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# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-002043-MR

CYNTHIA WILLIAMS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 16-CI-002963

BROWN-FORMAN CORPORATION — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, MAZE, AND K. THOMPSON, JUDGES.

MAZE, JUDGE: Cynthia Williams (Williams) appeals from a summary judgment by the Jefferson Circuit Court dismissing her age-discrimination and retaliation claims against Brown-Forman Corporation (Brown-Forman). She argues that summary judgment on her claims was premature because discovery was still ongoing, and that she presented sufficient circumstantial evidence to establish all

necessary elements of her *prima facie* cases. We agree with the trial court that Williams failed to present sufficient evidence she was subjected to disparate treatment from younger, similarly situated employees. However, we find that there was sufficient evidence to allow Williams's remaining claims to proceed. Hence, we reverse the summary judgment on those claims and remand for additional proceedings.

## I. Facts and Procedural History

Since we are reviewing the trial court's entry of summary judgment, we must consider the evidence in the light most favorable to Williams. Williams began working for Brown-Forman as an Associate Marketing Research Manager in June of 1997. Williams left full-time employment with Brown-Forman in August 2000, but she maintained contacts with Brown-Forman by working as a consultant on various projects for its Consumer Insights Department. In 2008 Brown-Forman re-hired Williams in a full-time position with the Consumer Insights Department. The parties agree that Williams performed exemplary work from 2008 to 2013, winning numerous company awards and receiving an "on target" rating in every annual Personal Performance Appraisal (PPA).

In 2013 Williams was promoted to Group Manager of Shopper Insights, a subgroup of the Consumer Insights Department. In this position, she reported to Bill Hensler, who was her direct manager, and Cheryl Small, who was

her "dotted-line" manager.[1] In 2014 Williams continued to receive "on target" ratings and compliments on her performance as group manager. However, Hensler's evaluation at the end of 2014 noted that Williams's leadership was an area of concern, and he would have deemed her below target if a rating were given at that time. On the other hand, the same document noted the "positive feedback" and "[m]any substantive contributions" Williams made in communicating shopper information to internal partners.

In February 2015 Hensler left Brown-Forman and Williams began directly reporting to Small. The parties agree that the relationship between Williams and Small was strained. The parties also agree that other members of the Shopper Insights team complained about Small's management style. Williams and several other members of Shopper Insights complained that Small was difficult to work with and frequently dismissive of older workers. On the other hand, Brown-Forman contends that Williams refused to accept criticism of her own leadership style.

In May 2015 Williams met with Lisa Steiner, Brown-Forman's Senior Vice President, Chief of Staff, and former head of Human Resources. Williams states that she told Steiner that Small was creating a hostile work environment and

[1] A "dotted-line" manager is an individual who has some degree of supervision or influence over the employee but is not the employee's direct manager.

favoring younger workers. Steiner's notes regarding the meeting reflected only that Williams complained about unfair treatment by Small. Williams was concerned that Small was deliberately undermining her and damaging the reputation of Shopper Insights.

Steiner referred Williams to Kirsten Hawley, the current Chief Human Resources Officer. Williams had two or three meetings with Hawley, and after those meetings, she summarized her complaints about Small as follows:

> [The group is] upset about the things you and I have covered – lack of trust, inconsistent or non-existent direction, "violence" (that is my word from Critical Conversations), not listening, no respect, lies, lack of autonomy, manipulation, insincerity, "throwing people under the bus," not having team members best interest in mind (instead focused on herself), contradictory goals, overly stressful situations, etc.
> They want these issues exposed because they feel no one is noticing what is happening, and they don't have anywhere to go. The anxiety level keeps growing, and the examples are occurring daily. Team morale is taking a very hard hit, and I am very concerned as to the consequences.

On June 11, 2015, Small issued a PPA rating Williams as "below target" based upon deficiencies in areas of communication, leadership and people development. The PPA advised Williams that she would be placed on an improvement plan if the deficiencies continued. On June 16, 2015, Williams met to follow up with Steiner. Williams objected to the "below target" rating, stating

that it was based on arbitrarily altered performance criteria. Steiner's notes from that meeting also reflect the following:

> [Small's] leadership, combined with what [Williams] and members went through under [Hensler's] abusive leadership have created a work environment that is very unhealthy. People (not only on [Small's] team but others also reporting to [Small]) have seen [Small] demonstrate a bias toward youth and there has been some chatter about hostile work environment and age discrimination (my words, not [Williams's]). It is clearly a situation where everyone is trying to survive, and [Williams] feels almost broken trying to protect her people.

In July of 2015, Hawley notified Williams that Brown-Forman would appoint someone outside of its North American Region Group to investigate Small's behavior. This assignment fell to Diane Nguyen, who interviewed several other Brown-Forman employees who had interacted with Small. The interviewed employees confirmed Williams's reports regarding Small's conduct, noting instances of ill-treatment, favoritism toward certain employees, and hostile behavior toward others, particularly older employees.

In August of 2015, while Nguyen's investigation was proceeding, Sol Clahane, Brown-Forman's Vice President, Director of Channel and Customer Development, advised Williams of areas needed for improvement in Shopper Insights. Based upon feedback provided by Small, Clahane informed Williams that the data received from Shopper Insights was neither "efficient" nor "helpful." However, Clahane's email was specifically addressed to Williams demonstrating

stronger leadership to address the performance issues with another member of the team.

On October 27, 2015, Small placed Williams on a Performance Improvement Plan (PIP). The PIP identified areas for improvement including, ensuring that members of Williams's team were working at their full capabilities; managing performance gaps within her team with well thought out development plans; and "demonstrating ability to listen and accept feedback." The PIP also stated that Williams was demonstrating a lack of objectivity and respect toward her supervisor, which was undermining the team's effectiveness. The PIP identified areas of improvement with objectives to be met within the next sixty days and beyond.

The creation of the PIP did not prevent additional disputes from emerging between Williams and Small. Williams contends that Small kept changing the PIP criteria to prevent her from achieving the objectives. Williams also cites to several other incidents. One involved Small's rejection of a supplier recommended by Williams, even though Brown-Forman used the supplier previously. Another incident involved Small's rejection of "ProForm," a workflow prioritization process designed by Williams. Small criticized ProForm in a meeting with Brown-Forman employees outside Shopper Insights. But subsequently, Small sent out an email detailing her own, similar plan. Small also

criticized Williams for continuing to work on a questionnaire despite instructions to transfer the assignment to another employee.

During this period, Nguyen completed her investigation of the complaints regarding Small. Nguyen concluded that no illegal conduct was involved. However, Nguyen was critical of Small's management and leadership style, noting that it was often "competitive," "disruptive," and "disrespectful." The report specifically noted the ProForm incident, criticizing Small for discrediting the project in front of outside members without first raising her concerns to the group. The report also referred to another incident in which Small criticized the Neilson rating data as being created "by a bunch of old white people." The report suggested that Small be coached to improve these areas. The report was sent to Geoff Cronan, Brown-Forman's Director of Sales and Marketing Integration and Execution. Nguyen's suggestions were incorporated in Brown-Forman's subsequent coaching plan for Small.

At the 30-day update on Williams's progress on the PIP objectives, Small commented that Williams refused to act on written feedback and failed to take initiative. At the 45-day update, Small stated that Williams's failure to obtain quotes from multiple suppliers demonstrated an inability to accept feedback from her manager. And at the 60-day check-in, Small rated Williams as "below target," stating that Williams continued to reject her feedback. Citing these failures to

meet the PIP objectives, Small and Cronan made the decision to fire Williams. The termination was effective on January 25, 2016, at which time Williams was 51 years old.

On June 23, 2016, Williams filed a complaint against Brown-Forman, alleging age discrimination and retaliation in violation of the Kentucky Civil Rights Act, KRS[2] 344.010 *et seq.* Following a period of discovery, Brown-Forman filed a motion for summary judgment in April of 2017. Williams argued that the matter was not ripe for summary judgment since discovery was still ongoing. On August 22, 2017, the trial court entered an opinion and order granting Brown-Forman's motion. In dismissing the age discrimination claim, the court concluded that Williams failed to present evidence showing either that she was subjected to substantially disparate treatment from similarly situated younger employees, or that she had been replaced by a substantially younger employee. With respect to the retaliation claim, the trial court found that Williams failed to present evidence showing that either Small or Cronan were aware of Williams's complaints of age discrimination at the time they fired her. Based on these conclusions, the trial court dismissed the complaint.

[2] Kentucky Revised Statutes.

Thereafter, Williams filed a motion to alter, amend, or vacate pursuant to CR[3] 59.05. Williams again argued that summary judgment was premature on both claims while discovery was ongoing. Williams also pointed to newly discovered evidence as supporting her age discrimination claim. First, additional discovery revealed that, in July 2017, Brown-Forman hired Loli Oles to fill the position formerly held by Williams. Oles is six years and nine months younger than Williams. Second, Williams obtained the performance evaluations of three younger employees, Mattingly, Eichberger, and Tyler. Small rated these employees positively for their work on projects on which Williams also worked and received criticism. Williams argued that this evidence was sufficient to create genuine issues of material fact supporting the disparate treatment element of her age discrimination claim.

On November 21, 2017, the trial court denied the motion to reconsider. The court first found that, while Oles is younger than Williams, the age difference is not large enough to be significant for purposes of establishing age discrimination. The court further found that, while Mattingly, Eichberger and Tyler worked on the same projects as Williams, they were not similarly situated to Williams in their supervisory and competence standards. Finally, the court found

[3] Kentucky Rules of Civil Procedure.

that Williams failed to show any factual errors in its prior order meriting reinstatement of the age discrimination or retaliation claims. Williams now appeals. Additional facts will be set forth below as needed.

## II. Summary Judgment Standard

We review the trial court's order under the well-settled standard of review governing appeals from a summary judgment. Summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). On review, the appellate court must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

## III. Age Discrimination Claim

With respect to the age discrimination claim, KRS 344.040(1) provides that it is unlawful for an employer to discharge or otherwise discriminate against an individual because that individual is forty years of age or older. In the

absence of direct evidence of discriminatory motivation, a plaintiff claiming age discrimination with respect to an employment decision must satisfy the burden-shifting test set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005). The plaintiff must first establish a *prima facie* case of age discrimination by showing that she: (1) was a member of a protected class; (2) was discharged; (3) was qualified for the position from whichs he was discharged; and (4) received disparate treatment from a similarly situated younger person or was replaced by a significantly younger person. *Id.* at 496. Under the *McDonnell Douglas* framework, a plaintiff is not required to introduce direct evidence of discrimination. *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 349 (6th Cir. 1997); *Williams*, *supra* at 496. *See also Flock v. Brown-Forman Corp.*, 344 S.W.3d 111, 114 (Ky. App. 2010).

*a. Disparate Treatment element*

The trial court found that Williams failed to prove the fourth element of her *prima facie* case—that she was treated differently than a similarly situated employee from outside the protected class or that she was replaced by a significantly younger person. To establish disparate treatment, Williams was required to show that similarly situated younger employees were treated differently than her for comparable conduct. In identifying suitable comparators, the younger

employees must be "similarly situated in all relevant aspects." *The Bd. of Regents of N. Kentucky Univ. v. Weickgenannt*, 485 S.W.3d 299, 308 (Ky. 2016) (quoting *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998)). To make this determination, the court should consider whether the other employees have dealt with the same supervisor, have been subject to the same standards, and have engaged in the same conduct without such differentiating circumstances that would distinguish their conduct or the employer's response. *Ercegovich*, 154 F.3d at 352. Williams must present evidence that all relevant aspects of her employment situation were nearly identical to those of the employees who she alleges were treated more favorably. *Weickgenannt*, 485 S.W.3d at 308.

As noted above, Williams identified three younger employees, Mattingly, Eichberger and Tyler, who she alleges received more favorable treatment for similar work. Mattingly and Eichberger worked in the Shopper Insights group on many of the same projects as Williams. Tyler worked in a different group, but he occupied a similar position as Mattingly and Eichberger, and he was transferred to Shopper Insights after Williams was fired. Williams points out that Small criticized her work on a number of projects but gave each of these employees favorable evaluations for their performance on the same projects. Williams also notes that Tyler received a "Strong Performance" rating from Small for his work on several projects that Williams developed, but Williams was given a

poor rating. Williams argues that this evidence was sufficient to warrant additional discovery on her disparate treatment claim.

The trial court rejected this argument, concluding that additional discovery would not be relevant to establish whether these employees were similarly situated to Williams. We agree. Mattingly and Eichberger were subordinate to Williams, and Tyler was in a comparable position to them. In addition, Small criticized Williams for her leadership skills on projects, but there was no evidence that the younger employees were evaluated on their leadership skills. Consequently, Williams did not show that the other employees were subject to substantially similar performance criteria. Under the circumstances, we must agree with the trial court that Williams failed to establish the disparate treatment element of her *prima facie* case.

*b. Replacement by Substantially Younger Employee*

On the other hand, Williams clearly established that she was replaced by a younger employee. Nevertheless, an inference of age discrimination cannot be drawn from the replacement of one worker with another worker who is insignificantly younger, but only by a worker who is substantially younger. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433 (1996). In *Grosjean v. First Energy Corp.*, 349 F.3d 332, 336 (6th Cir. 2003), the Sixth Circuit held that as a general rule, age

differences of ten or more years are sufficiently substantial to meet the requirement of the fourth part of age discrimination *prima facie* case. *Id.* at 336.

Conversely, the court in *Grosjean* adopted a bright-line rule that an age difference of six years or less is not sufficiently substantial to meet the element. *Id.* at 340. Subsequently, in *Blizzard v. Marion Tech. Coll.*, 698 F.3d 275, 284 (6th Cir. 2012), the court explained that replacement of the employee by a person who is between six to ten years younger her junior must be considered on a case-by-case basis. *Id.* at 284. "Thus, *Grosjean* essentially created a zone of discretion in age-discrimination cases involving replacement by a person who is between six and ten years younger than the plaintiff." *Id.*

The trial court relied on *Grosjean* and *Blizzard* to reach its conclusion that Williams failed to meet an essential element of her *prima facie* case. The court concluded that, while Oles is more than six years younger than Williams, the age difference "leans toward the insignificant end of the zone of discretion." In the absence of any other evidence of discrimination, the court concluded that Brown-Forman's subsequent hiring of Oles did not create an issue of material fact concerning Williams's discrimination claim.

Since Kentucky courts have adopted the federal framework provided in *McDonnell Douglas,* for analyzing a plaintiff's claim of age discrimination with respect to an employment decision, Federal decisions and interpretations of the law

are persuasive and will be considered by this Court. *See Kentucky Ctr. for the Arts v. Handley*, 827 S.W.2d 697, 699 (Ky. App. 1991). However, not all courts have adopted the Sixth Circuit's bright-line test set out *Grosjean*. The Seventh and the Eighth Circuit hold that "an age disparity of less than ten years is presumptively insubstantial unless the plaintiff 'directs the court to evidence that her employer considered her age to be significant.'" *Cianci v. Pettibone Corp.*, 152 F.3d 723, 728 (7th Cir. 1998) (quoting *Harley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997)); *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1413 (8th Cir. 1997) (both holding that a five-year age difference is presumptively insufficient).

On the other hand, the Ninth, Tenth, and Eleventh Circuits apply a relative test to age differences of less than ten years.

> In our view, a definitive five-year rule is unjustified. We are not convinced that all five-year age differences are the same. The replacement of a 45-year-old by a 40-year-old would be less suspicious than the replacement of a 62-year-old by a 57-year-old. Comparing a 62-year-old worker with one who is 57, an employer may think it better to retain someone who will stay with the company another eight years (until age 65) rather than one who would be retiring in three years, less than half the time. Or a company may simply wish to rid itself of its older workers, beginning with the oldest.

*Whittington v. Nordam Grp. Inc.*, 429 F.3d 986, 996 (10th Cir. 2005). *See also Douglas v. Anderson*, 656 F.2d 528, 533 (9th Cir. 1981) (holding that a five-year difference was held to be enough to suggest that a substantially younger

replacement had been hired), and *Carter v. City of Miami*, 870 F.2d 578, 583 (11th Cir. 1989) (holding that a three-year age difference may be sufficient).

We do not find that the facts of the current case strongly support either the adoption or rejection of a bright-line rule regarding the significance of an age disparity. Indeed, while Kentucky courts have cited *Grosjean* on numerous occasions, we have yet to adopt its strict rule than an age difference of less than six years is presumptively insignificant. *See Williams*, 184 S.W.3d at 496. In any event, the age difference between Williams and her replacement was six years and nine months. That difference was more than the Court in *Grosjean* held to be presumptively insignificant, but less than the ten-year difference found to be presumptively substantial in *O'Connor*.

Under the circumstances, the more significant factor concerns the existence of direct or circumstantial evidence supporting an inference of discrimination. Williams cannot prevail merely by questioning the wisdom of Brown-Forman's business decisions addressing Small's other deficiencies as a manager, *Flock*, 344 S.W.3d at 117 (citing *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir.1987)). Likewise, Small's stray remarks expressing a preference for youth do not constitute direct evidence of discrimination. *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 710 (Ky. App. 2004).

However, we may consider such remarks as circumstantial evidence of a discriminatory motive. Typically, there are three categories of circumstantial evidence which would support an inference of discrimination:

> (1) suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and (3) evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer's reason is a pretext for discrimination.

*Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 631 (7th Cir. 2009) (quoting *Sun v. Bd. of Trustees*, 473 F.3d 799, 812 (7th Cir. 2007)). In this case, Williams points to the documented complaints by other members of the Shopper Insights group that Small gave preferential treatment to younger employees. In addition to Small's remarks expressing a preference for younger employees, Small singled out younger employees for preferential treatment to the exclusion of older employees. Small also rejected ideas from older employees but praised the same proposals from younger employees. Those complaints were sufficient to alert Steiner and other Brown-Forman management to a potential issues of age discrimination and hostile work environment even though none of the employees, including Williams, specifically used those terms.

Although this alleged conduct is not sufficient to show disparate treatment, it may be sufficient to warrant an inference that Small considered Williams's age to be relevant in the decision to terminate her. While the age difference between Williams and her replacement was not presumptively substantial, we cannot find that it was presumptively insubstantial under the facts of this case. Moreover, Oles was not hired to replace Williams until after Brown-Forman's summary judgment motion had been submitted to the court. We do not suggest any direct correlation between those actions, but summary judgment should not be granted until a party has been given an ample opportunity to complete discovery. *Pendleton Bros. Vending, Inc. v. Commonwealth Fin. & Admin. Cab.*, 758 S.W.2d 24, 29 (Ky. 1988).

Oles's hiring required a significant change to Williams's theory of her case. Furthermore, Williams's case had been pending for just over a year when the trial court ruled on the motion for summary judgment. Williams had not yet deposed either Small or Cronan, and her counsel received the relevant employment records from Brown-Forman only shortly before the trial court granted summary judgment. Williams made a compelling showing that any delays in pursuing discovery were based upon a reasonable strategy and not for purposes of delay. Given the record before this Court, we find that Williams alleged sufficient facts to warrant additional discovery on whether the age difference between her and Oles

was substantial. Therefore, we conclude that the trial court granted summary judgment prematurely on this issue.

## IV. Retaliation Claim

For similar reasons, we conclude that the trial court granted summary judgment prematurely on Williams's retaliation claim. A *prima facie* case for retaliation requires a plaintiff to demonstrate that (1) she engaged in protected activity; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Flock*, 344 S.W.3d at 118 (citing *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 803 (Ky. 2004)). In support of its motion for summary judgment, Brown-Forman presented affidavits from Small and Cronan, who each stated that they were unaware of Williams's complaints when they placed her under the PIP and when they made the decision to fire her for failure to meet the PIP objectives. The trial court noted Williams failed to present any affirmative evidence to rebut these statements. Consequently, the trial court found that she could not show that there was a causal connection between her complaints and the adverse employment action.

Williams responds that she presented circumstantial evidence showing that the timing of the negative evaluations coincided with the complaints about

Small's behavior. In addition, Nguyen's investigation was still ongoing when Small placed Williams on the PIP. Brown-Forman admitted that both Small and Cronan were aware of the investigation, but not who made the complaints. However, the Shopper Insights Team had only six members, which is small enough to warrant an inference that they were aware of the source of the complaints. And as noted above, Williams had not yet deposed Nguyen, Small, or Cronan at the time the trial court granted summary judgment for Brown-Forman. Their testimony would have a direct bearing on the credibility of Small's and Cronan's affidavits.

We agree with the trial court that a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Steelvest*, 807 S.W.2d at 482. However, we find that Williams identified sufficient circumstantial evidence that would cast doubt on the credibility of Small's and Cronan's affidavits. And considering that discovery was not yet complete, we conclude that summary judgment was not yet appropriate on this claim.

## V. Conclusion

We emphasize that Williams still bears the burden of proof on these claims of age discrimination and retaliation against Brown-Forman. Once

discovery is substantially complete, the trial court may still conclude that Williams failed to establish her *prima facie* cases on these claims. And even if Williams establishes her *prima facie* case, the burden would then shift to Brown-Forman to articulate legitimate, non-discriminatory reasons for its employment decisions. Once Brown-Forman makes that showing, the ultimate burden shifts back to Williams to show that the explanation is merely pretextual and that the decisions were actually motivated by age discrimination and retaliation. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). At this point, we merely conclude that there were genuine issues of material fact on all necessary elements of Williams's *prima facie* cases of age discrimination against Brown-Forman.

Accordingly, we reverse the summary judgment entered by the Jefferson Circuit Court, and we remand this matter for additional proceedings on the merits of Williams's remaining claims.

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