with a \$3,000 signing bonus. Lauer also testified extensively at trial about his offers to plaintiff. For example, when questioned at trial about why he did not pursue plaintiff when the two spoke on July 12, 2004 and plaintiff continued to express his interest in the position, Lauer explained he had offered the position to plaintiff "two or three other times" and had told plaintiff "this is a final offer. I can't do any more. I can't go any higher." (Tr. 84.)

{¶40} Although plaintiff claims he would have accepted the position had Lauer "offered \$65,000 with a \$3,000 bonus," OSU provided evidence that directly contradicts this assertion. Particularly telling is Gordon's affidavit in which she stated that plaintiff told her he had several offers in Cincinnati, would rather work for OSU, but would require a salary of at least \$75,000 in order to justify his decision. Gordon's affidavit also corroborates Lauer's testimony that after offering the position to plaintiff, Lauer eventually moved on to the third-choice candidate, believing further negotiations with plaintiff would be fruitless since OSU could never offer plaintiff as much as he required. Indeed, plaintiff himself acknowledges Lauer "indicated that he was unwilling to increase the offer to Refaei above \$65,000 because Refaei has '4 years as a mgr/dir in a multi modality environment,' with 'the other 8 as a nuc med tech and supervisor.' " (Appellant brief, 8.)

{¶41} Plaintiff alternatively asserts Lauer could have requested an exception to the salary cap that would have allowed OSU to offer plaintiff the salary he desired. According to the evidence, even if Lauer had requested an "exception" to allow an additional ten percent increase beyond the salary range the Human Resources department calculated, OSU would not have reached the \$75,000 that Lauer testified plaintiff said he required.

{¶42} The Court of Claims, as trier of fact, was free to believe all, part or none of the testimony regarding the conversations between plaintiff and the other witnesses and could assign the weight it deemed appropriate to such testimony. *Barker v. Century Ins. Group*, 10th Dist. No. 06AP-377, 2007-Ohio-2729, ¶16, citing *In re D.F.*, 10th Dist. No. 06AP-1052, 2007-Ohio-617, quoting *Maxton Motors, Inc. v. Schindler* (Dec. 26, 1984), 3d Dist. No. 4-83-23. Competent, credible evidence, if believed, supports the Court of Claims

conclusion that not only did OSU make an offer, or offers, to plaintiff, but also, "under such circumstances, plaintiff lacked credibility in testifying that he never understood Lauer or Gordon to have offered him the position." (Decision, 8).

{¶43} Plaintiff's failure to establish a prima facie case of discrimination is fatal to his claim. See *St. Mary's Honor Ctr.*, 509 U.S. at 510, 113 S.Ct. at 2748, fn.3 (stating that "the effect of failing to produce evidence to rebut the *McDonnell Douglas* presumption is not felt until the prima facie case has been established, either as a matter of law (because the plaintiff's facts are uncontested) or by the fact finder's determination that the plaintiff's facts are supported by a preponderance of the evidence"). Plaintiff's assignment of error as it pertains to OSU's East Hospital is overruled.

### **III. Disposition**

{¶44} The manifest weight of the evidence supports the Court of Claims' determination that (1) plaintiff failed to prove OSU's articulated reasons for not hiring him for the Main Hospital position were a pretext for discrimination, and (2) plaintiff did not meet his initial burden to establish a prima facie case regarding the East Hospital position. We therefore overrule plaintiff's single assignment of error and affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

FRENCH and TYACK, JJ., concur.

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