[Cite as *Veal v. Upreach, L.L.C.*, 2011-Ohio-5406.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Monica Veal,	:	
Plaintiff-Appellant,	:	
		No. 11AP-192
v.	:	(C.P.C. No. 09CVC05-7290)
Upreach LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on October 20, 2011

The Isaac Firm L.L.C., *Kendall D. Isaac*, and *Lasheyl N. Stroud*, for appellant.

Dinsmore & Shohl, *LLP*, and *Jan E. Hensel*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Monica Veal, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of appellees, Upreach, LLC ("Upreach") and Learning Never Ends, LLC ("LNE"). For the following reasons, we affirm.

{¶2} Upreach and LNE provide services to people with developmental disabilities. Upreach offers living services, and LNE presents daytime continuing adult education and wellness opportunities. At all relevant times hereto, Upreach and LNE were owned by Melissa Gourley, Susan Sadauskas, and Beth Swegheimer.

{¶3} On August 4, 2005, Upreach hired appellant, an African-American female, as a support specialist, responsible for supervising Upreach consumers in their homes and transporting them to various LNE programs. Appellant eventually became dissatisfied with the position and, in April 2007, discussed the possibility of a promotion with Gourley. Based upon appellant's stated interests, Gourley and Swegheimer specifically created an administrative assistant position for her, which appellant accepted on April 27, 2007. In accepting the promotion, appellant signed a document acknowledging that the position required her to "[d]ress in business casual attire to ensure UPREACH LLC is represented in a professional manner at all times." (Gourley Affidavit, Exhibit A, ¶8.)

{¶4} By way of affidavit, Gourley stated that appellant complained about the dress code soon after she accepted the administrative assistant position and, consequently, "developed a very negative attitude" in the workplace. (Gourley Affidavit ¶12.) After appellant had made several complaints about the business-casual requirement, Gourley asked her if she would accept a position with LNE that did not have a dress code. (Gourley Affidavit ¶13.) Appellant accepted and began her new position with LNE on June 11, 2007. According to Gourley, appellant's negative attitude continued in her position with LNE. (Gourley Affidavit ¶14.) Gourley indicated that appellant refused to cooperate with supervisors, read personal books during work, used

the internet for personal purposes, and continuously "wandered off" and could not be found. (Gourley Affidavit ¶14.)

{¶5} On June 26, 2007, Gourley and Swegheimer met with appellant in response to appellant's complaint that she was unfairly criticized by a coworker. (Gourley Affidavit ¶15-16.) At one point in the discussion, appellant said that she had been promised "growth" in the company and that it had been taken from her "unjustly." (Gourley Affidavit ¶16.) When Gourley reminded appellant that she voluntarily accepted the position with LNE, appellant became angrier and stated that she would not talk to Gourley or to anyone else in the office anymore. (Gourley Affidavit ¶16.) Gourley construed this statement as "a direct act of insubordination" and became concerned with appellant's ability to work for LNE. (Gourley Affidavit ¶17.) In the following weeks, Gourley contacted Timothy Pitts, appellant's direct supervisor at LNE, to determine whether appellant's behavior had improved. Pitts reported that appellant maintained her negative attitude and refusal to accept direction. (Gourley Affidavit ¶18.) Upreach terminated appellant in July 2007. (Gourley Affidavit ¶19.)

{¶6} Appellant filed a complaint with the Ohio Civil Rights Commission ("OCRC") on July 17, 2007. The complaint alleged racial discrimination, gender discrimination, and retaliation. The OCRC investigated the charges and, on May 1, 2008, issued a report finding it "[p]robable that Respondent[1] has engaged in practices unlawful under Section 4112 of the Ohio Revised Code."

[1] Although LNE was also referenced in the report, Upreach was the only named respondent.

{¶7} In May 2009, appellant filed a complaint against appellees in the Franklin County Court of Common Pleas, alleging violations of R.C. Chapter 4112 and Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. 2000e, et seq. Specifically, appellant claimed that appellees engaged in disparate-treatment discrimination on the basis of her race and gender and that appellees also engaged in retaliation. The complaint also sought damages for failure to pay overtime in violation of the Fair Labor Standards Act ("FLSA").

{¶8} Appellees moved for summary judgment, arguing, inter alia, that appellant failed to establish a prima facie case of sex discrimination, race discrimination, and retaliation. In support of the motion, appellees attached Gourley's affidavit, the document in which appellant acknowledged the dress code for the administrative assistant position, and Pitts' report recommending appellant's termination.

{¶9} Appellant filed a memorandum opposing appellees' motion for summary judgment. To support the allegations contained in her memorandum, appellant attached her own affidavit; however, the affidavit pertained only to her failure-to-pay-overtime claim under the FLSA. Appellant also attached the investigative report prepared by the OCRC.

{¶10} The trial court granted appellees' motion for summary judgment as to the claims of disparate-treatment discrimination and retaliation. The trial court did not dismiss appellant's remaining FLSA claim and ruled that the claim remained pending. However, due to a settlement between the parties, appellant filed a motion to dismiss the remaining FLSA claim. The trial court granted the motion, thereby disposing of all claims between the parties.

{¶11} Appellant now appeals, advancing the following assignments of error for our consideration:

> [I.] Judge erred in dismissing ORC 4112.02 retaliation discrimination claim.
>
> [II.] Judge erred in dismissing ORC 4112.02 sex discrimination claim.
>
> [III.] Judge erred in dismissing ORC 4112.02 race discrimination claim.

{¶12} We review the trial court's grant of summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶8. To obtain summary judgment, the movant must show that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶29.

{¶13} The movant bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once the moving party meets this initial burden, the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶14} We begin by addressing an argument made by appellant at the end of her brief, although the argument is not separately assigned as error. See App.R. 16(A)(3)

and (7); Loc.R. 7(A). While the purpose of her argument is unclear, appellant contends that this court "should not ignore" the OCRC's investigative report finding probable cause, and that we should consider the report "favorably" when reviewing the trial court's decision granting summary judgment. (Appellant's Brief, 17-18.) Appellant attempts to support this position by citing cases that discuss the admissibility of such findings at trial; however, she does not cite to any authority for the proposition that such findings are controlling on an appeal from a decision granting summary judgment. In fact, appellant concedes that such decisions are reviewed de novo. (Appellant's Brief, 9.) Therefore, to the extent appellant argues that we must defer to the findings of the OCRC, we disagree. We will review the trial court's decision granting summary judgment under a de novo standard of review. *Comer*.

{¶15} In her first assignment of error, appellant challenges the trial court's decision to dismiss her claim of retaliation under R.C. 4112.02(I), which prohibits an employer from discriminating against an employee because that employee has "opposed any unlawful discriminatory practice" or "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." The Supreme Court of Ohio has held that federal decisions interpreting Title VII can be instructive when reviewing alleged violations of R.C. Chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196.

{¶16} Absent direct evidence of retaliatory intent, Ohio courts analyze retaliation claims using the evidentiary framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, a case

involving claims of racial discrimination under Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. 2000e, et seq. Id. *Woods v. Capital Univ.*, 10th Dist. No. 09AP-166, 2009-Ohio-5672, ¶45, citing *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶13-14. Under that framework, a plaintiff bears the initial burden of establishing a prima facie case of retaliation. Specifically, the plaintiff must establish that (1) she engaged in a protected activity, (2) the defending party was aware that the claimant had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and (4) there is a causal connection between the protected activity and adverse action. *Temesi* at ¶13, citing *Canitia v. Yellow Freight Sys., Inc.* (C.A.6, 1990), 903 F.2d 1064, 1066.

{¶17} Once a plaintiff establishes a prima facie case, the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for its actions. *Temesi* at ¶14, quoting *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. If the employer satisfies this burden, the burden shifts back to the complainant to demonstrate "that the proffered reason was not the true reason for the employment decision." *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 256, 101 S.Ct. 1089, 1095.

{¶18} An employee's activity is "protected" for purposes of R.C. 4112.02(I) if the employee has "opposed any unlawful discriminatory practice" (the "opposition clause") or "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" (the "participation clause"). *HLS Bonding v. Ohio Civ. Rights Comm.*, 10th Dist. No. 07AP-1071, 2008-Ohio-4107, ¶15; *Niswander v. Cincinnati Ins. Co.* (C.A.6, 2008), 529 F.3d

714, 719-20 (discussing the "opposition" and "participation" clauses in the anti-retaliation provision of Title VII).

{¶19} In the present case, appellant did not specifically allege or present evidence establishing that she was engaged in a protected activity under R.C. 4112.02(I). Her complaint and memorandum opposing summary judgment merely alleged that she was terminated after Pitts saw her reading a book on employee rights and overheard her placing a call to the Equal Employment Opportunity Commission ("EEOC") during work hours. However, appellant offered nothing to substantiate these claims, nor did she explain how her allegations amounted to conduct protected by the opposition or participation clauses in R.C. 4112.02(I). As appellees correctly note, it is unclear whether appellant actually spoke to anyone at the EEOC or whether Pitts even heard the alleged conversation. In fact, during her deposition, appellant admitted that she did not speak with Pitts after she allegedly contacted the EEOC. (Deposition 136.) Without presenting evidence that she "opposed" an unlawful discriminatory practice or "participated" in an investigation, proceeding or hearing under R.C. 4112.01 to 4112.07, appellant failed to establish a prima facie case of retaliation under R.C. 4112.02(I). Accordingly, her first assignment of error is overruled.

{¶20} In her second and third assignments of error, appellant claims that the trial court erred by dismissing her claims of disparate-treatment discrimination on the basis of race and gender under R.C. 4112.02(A). To prevail on such claims, a plaintiff must prove discriminatory intent. *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 584, 1996-Ohio-265. When asserting claims of racial or gender discrimination under R.C. 4112.02(A), like claims of retaliation under R.C. 4112.02(I), a plaintiff may prove

discriminatory intent through direct evidence or through the analysis established by the United States Supreme Court in *McDonnell Douglas*. Id.

{¶21} Under the *McDonnell Douglas* framework, a plaintiff bears the initial burden of establishing a prima facie case of discrimination. The plaintiff must present evidence that: (1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position in question, and (4) either she was replaced by someone outside the protected class or a non-protected similarly situated person was treated better. Id., 411 U.S. at 802, 93 S.Ct. at 1824. Once a plaintiff has established a prima facie case, the burden of production shifts to the employer to present evidence of some legitimate, nondiscriminatory reason for its action. Id. If the employer carries this burden, then the plaintiff must demonstrate that the reason the employer offered was not its true reason, but was a pretext for discrimination. *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093.

{¶22} We begin by addressing appellant's second assignment of error involving the dismissal of her gender-discrimination claim. In dismissing appellant's claim, the trial court found that appellant failed to present evidence that she suffered an adverse employment action necessary for a prima facie case. We agree.

{¶23} 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. Employment actions that result in mere inconvenience or an alteration of job responsibilities are not disruptive enough to constitute adverse employment actions. *Canady* at ¶25, citing *Mitchell v.*

Vanderbilt Univ. (C.A.6, 2004), 389 F.3d 177, 182; *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, ¶38. Instead, 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.

{¶24} Upon review of the record, we find that appellant failed to sufficiently allege or present evidence of an adverse employment action. Appellant's complaint alleged only that "[s]imilarly situated employees were not held to the same dress code standard" that was imposed on her when she accepted the administrative assistant position on April 27, 2007. (Complaint ¶15.) Then, in the statement of facts of her memorandum opposing summary judgment, appellant seemed to claim that her gender caused her to be "demoted from the administrative position to working in a lower level capacity solely for LNE." (Memorandum 4.) However, this "demotion" claim lacks evidentiary support. Appellant admitted that she voluntarily "accepted" the LNE position because it did not require her to dress in a business casual manner. (Deposition 79-80.) To the extent appellant claims that the business-casual dress requirement constitutes an adverse employment action, such a claim would fail because she was aware of the dress code when she previously accepted the administrative assistant position. (Deposition 71-72.) Because appellant failed to present evidence that she suffered an adverse employment action, she did not establish a prima facie case of gender discrimination under R.C. 4112.02(A).

{¶25} Accordingly, appellant's second assignment of error is overruled.

{¶26} Appellant's third assignment of error challenges the dismissal of her racial-discrimination claim under R.C. 4112.02(A). Appellant claimed that she was unfairly denied a promotion to the position of project manager based on statements allegedly made to her by Gourley and based on her claim that three Caucasian employees received such promotions. On appeal, appellant argues that she presented sufficient evidence to survive summary judgment under either the *McDonnell Douglas* framework or a "mixed-motive" theory. We disagree.

{¶27} First, as explained above, claims of disparate-treatment discrimination generally fall under the burden-shifting analysis established in *McDonnell Douglas*. In the failure-to-promote context, a plaintiff's prima facie case must include evidence proving: "(1) she is a member of a protected class; (2) she was qualified for promotion; (3) she was 'considered for and denied the promotion'; and (4) 'other employees of similar qualification who were not members of the protected class received promotions.' " *Upshaw v. Ford Motor Co.* (C.A.6, 2009), 576 F.3d 576, 584-85, quoting *Grizzell v. Columbus Div. of Police* (C.A.6, 2006), 461 F.3d 711, 719; see also *Brown v. Worthington Steel, Inc.*, 10th Dist. No. 05AP-01, 2005-Ohio-4571, ¶13.

{¶28} Under the *McDonnell Douglas* framework, appellant has failed to present evidence that she suffered an adverse employment action. As the trial court correctly determined, appellant never formally applied for the project manager position. In her complaint and her memorandum opposing summary judgment, appellant alleged only that she was interested in a promotion and that she made a formal request to "discuss" the possibility of a promotion with Gourley and Swegheimer. (Complaint ¶7; Memorandum 2.) In describing the meeting during her deposition, appellant stated that

she told Gourley and Swegheimer that she "just wanted to move up," whether it be into a trainer position or a program manager position. (Deposition 41.) Because appellant failed to present evidence that she had applied for the project manager position—or that such a position was even available at the time—she failed to establish her prima facie case. See, e.g., *Starner v. Guardian Industries* (2001), 143 Ohio App.3d 461, 472 (summary judgment proper in failure-to-promote theory of sex discrimination because the plaintiff failed to present any evidence that she actually applied for the position).

{¶29} Appellant also failed to satisfy *McDonnell Douglas* analysis because she did not present evidence that she was qualified for the position. The record indicates that the position required a four-year college degree in a related field and at least four years of experience in the field of developmental disabilities. (Gourley Supplemental Affidavit, Exhibit C.) Appellant did not, by way of allegation or evidentiary support, prove that she satisfied these requirements.

{¶30} Moreover, appellant presented nothing to show that Pat Gourley, Cara Williams, and Patrick Selby were similarly situated employees. As evidenced by the job description forms signed by each employee, neither Pat Gourley nor Cara Williams were promoted to the position of project manager. Pat Gourley was employed as a human resources manager, a job which required a four-year college degree, a minimum of five years in a supervisory position, and five years of experience in human resources work. (Gourley Supplemental Affidavit, Exhibit A.) Cara Williams was hired as a social worker and, as such, was required to be designated as a licensed social worker with at least one year of experience in the mental retardation and developmental disabilities or other related field. (Gourley Supplemental Affidavit, Exhibit A.) Although Patrick Selby

was promoted into a program manager position, he had a four-year college degree whereas appellant did not. Therefore, appellant has failed to present a prima facie case of racial discrimination under *McDonnell Douglas*.

{¶31} Appellant also claims racial discrimination under a "mixed-motive" theory. While it is less than settled whether mixed-motive claims are viable in the context of R.C. 4112.02(A), because appellant has failed to present evidence of an adverse employment action under these facts, we need not address her claim under a "mixed-motive" theory. See *White v. Baxter Healthcare Corp.* (C.A.6, 2008), 533 F.3d 381, 400 (holding that a plaintiff asserting a mixed-motive claim under Title VII must establish an adverse employment action).

{¶32} Accordingly, appellant's third assignment of error is overruled.

{¶33} Having overruled appellant's first, second, and third assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.

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