[Cite as *Meggitt v. Ohio Dept. of Pub. Safety*, 2020-Ohio-4412.]

RHONDA L. MEGGITT Plaintiff v. OHIO DEPARTMENT OF PUBLIC SAFETY Defendant	Case No. 2019-00575JD Judge Dale A. Crawford DECISION

{¶1} This matter is before the Court on Defendant's Motion for Summary Judgment. Plaintiff alleges in her Complaint that Defendant, her former employer, discriminated against her on the basis of age when it constructively discharged her in December 2018.

{¶2} In its Motion for Summary Judgment, Defendant asserts that Plaintiff was not discharged, but rather voluntarily resigned; that Plaintiff's claim is barred because, even if she were discharged, she had the ability to arbitrate a discharge; and, lastly, that Plaintiff violated her last chance agreement immediately prior to her resignation. Defendant's Motion for Summary Judgment is now before the Court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4. For the reasons set forth below, Defendant's Motion will be denied.

Standard of Review

{¶3} Civ.R. 56(C) states, in part, as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A

> summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶4} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A "movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C)." *Id.* at 292. The court must resolve all doubts and construe the evidence in favor of the nonmoving party. *Pilz v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-240, 2004-Ohio-4040, ¶ 8. Further, "[i]f the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Keaton v. Gordon Biersch Brewery Rest. Group*, 10th Dist. No. 05AP-110, 2006-Ohio-2438, ¶ 15.

{¶5} When a moving party makes a properly supported motion for summary judgment, the adverse party may not rest upon the mere allegations or denials in the pleadings but "by affidavit or as otherwise provided in [Civ.R. 56] must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E). In seeking and opposing summary judgment, parties must rely on admissible evidence and evidentiary material as provided in Civ.R. 56(E). *Keaton* at ¶ 18.

Facts

{¶6} In support of its Motion, Defendant submitted various affidavits, exhibits, and deposition testimony, including a deposition of Plaintiff. With its Memorandum in Opposition, Plaintiff submitted an affidavit of Plaintiff. The following facts are derived

from the evidence submitted, though the Court does not make factual findings at this time.

{¶7} Plaintiff began working for the Department of Public Safety (hereinafter Defendant or DPS) in 1994 as a Word Processing Specialist. In 2001, she transferred to the Ohio Traffic Safety Office within DPS, where she was promoted to Planner 3. In 2013, she transferred to the Emergency Management Agency (EMA), a different agency within DPS. According to Plaintiff, she transferred to EMA because she wanted a change after working in her previous position for 13 years. However, according to Defendant, Plaintiff was transferred to EMA pursuant to a last chance agreement in lieu of being terminated from her previous position for violations of DPS policies and rules.

{¶8} In October 2016, Plaintiff accidentally drove through the wrong lane of a tollbooth in a state vehicle. Plaintiff paid the fine and she received a written reprimand. This was her first infraction while employed by EMA, and any previous infractions incurred while Plaintiff worked for other agencies within DPS had been purged from her personnel file in 2015 pursuant to a previous last chance agreement.

{¶9} In January 2017, Matthew McCrystal was hired as the Branch Chief who oversaw Plaintiff's section within EMA. In her deposition, Plaintiff related that McCrystal was the main individual who discriminated against her because of her age. According to exhibits submitted by Defendant, in March and April 2017, Plaintiff was allegedly discourteous in her interactions with a highway patrol officer at the front desk of a DPS building and with Licking County EMA staff during a training exercise. In May 2017, however, Plaintiff was rated as meeting or exceeding expectations in her annual performance review. According to Plaintiff's deposition testimony, McCrystal was the main evaluator for her performance reviews. Notwithstanding the adequate performance review, Plaintiff received a three-day suspension (with two days held in abeyance) in June 2017 as a result of the alleged discourteous conduct.

{¶10} In September 2017, McCrystal initiated an administrative investigation regarding two incidents in which Plaintiff was allegedly rude to him and other coworkers. The investigation resulted in a five-day suspension. In May 2018, however, Plaintiff was rated as meeting or exceeding expectations in all categories in another annual performance evaluation.

{¶11} On July 24, 2018, Plaintiff received a speeding ticket for driving 64 mph in a 55-mph zone while in a state vehicle. Defendant alleges that, as a result of this ticket and Plaintiff's disciplinary history, Plaintiff, Defendant, and Plaintiff's union entered into a Last Chance Agreement (LCA). The LCA provided that "if the Employee fails to keep any part of the above terms, said actions will violate this Last Chance Agreement and the appropriate discipline shall be termination." (Defendant's Ex. 47.) The LCA also contained the following paragraph regarding grievances:

> Any grievance arising out of this discipline shall be limited to the question of whether or not the grievant did indeed violate this Last Chance Agreement. The Agency need only prove that the employee violated this agreement or the discipline grid. The Arbitrator shall have no authority to modify the discipline. All parties acknowledge the waiver of the contractual due process rights to the extent stated above.

(Defendant's Ex. 47.) While the LCA refers to an arbitrator, neither party submitted any evidence of the contents of an arbitration provision in the union contract or elsewhere.[1]

{¶12} Defendant submitted the deposition testimony of Cathy Deck, the president of the union for some of Defendant's employees, including Plaintiff, in support of Defendant's Motion. Therein, Deck testified that Defendant is not required to impose escalating disciplinary measures for subsequent infractions. (Deck Deposition, p. 56-58.) Deck also testified that Defendant is not required to terminate employees for

[1]Defendant submitted Plaintiff's Responses to Defendant's Admission Requests, in which Plaintiff admitted that the union contract contains an arbitration provision.

speeding, and that she was not aware of any other employee being recommended for termination based upon a speeding ticket. (Deck Deposition, p. 82-83.)

{¶13} Shortly after the parties signed the LCA, Defendant reassigned some of Plaintiff's duties to a newly hired planner, Josh Vittie. According to McCrystal's deposition testimony, Vittie was 37 or 38 years old when hired by Defendant—approximately 15 or 16 years younger than Plaintiff. McCrystal testified in his deposition and averred in his affidavit that he reassigned some of Plaintiff's duties to Vittie. According to Plaintiff, the duties reassigned to Vittie "constituted all of the work [that she] had been performing." (Meggitt Affidavit, ¶ 20.)

{¶14} On the morning of October 5, 2018, Plaintiff was ill. She allegedly lost track of time due to her illness and did not report that she would be late to work until 40 minutes after the start of her shift—ten minutes after the deadline contained within Defendant's policy. McCrystal initiated an administrative investigation that same day and pointed out that Plaintiff had an LCA in effect. (Defendant's Ex. 55.) In the initial review by Human Resources, the "HRM" recommended "Removal." (Defendant's Ex. 49.) Plaintiff submitted her resignation letter before the Director of DPS made the ultimate decision of what, if any, discipline to impose. However, Plaintiff averred in her affidavit that she resigned because she knew that she would be terminated for even a minor violation of the LCA, and she thought that it would be easier to find another job within the OPERS system if she resigned rather than being terminated.

Law and Analysis

{¶15} Defendant asserts that there is no genuine issue of material fact and it is entitled to judgment as a matter of law on Plaintiff's claim that Defendant discriminated against Plaintiff because of her age. First, Defendant argues that it did not discharge Plaintiff. Second, Defendant asserts that, even if it discharged Plaintiff, Plaintiff's claim is barred because she had the ability to arbitrate the discharge and did not do so. Lastly, Defendant contends that it had a valid reason for discharging Plaintiff: she

violated her last chance agreement. Plaintiff, however, asserts that she was constructively discharged and that there has been a pattern of terminating older employees within EMA. Plaintiff also denies that she had a meaningful opportunity to arbitrate a discharge. Defendant's first and third arguments both refer to the *McDonnell Douglas* analysis for age discrimination claims.

***McDonnell Douglas* Standard for Age Discrimination**

{¶16} Revised Code 4112.14(A) provides: "No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee." In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 196 (1981).

{¶17} The key question in an employment discrimination case is the intention of the employer in taking the adverse employment action against the plaintiff—"whether 'the defendant intentionally discriminated against plaintiff.'" *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478 (1983), quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089 (1981). "'To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent' and may establish such intent through either direct or indirect methods of proof." *Dautartas v. Abbott Labs.*, 10th Dist. Franklin No. 11AP-706, 2012-Ohio-1709, ¶ 25, quoting *Ricker v. John Deere Ins. Co.*, 133 Ohio App.3d 759, 766, 729 N.E.2d 1202 (10th Dist.1998).

{¶18} "[D]irect evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926

(6th Cir.1999). Direct evidence "does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir.2003).

{¶19} Indirect proof of age discrimination is examined via the burden shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), as modified by the Ohio Supreme Court in *Barker v. Scovill, Inc*., 6 Ohio St.3d 146, 451 N.E.2d 807 (1983). *Mauzy v. Kelly Servs.*, 75 Ohio St.3d 578, 582, 1996-Ohio-265, 664 N.E.2d 1272 (1996). "Under *McDonnell Douglas*, a plaintiff must first present evidence from which a reasonable jury could conclude that there exists a prima facie case of discrimination." *Turner v. Shahed Ents.*, 10th Dist. Franklin No. 10AP-892, 2011-Ohio-4654, ¶ 11-12. "In order to establish a prima facie case of a violation of R.C. 4112.14(A) in an employment discharge action, a plaintiff-employee must demonstrate that he or she (1) was a member of the statutorily protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by, or the discharged permitted the retention of, a person of substantially younger age." *Nist v. Nexeo Solutions, LLC*, 10th Dist. Franklin No. 14AP-854, 2015-Ohio-3363, ¶ 32.

{¶20} Once a plaintiff has established a prima facie case, the burden of production shifts to the employer to propound a legitimate, non-discriminatory reason for plaintiff's discharge. *Mauzy* at 582. In a discrimination case, the Court must examine the employer's motivation, not a plaintiff's perceptions. *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir.1987). As a general rule, the Court will not substitute its judgment for that of the employer and will not second-guess the business judgment of employers regarding personnel decisions. *Kirsch v. Bowling Green State Univ.,* 10th Dist. Franklin No. 95API11-1476 (May 30, 1996). If the employer provides a non-discriminatory reason for plaintiff's discharge, then the plaintiff must demonstrate that the rationale set forth by plaintiff was merely a pretext for unlawful discrimination. *Mauzy* at 582. A

plaintiff can establish pretext by demonstrating that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's conduct, or (3) was insufficient to warrant the challenged conduct. *Pla v. Cleveland State University*, 10th Dist. Franklin No. 16AP-366, 2016-Ohio-8165, 22.

{¶21} Statistical data is another means of establishing a prima facie case of discrimination. *Mauzy* at 584. "Appropriate statistical data showing an employer's pattern of conduct toward a protected class as a group can, if unrebutted, create an inference that a defendant discriminated against individual members of the class." *Barnes v. Gencorp, Inc.*, 896 F.2d 1457, 1466 (6th Dist.1990). "When a plaintiff demonstrates a significant statistical disparity in the discharge rate, he or she has provided strong evidence that chance alone is not the cause of the discharge pattern." *Barnes*, at 1466-1469. Once the plaintiff has shown that there exists a disparity in the statistics, the defendant is then required to put forth some evidence explaining the disparity to rebut plaintiff's assertion. *Id.*

{¶22} Under *McDonnell Douglas*, this Court first considers whether Plaintiff can establish a prima facie case of age discrimination. It is undisputed that Plaintiff is a member of the statutorily protected class of people over 40 years old and that she was qualified for the position. Indeed, Plaintiff was rated as meeting or exceeding expectations in both of the performance reviews submitted by Defendant. However, Defendant contests the other two prima facie elements.

{¶23} Defendant argues that there is no evidence in the record that Plaintiff was replaced by a substantially younger person. However, Defendant admits that it hired Vittie shortly after the parties and the union entered into the LCA, Vittie was 15 or 16 years younger than Plaintiff when he was hired, and several of Plaintiff's job duties were reassigned to Vittie. According to Plaintiff, the duties that were reassigned to Vittie "constituted all of the work [that she] had been performing." (Meggitt Affidavit, ¶ 20.)

Therefore, there is an issue of material fact as to whether Defendant was replaced by someone substantially younger than her.

{¶24} The remaining prima facie element is whether Plaintiff was discharged. Defendant argues that Plaintiff was not discharged, but rather voluntarily resigned. Plaintiff argues that she was constructively discharged. "Courts generally apply an objective test in determining when an employee was constructively discharged, *viz.*, whether the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *Mauzy*, 75 Ohio St.3d 578, 588-589. "In applying this test, courts seek to determine whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent. They recognize that there is no sound reason to compel an employee to struggle with the inevitable simply to attain the 'discharge' label." *Id*. at 589.

{¶25} Defendant argues that it was not inevitable that Plaintiff would have been terminated because only the Director of DPS can terminate an employee. However, Plaintiff's affidavit is sufficient to raise a genuine issue of material fact as to whether—after an investigation was initiated and Human Resources recommended removal—a reasonable person would have believed that termination was imminent. Therefore, there are genuine issues of material fact as to whether Plaintiff can establish the elements of a prima facie case of age discrimination.

{¶26} Plaintiff also attempts to establish a prima facie case through statistical data, in accordance with *Barnes*, by showing that there has historically been action taken against the protected class. However, while Plaintiff refers to some statistical data in her memorandum—purportedly derived from answers to interrogatories—no evidence containing the data was submitted in accordance with Civ.R. 56(C). Therefore, the evidence is not properly before the Court for consideration.

{¶27} Defendant asserts that even if Plaintiff were able to present a prima facie case, it had a legitimate reason for terminating Plaintiff: the violation of the LCA. Defendant further argues that Plaintiff cannot show pretext because it is undisputed that she violated the LCA by calling in late. However, while Plaintiff may establish pretext by showing that the proffered reason has no basis in fact, Plaintiff may also establish pretext by showing that the proffered reason did not actually motivate Defendant's conduct or that the proffered reason was insufficient to warrant the challenged conduct. *Pla*, 2016-Ohio-8165, at ¶ 22.

{¶28} To this point, Plaintiff averred that the escalating measures were not warranted by her behavior and contrasted with how other employees, including McCrystal, were treated. Furthermore, Deck testified that Defendant was not required to impose escalating disciplinary measures—culminating in the LCA—for each infraction. Deck also testified that she was not aware of any other employee being recommended for termination based upon a speeding ticket. Lastly, though she was disciplined for reasons unrelated to her job performance, it appears that she performed sufficiently at her job duties. Accordingly, there is a genuine issue of material fact as to whether Defendant's proffered reason for terminating Plaintiff, or its reasons for the prior escalating discipline, is pretextual.

Arbitration Provision and Revised Code 4112.14(C)

{¶29} In its second argument, Defendant contends that Plaintiff's claim is barred because she had the ability to arbitrate a discharge either through the arbitration provision in her union contract or the arbitration provision in the last chance agreement between Plaintiff, her union, and Defendant. Revised Code 4112.14(C) provides that a cause of action under R.C. 4112.14(B) "shall not be available in the case of discharges where the employee has available to the employee the opportunity to arbitrate the discharge or where a discharge has been arbitrated and has been found to be for just cause." R.C. 4112.14(C). If a grievance procedure contains sufficient procedural

safeguards so as to be the functional equivalent of arbitration, the grievance procedure may also invoke the bar to suit set forth in R.C. 4112.14(C). *Meyer v. UPS*, 122 Ohio St.3d 104, 2009-Ohio-2463, 909 N.E.2d 106, ¶ 46-47. In commenting on R.C. 4112.14(C), the Ohio Supreme Court has noted that "for certain age discrimination claims, the General Assembly has expressed its intent to prefer arbitration over other remedies when arbitration is available." *Dworning v. City of Euclid*, 119 Ohio St.3d 83, 2008-Ohio-3318, 892 N.E.2d 420, ¶ 41.

{¶30} While Defendant argues that Plaintiff's claim is barred by R.C. 4112.14(C), it has not submitted an arbitration agreement or provision into evidence. The only evidence of an arbitration provision that the Court was able to find in the evidence submitted is the word "Arbitrator" within the LCA and an admission that the union contract contains an arbitration provision. The relevant paragraph of the LCA, quoted above, does not in and of itself set forth an arbitration procedure sufficient to invoke R.C. 4112.14(C).[2] Defendant also submitted Plaintiff's Responses to Defendant's Admission Requests in support of its argument that Plaintiff was required to arbitrate any discharge. However, while Plaintiff admitted therein that the union contract contained an arbitration provision, Plaintiff denied that she could have gone to arbitration if her employment had been terminated. Because the union contract was not submitted into evidence, there is a genuine issue of material fact as to whether Plaintiff's claim is barred by R.C. 4112.14(C).

Conclusion

{¶31} Based upon the foregoing, there are genuine issues of material fact as to whether Plaintiff can show a prima facie case of age discrimination, whether

[2]Even if the paragraph in the LCA regarding grievances were interpreted to be an arbitration agreement, the procedure set forth therein is not sufficient to invoke R.C. 4112.14(C). That division only applies if a plaintiff has a meaningful opportunity to arbitrate the age discrimination claim and obtain the full extent of relief provided by law: "the arbitral forum must 'allow for the effective vindication' of a plaintiff's statutory claim." *Raasch v. NCR Corp.*, 254 F.Supp.2d 847, 854 (S.D.Ohio 2003), quoting *Floss v. Ryan's Family Steak Houses, Inc*., 211 F.3d 306, 313 (6th Cir.2000).

Defendant's justification for terminating Plaintiff is pretextual, and whether R.C. 4112.14(C) bars Plaintiff's claim. Therefore, Defendant's Motion for Summary Judgment shall be denied.

DALE A. CRAWFORD
Judge

[Cite as *Meggitt v. Ohio Dept. of Pub. Safety*, 2020-Ohio-4412.]

RHONDA L. MEGGITT Plaintiff v. OHIO DEPARTMENT OF PUBLIC SAFETY Defendant	Case No. 2019-00575JD Judge Dale A. Crawford JUDGMENT ENTRY

{¶32} A non-oral hearing was conducted in this case upon Defendant's Motion for Summary Judgment. For the reasons set forth in the decision filed concurrently herewith, Defendant's Motion for Summary Judgment is DENIED.

DALE A. CRAWFORD
Judge

Filed July 13, 2020
Sent to S.C. Reporter 9/14/20