[Cite as *Rafferty v. Ohio Dept. of Transp.*, 2003-Ohio-6573.]

IN THE COURT OF CLAIMS OF OHIO

LARRY RAFFERTY	:	
Plaintiff	:	CASE NO. 2001-11294 Judge Fred J. Shoemaker
v.	:	DECISION
OHIO DEPARTMENT OF TRANSPORTATION	:	
Defendant	:	

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{¶1} Plaintiff brought this action against defendant alleging claims of age discrimination and retaliation in violation of the Age Discrimination in Employment Act (ADEA) and R.C. Chapter 4112. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff was born on July 18, 1951. On October 12, 1971, plaintiff began his employment with defendant and eventually attained the position of "Highway Maintenance Worker 4" (HMW4) at the Jackson County Garage located in District 9. His job duties as an HMW4 included serving as a "lead worker" in the maintenance and repair of highways, operating heavy construction equipment such as cranes and trucks, and general maintenance of the highways, including litter removal. Plaintiff was a member of the OCSEA, Local 11 AFSCME, AFL-CIO union and served as the union chapter president for Jackson County from 1997 to 2000. On April 29, 1998, a vacancy was posted for the position of Transportation Manager 1 (TM1) for District 9, Jackson County Maintenance Garage. Plaintiff applied for the position but was informed by a letter dated June

25, 1998, that the position had been awarded to another applicant. Plaintiff thereafter learned that Tim Dobbins, who was 33 years old at the time, accepted the position.

{¶3} Plaintiff believed that he was more qualified for the position than Dobbins; consequently, he asked Mike Kinnison, Jackson County Manager, why Dobbins had been chosen for the position. Kinnison replied that Dobbins had more construction experience than plaintiff. Plaintiff alleges that Kinnison also told him that, "You almost have your time in," which could have meant that plaintiff was not selected for the position because he was nearing the age of retirement eligibility.

{¶4} On September 24, 1998, plaintiff filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission (OCRC) regarding his not being promoted to the TM1 position. On June 22, 1999, the EEOC sent plaintiff a letter stating that a recommendation of "no probable cause" was being sent to the OCRC, based upon insufficient evidence to substantiate that plaintiff was denied the TM1 promotion due to his age. On July 1, 1999, the OCRC determined that it was not probable that defendant had engaged in practices unlawful under Chapter 4112 of the Ohio Revised Code. Plaintiff filed an application for reconsideration of that finding, and on July 29, 1999, the OCRC denied the application and dismissed plaintiff's case.

{¶5} On March 18, 1999, plaintiff filed a union grievance alleging that Vaughn Wilson, a Highway Management Administrator, had harassed him by telling him to stop encouraging employees to file union grievances. On April 1, 1999, a hearing was held regarding plaintiff's grievance at the district office in Chillicothe. The Labor Relations Officer determined that the grievance had no merit.

{¶6} On November 1, 1999, a vacancy was posted for a Transportation Manager 3 (TM3) position for Jackson County, District 9, Construction. A TM3 position requires more supervisory responsibility than a TM1. Plaintiff applied for the position but David Walton, who was 34 years old at the time, was selected. On March 22, 2000, another vacancy was posted for a TM3 position in Pike County, District 9, Construction. Plaintiff also applied for that position but was not interviewed; Dave Darst, who was 38 years old at the time, was chosen. On November 14 and 17, 2000, two vacancies were posted for TM1 positions in District 9, Highland County Maintenance Garage. Plaintiff applied for both positions. Roger Robinson, who was 46 years old at the time, and Charlie Wallingford, who was 59 years old at the time, were each selected for one of those positions. On December 4, 2000, another vacancy was posted for a TM3 position in Ross County, District 9, Construction. Plaintiff applied for that position but was not interviewed. Tim Dobbins was selected for this position.

{¶7} On February 1, 2001, plaintiff was given an oral reprimand for insubordination. Plaintiff alleges that Kinnison was angry that employees were coming in early from their job sites, so Kinnison passed out brooms to all the employees in the garage and told them to start sweeping. Instead, plaintiff telephoned Kenneth Parks, Human Resources Administrator (HRA), about his paycheck. Kinnison became angered that plaintiff was not following his order and issued plaintiff an oral reprimand for insubordination. Plaintiff filed a grievance regarding this incident. On February 21, 2001, the Labor Relations Officer determined that the grievance had no merit.

{¶8} On April 5, 2001, plaintiff filed a charge of discrimination with the OCRC and EEOC wherein he referenced his 1998 charge of discrimination, and alleged that since that filing,

he had been denied promotions in retaliation for filing the original charge of discrimination. On August 21, 2001, plaintiff received a "dismissal and notice of rights" from the EEOC, notifying him that the EEOC was unable to conclude that defendant had violated any statute, and informing him that he had the right to file a federal or state lawsuit within 90 days of the receipt of the notice. Plaintiff filed the instant case on November 21, 2001.

{¶9} Plaintiff alleges that after he filed his initial charge of discrimination he was assigned to demeaning and degrading tasks, such as clearing dead animals off the roadway and "walking litter patrol" where he was required to use a stick with a nail on the end of it to pick up litter. Plaintiff asserts that his failure to attain promotion and his assignment to menial tasks was in retaliation for filing a charge with the EEOC.

{¶10} Defendant denies liability and asserts that plaintiff's claims of discrimination arising from the positions posted on April 29, 1998, and November 1, 1999, are barred by the statute of limitations.

I. THE APRIL 29, 1998, TM1 POSTING

{¶11} On September 24, 1998, plaintiff filed a dual charge of age discrimination with the EEOC and the OCRC based upon his failure to obtain the TM1 position that was posted on April 29, 1998. Plaintiff received a right-to-sue letter on September 23, 1999, which notified him that he had 90 days within which to file suit concerning that claim in federal or state court. Plaintiff did not file his claim in this court until November 21, 2001.

{¶12} R.C. 2743.16(A) states:

{¶13} "*** civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar

suits between private parties." Plaintiff would have had two years from September 23, 1999, to file a lawsuit in this court regarding violations of R.C. Chapter 4112. Plaintiff filed this case more than two years after the cause of action accrued. Therefore, plaintiff's claims of age discrimination and retaliation arising from the first TM1 position are barred by the statue of limitations and those claims are hereby dismissed.

II. THE NOVEMBER 1, 1999, TM3 POSTING

{¶14} Plaintiff's federal ADEA claim premised upon the November 1, 1999, TM3 posting is also barred by the statute of limitations. Plaintiff's second EEOC/OCRC charge, which referenced all of the positions for which he was not selected, was filed on April 5, 2001. In order to be considered timely, charges of age discrimination under federal law must be filed within 300 days of the alleged discriminatory activity. 29 USC 626(d). Since plaintiff did not file an EEOC/OCRC charge until April 5, 2001, plaintiff's federal ADEA claims and federal retaliation claims arising from the November 1, 1999, posting are time-barred and cannot be considered by the court.

III. PLAINTIFF'S REMAINING AGE DISCRIMINATION CLAIMS

{¶15} Plaintiff filed a charge of discrimination on April 5, 2001, after which he received a 90-day right-to-sue letter. Plaintiff timely filed his complaint in this court on November 21, 2001. Therefore, the court will consider plaintiff's state claims arising from the November 1, 1999, posting; his federal and state claims for the positions posted on March 22, 2000, November 14 and 17, 2000, and December 4, 2000; and his claims of retaliation that occurred from November 21, 1999, through November 21, 2001.

{¶16} The Supreme Court of Ohio has held that age discrimination cases brought in state courts should be construed and decided in accordance with federal guidelines and requirements.

Barker v. Scovill, Inc. (1983), 6 Ohio St.3d 146, 147. A plaintiff may establish a prima facie case of discrimination either by direct evidence or by the indirect method established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. In this case, the only direct evidence plaintiff presented was Kinnison's alleged comment that plaintiff almost had his time in. However, Kinnison denied making that remark. Whether or not the comment was made, under *McDonnell Douglas*, supra, an inference of discriminatory intent may be drawn where plaintiff establishes that he: 1) was at least 40 years old at the time of the alleged discrimination; 2) was subjected to an adverse employment action; 3) was otherwise qualified for the position; and 4) that after plaintiff was rejected, a substantially younger applicant was selected. *Burzynski v. Cohen* (C.A. 6, 2001), 264 F.3d 611, 622.

{¶17} In the case of age discrimination, it must be shown that age was the motivating factor for the adverse employment action. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501. Generally, the denial of a promotion is an adverse employment action. See *Walker v. Mortham* (C.A. 11, 1998), 158 F.3d 1177, 1187.

{¶18} Plaintiff has met three requirements of a prima facie case of age discrimination for the positions at issue: he was over 40 years old, he was not promoted, and he was qualified for the positions. However, the applicant who was selected for the November 17, 2000, posting, Charlie Wallingford, was ten years older than plaintiff. In addition, the applicant who was selected for the November 14, 2000, position, Roger Robinson, was only three years younger than plaintiff. Therefore, plaintiff has failed to meet his prima facie case of age discrimination with regard to the November 14, 2000, or the November 17, 2000, postings because he has failed to prove that a substantially younger applicant was

selected for either position. Plaintiff's allegations regarding these two positions are without merit. However, the court finds that plaintiff has met a prima facie case of age discrimination with regard to the November 1, 1999, March 22, 2000, and December 4, 2000, positions.

{¶19} Once a plaintiff establishes a prima facie case, the burden of production then shifts to the employer to come forward with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. *Burzynski, supra*. If the employer articulates a legitimate, nondiscriminatory reason, the presumption of discrimination is rebutted; plaintiff must then present evidence that the employer's proffered reason was a mere pretext for unlawful discrimination. *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 667.

{¶20} HRA Parks testified that all three positions at issue required construction and supervisory experience; that all of the candidates were asked the same list of questions; that all of the interviews were conducted by the same panel of interviewers which included himself, Kinnison, and Gwen Stauffer; and that the Department of Administrative Services (DAS) set the minimum qualifications for each position. With regard to the November 1, 1999, posting, Kinnison testified that Walton was chosen for the TM3 position because he had more construction experience than any of the other interviewees. Even plaintiff admitted that Walton had more construction experience and more administrative experience than he did. With regard to the March 22, 2000, posting, Parks testified that Darst had the required construction experience and supervisory experience since Darst had acted as an interim TM1. With regard to the December 4, 2000, posting, Parks and Kinnison testified that Dobbins had construction and supervisory experience as a former TM1.

{¶21} The court finds that defendant has produced persuasive evidence of a legitimate, nondiscriminatory reason for not selecting plaintiff for these positions. Specifically, the totality of the evidence demonstrates that all three positions required construction and supervisory experience, and that the selected candidates met the minimum qualifications set by DAS. The evidence also demonstrates that although plaintiff was a skilled equipment operator, he did not possess the required construction or supervisory experience for the positions. The general rule is that this court will not substitute its judgment for that of the employer and may not second-guess the business judgments of employers regarding personnel decisions. See, e.g., *Dodson v. Wright State Univ.* (1997), 91 Ohio Misc.2d 57; *Washington v. Central State Univ.* (1998), 92 Ohio Misc.2d 26; *Boyle v. Dept. of Rehab. and Corr.* (April 22, 2002), Court of Claims No. 00-03140. Moreover, "[t]he ADEA was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers." *Bienkowski v. American Airlines, Inc.* (C.A. 5, 1988), 851 F.2d 1503, 1507-1508.

{¶22} In an attempt to show that defendant's proffered reason was a mere pretext for unlawful age discrimination, plaintiff contends that applicants for the positions were pre-selected before the interviews even began. However, the evidence presented at trial does not support that allegation and does not persuade the court that defendant's reasons for hiring the chosen applicants were a mere pretext. Therefore, the court finds that plaintiff has failed to prove his claims of age discrimination pursuant to R.C. Chapter 4112 and the ADEA by a preponderance of the evidence.

IV. RETALIATION

{¶23} R.C. 4112.02(I) states that it is an unlawful discriminatory practice: "for any person to discriminate ***

against any other person because that person *** has made a charge, testified, *** or participated *** in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code." In order to state a cause of action for retaliation, plaintiff must establish: 1) that he engaged in protected activity; 2) that he was subjected to an adverse employment action; and 3) that a causal link exists between a protected activity and the adverse action. *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App.3d 715, 727. The adverse action need not result in pecuniary loss, but must materially affect the plaintiff's terms and conditions of employment. *Wille v. Hunkar Lab., Inc.* (1998), 132 Ohio App.3d 92, citing *Kocsis v. Multi-Care Mgt., Inc.* (C.A.6, 1996), 97 F.3d 876. Factors to consider when determining whether an employment action was materially adverse include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady v. Liberty Natl. Bank & Trust Co.* (C.A.7, 1993), 993 F.2d 132, 136. Changes in conditions that result merely in inconvenience or an alteration of job responsibilities are not disruptive enough to constitute an adverse employment action. *Kocsis* at 886.

{¶24} Plaintiff has failed to prove that any adverse employment action was taken by defendant as a result of grievances being filed by plaintiff. Further, the court finds that plaintiff's job responsibilities as an HMW4 included removal of litter and dead animals from highways and that removal of litter is listed in plaintiff's position description. (Defendant's Exhibit A.) Therefore, such assignment cannot rise to the level of an adverse

employment action; consequently, plaintiff has failed to state a prima facie case of retaliation.

{¶25} For the foregoing reasons, the court finds that plaintiff has failed to prove any of his claims and accordingly, judgment shall be rendered in favor of defendant.

{¶26} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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FRED J. SHOEMAKER
Judge

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