[Cite as *Meggitt v. Ohio Dept. of Pub. Safety*, 2021-Ohio-1140.]

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

{¶1} This case is before the Court on a complaint brought by Plaintiff, Rhonda Meggitt, for age discrimination in violation of R.C. 4112.14. The Court held a trial on the issues of liability and damages. For the reasons stated below, judgment will be rendered in favor of Defendant.[1]

Findings of Fact

{¶2} Plaintiff was born in July 1965. Plaintiff began working for the Department of Public Safety (hereinafter Defendant or DPS) in 1994 as a Word Processing Specialist. She later became a Planner 3. In 2013, Plaintiff was transferred to the Emergency Management Agency (EMA) pursuant to a last chance agreement in lieu of being terminated from her previous position within DPS. (Defendant's Ex. M.)

{¶3} Plaintiff worked for EMA as a Planner 3 until she resigned on November 26, 2018. Plaintiff asserts that she was forced to resign due to defendant's continual disciplinary actions against her due to age discrimination. As a planner, Plaintiff was the state lead for mass care, which included reunification, repatriation, reception center, and the fatality management plan. She also performed planning for firefighting, transportation, the emergency response team, and the community emergency response

[1]At the end of the trial, the undersigned ruled from the bench in favor of Defendant.

team. Plaintiff was disciplined or reprimanded at least eight times during her employment with EMA.

{¶4} Plaintiff's disciplinary history with EMA began in October 2016. Plaintiff "accidentally" drove through the wrong lane of a tollbooth in a state vehicle, which resulted in the state of Pennsylvania issuing a fine. (Defendant's Ex. O.) Plaintiff paid the fine and received a written reprimand. (Defendant's Ex. P.) Matthew McCrystal, whom Plaintiff alleges was the source of the age discrimination against her, was hired in January 2017.

{¶5} In the second incident, on March 14, 2017, Plaintiff was charged with being rude to a state trooper who was working at the front desk of DPS headquarters, also known as the Shipley building. (Defendant's Ex. R.) Plaintiff testified that she went to DPS headquarters to attend a training session. According to State Trooper Norma Scott, Plaintiff became aggravated and belligerent when Scott could not find the training session on her list of meetings for that day. Someone from DPS headquarters reported the incident to EMA, and EMA Assistant Director Daniel Kolcum requested that the Administrative Investigation's Unit (AIU) perform an administrative investigation.[2] (Defendant's Ex. R.) The investigation concluded that Plaintiff had been rude and abusive to the highway patrol trooper. (Defendant's Ex. R.)

{¶6} On April 21, 2017, for the third incident, Plaintiff received a counseling from her supervisor, Karen Kadar, for several comments that she made that were considered to be negative, rude, or inappropriate. (Defendant's Ex. S.) The fourth incident occurred the next day when Plaintiff was accused of being rude to the deputy director of the Licking County EMA during a training exercise. (Defendant's Ex. T.) The director of the Licking County EMA sent an email to McCrystal informing him of Plaintiff's conduct.

[2]The Administrative Investigations Unit is a unit within DPS separate from EMA and separate from HR. An investigator from AIU interviews employees, reviews records, and completes a report. The report does not include a recommendation as to discipline; the report only concludes whether the allegation is founded or unfounded.

(Defendant's Ex. T, DPS_000519-520.) Assistant Director Kolcum again requested that AIU conduct an administrative investigation, which concluded that plaintiff had been rude to the deputy director. (Defendant's Ex. T.)

{¶7} After AIU completes a report, the report is sent to HR, where it goes through several layers of independent review by HR employees before the director of HR conducts an independent review and makes a recommendation. For sanctions of suspension or above, the file would then be reviewed by the director of the division in which the employee is employed or his/her designee. It is then sent to the director of DPS who performs a final review and makes the final decision of what the discipline will be. As a result of both the March 14, 2017 and the April 21, 2017 incidents, Plaintiff received a three-day suspension with two days held in abeyance. (Defendant's Ex. W, X.) Plaintiff agreed to the suspension as part of a settlement agreement to resolve the disciplinary action. (Defendant's Ex. V.)

{¶8} The fifth incident occurred on September 8, 2017, when Plaintiff was allegedly rude to McCrystal and an administrative professional while attempting to submit a requisition form. (Defendant's Ex. Y.) A new policy required that only a supervisor or manager could turn in the paperwork. (Defendant's Ex. Y.) When Plaintiff attempted to submit the form to the administrative professional, she refused to take it. Plaintiff was unaware of the new policy and became frustrated. During that conversation, McCrystal entered the office and reiterated the policy. Plaintiff and McCrystal disagreed in their testimony as to their respective tone with each other. Nevertheless, both testified that Plaintiff dropped the form on the administrative professional's desk and left. McCrystal decided that the rudeness warranted being referred to AIU. (Defendant's Ex. Y, DPS_000541.)

{¶9} On both September 9, 2017 and September 11, 2017, Plaintiff called the watch office after her normal work hours to inquire about an emergency shelter in Ohio that was listed as open. (Defendant's Ex. Y.) It turned out that the second shelter was

not actually open; the listing online was a mistake. During the September 11, 2017 call—according to the watch desk worker—Plaintiff was agitated and spoke to him in a demeaning manner, asking him why he was not monitoring the shelter information. (Defendant's Ex. Y, DPS_000543.) That was the sixth disciplinary incident. The Ohio EMA Watch Chief reported to McCrystal that Plaintiff berated the watch desk officer. (Defendant's Ex. Y, DPS_000552.) McCrystal then requested that an administrative investigation be initiated to investigate Plaintiff's rude behavior to McCrystal and the administrative professional and her rude behavior to the watch desk officer.

{¶10} As a result of both the September 8, 2017 and the September 11, 2017 incidents, Plaintiff received a five-day suspension. (Plaintiff's Ex. 11.) She also was required to serve the two days of suspension that previously had been held in abeyance from the previous administrative investigations. (Plaintiff's Ex. 11, DPS_000596.) Plaintiff agreed to the suspension as part of a settlement agreement to resolve the disciplinary action. (Plaintiff's Ex. 11, DPS_000597.)

{¶11} On July 24, 2018, Plaintiff received a speeding ticket for driving 69 mph in a 55-mph zone while in a state vehicle—the seventh incident. (Defendant's Ex. DD, DPS_000006.) EMA Deputy Director Kolcum initiated an Administrative Investigation, in which Plaintiff admitted that she was speeding and received the ticket. (Defendant's Ex. DD, DPS_000002 – DPS_000003.) As a result of the speeding ticket and Plaintiff's disciplinary history, Plaintiff, Defendant, and Plaintiff's union entered into a Last Chance Agreement (LCA) on August 30, 2018. (Defendant's Ex. EE, A.) In the LCA, Plaintiff agreed to strictly adhere to Defendant's policies and work rules for three years. The parties agreed that if Plaintiff failed to do so, "the appropriate discipline shall be termination[.]" (Defendant's Ex. A.)

{¶12} On September 4, 2018, Defendant hired Josh Vittie as Planner 3 for EMA. (Plaintiff's Ex. 27.) The bulk of Plaintiff's job duties, including mass care, firefighting, DPS ERT, and CERT, were reassigned to Vittie. Nevertheless, McCrystal testified that

Vittie was not hired as a replacement for Plaintiff. Instead, he was assigned those duties because his background was conducive to them, and some of the agencies had complained about Plaintiff. Plaintiff's new duty was to liaison with units within DPS. Plaintiff testified that the internal agencies did not need much help, and it was not enough work to keep her busy. Her salary and job title remained the same.

{¶13} The eighth incident occurred on October 5, 2018, when Plaintiff was ill. She did not inform McCrystal that she would be late to work until 8:10 a.m., 40 minutes after her start time of 7:30 a.m. (Defendant's Ex. B.) DPS policy required that she inform McCrystal by 8:00 a.m. (Defendant's Ex. B, DPS_00023.) An investigation conducted by AIU found that Plaintiff was late in calling McCrystal. (Defendant's Ex. B.) Human Resources recommended that Plaintiff be terminated. (Defendant's Ex. G.) However, Plaintiff resigned on November 26, 2018, after consulting her union representative, in the hopes that it would be easier to find another job with the state if she resigned rather than being terminated. (Defendant's Ex. E.) Her resignation became effective on December 3, 2018, at which time Plaintiff was 53 years old.

{¶14} During the trial, Plaintiff presented evidence in support of her assertion that other older workers within EMA were discriminated against on account of age. Brad Schwartz testified that he was 64 years old and has worked at EMA since March 2004. He testified that he has been marginalized due to his age, with responsibilities shifted away from him as part of a change in management style after McCrystal was hired. He also testified that it is obvious that McCrystal prefers working with younger planners, and—due in part to priorities shifting during the COVID-19 pandemic—it has been difficult for him to find enough work to do. Schwartz testified that he received a counseling shortly after McCrystal joined the agency, and it was obvious that McCrystal was behind it. Schwartz also testified that McCrystal commented that it is possible to teach an old dog new tricks when Schwartz demonstrated his competence with new software. However, McCrystal testified that he only referred to the old dog trope after

Schwartz himself referred to it. Although Schwartz denied referring to himself as an old dog first, he admitted that he may have said that he normally uses older methods because they are what he knows. Schwartz is still employed with EMA and has not been demoted or suffered any reduction in salary.

{¶15} Plaintiff and Schwartz both testified that other older employees retired, resigned, or transferred to other agencies after McCrystal joined EMA, and both witnesses alleged that it was due to age discrimination by McCrystal. Plaintiff provided a chart summarizing the birth dates of other employees and the dates on which they retired, resigned, or transferred. (Plaintiff's Ex. 27.) However, none of the other employees testified, and Plaintiff did not offer admissible evidence indicating that their reasons for retirement, resignation, or transfer had anything to do with McCrystal or age discrimination.

Law and Analysis

{¶16} Defendant argued that R.C. 4112.14(C) bars Plaintiff from bringing her age discrimination claim because arbitration was available and she failed to arbitrate her discharge. However, upon review of the evidence presented at trial, the Court concludes that the arbitration provision in the LCA did not provide Plaintiff with a meaningful opportunity to arbitrate her discharge. The arbitration process provided by the LCA could not have given her the remedies she seeks in this action. Therefore, the argument that R.C. 4112.14(C) bars Plaintiff's age discrimination claim is without merit.

{¶17} 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).

{¶18} In an employment discrimination case, the intention of the employer in taking the adverse employment action against the plaintiff is crucial—"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). "[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} In this case, Plaintiff alleges that the "old dog" comment between McCrystal and Schwartz constitutes direct evidence of discrimination. However, after listening to testimony from both McCrystal and Schwartz, the Court finds that McCrystal referred to the old dog stereotype in response to a comment that Schwartz made referring to it. Therefore, it is not direct evidence of an intent on the part of McCrystal to discriminate against older employees. Furthermore, even if McCrystal had called Schwartz an old dog without Schwartz's prompting, one such comment is insufficient to amount to direct evidence of discriminatory intent, especially towards Plaintiff. *See Chapa v. Genpak, LLC*, 10th Dist. Franklin No. 12AP-466, 2014-Ohio-897, ¶ 91 (a stray remark that is not

related to the specific employment decision being challenged is not direct evidence of discrimination).

{¶20} 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.

{¶21} 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.

{¶22} For purposes of this analysis, the Court concludes that Plaintiff has established a prima facie case of age discrimination. Plaintiff is a member of a protected class, and she was clearly qualified for her position. Although Plaintiff voluntarily resigned before the director of DPS officially terminated her—in the hopes that a resignation would look better on her job history—HR had already recommended that she be terminated for violating the LCA. Plaintiff was not required to wait for the sword to fall. *See Mauzy*, 75 Ohio St.3d at 589 (An employee is constructively discharged when "the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent."). The Court thus concludes that she was constructively discharged. As to whether Plaintiff was replaced by a person substantially younger than her, if this were the dispositive factor, the Court would find against Plaintiff on this issue. However, because the Court will conclude that Plaintiff's claim fails on other grounds, the Court will proceed as though Vittie replaced Plaintiff.

{¶23} After Plaintiff shows a prima facie case, the burden shifts to Defendant to articulate a legitimate, non-discriminatory reason for terminating her. *Mauzy* at 582. Defendant succeeded in doing so. Plaintiff violated department rules on at least eight occasions. The violations that resulted in discipline were independently investigated, and the discipline was justified. In each case, the investigation was conducted, and the discipline was recommended, by individuals who were not related to claims of discrimination.

{¶24} The burden then shifts to Plaintiff to show that the articulated reasons for terminating her were pretextual. Plaintiff did not meet her burden. Plaintiff identified McCrystal as the supervisor who discriminated against her due to her age. However, while McCrystal performed an intermediary step in the discipline processes for some

incidents, Plaintiff submitted no evidence that McCrystal's performance of his intermediary step was motivated by age animus. Furthermore, each investigation went through several layers of review by HR, and the ultimate decision regarding each discipline was made by the director. The Court finds that the director's decisions regarding discipline were supported by credible evidence. Plaintiff presented some statistical evidence that older planners retired or left their employment early, but there was no evidence that their leaving was a result of improper activity by McCrystal. Plaintiff did not show that anyone other than Plaintiff was terminated or suffered discipline. Nor did she show that younger people received less discipline for similar violations. Therefore, Plaintiff failed to prove her case by a preponderance of the evidence.

Conclusion

{¶25} Considering all of the evidence presented, the Court finds that Plaintiff failed to prove by a preponderance of the evidence that Defendant terminated her due to age discrimination. Although Plaintiff arguably presented a prima facie case of age discrimination, Defendant demonstrated how Plaintiff committed multiple violations of Defendant's policies, which resulted in justified discipline and ultimately a recommendation that she be terminated. Plaintiff then failed to show that Defendant's stated reasons for discipline were pretext for age discrimination. Therefore, judgment shall be rendered in favor of Defendant.

DALE A. CRAWFORD
Judge

[Cite as *Meggitt v. Ohio Dept. of Pub. Safety*, 2021-Ohio-1140.]

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

{¶26} This case came to trial before the Court on the issues of liability and damages. 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.

DALE A. CRAWFORD
Judge

Filed February 3, 2021
Sent to S.C. Reporter 4/5/21