[Cite as *Witzigreuter v. Cent. Hosp. Servs., Inc.*, 2020-Ohio-5088.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

AMY WITZIGREUTER, :

Plaintiff-Appellant, : No. 109192

v. :

CENTRAL HOSPITAL SERVICES INC., ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 29, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-905716

Appearances:

Orville E. Stifel, II, Co., L.P.A., and Orville E. Stifel, II; Stephen W. Gard, *for appellant.*

Tucker Ellis L.L.P., Thomas R. Simmons, and Christine M. Snyder, *for appellees.*

RAYMOND C. HEADEN, J.:

{¶ 1} Plaintiff-appellant Amy Witzigreuter ("Witzigreuter") appeals the trial court's order granting summary judgment in favor of defendants-appellees

Central Hospital Services, Inc. ("CHS"), Phil Mazanec ("Mazanec"), Toni Hare ("Hare"), and Lesley Forneris ("Forneris"). For the reasons that follow, we affirm.

I. Factual and Procedural History

{¶ 2} On October 22, 2018, Witzigreuter filed a complaint alleging age and gender discrimination against her employer, CHS, as well as employees Mazanec, Hare, and Forneris. At the time of her termination, Witzigreuter reported directly to Hare, the vice president of the oncology department. Mazanec was Hare's superior, and Forneris was the head of the human resources department.

{¶ 3} Witzigreuter began working for CHS in December 2014 as Director of Sales in the business development department. The business development department provided sales and business development for all departments within CHS. Witzigreuter worked with and reported to Ross Matlack ("Matlack"). In addition to Witzigreuter and Matlack, the department was comprised of two salespeople who were transferred from the group purchasing division and Mia Salvano ("Salvano") who came from the patient experience department. At the onset of her employment, Witzigreuter spent fifty percent of her time with the patient experience department and equally divided her remaining time among the oncology, group purchasing, and member services departments.

{¶ 4} In the spring of 2016, Witzigreuter's job title changed to Director of Strategic Relationships to reflect her job responsibilities; the title change did not represent a promotion or shift in her responsibilities. The majority of Witzigreuter's responsibilities involved sales activities including marketing, developing sales

strategies and sales processes, presenting sales pitches, servicing clients, and pursuing future sales opportunities. As Director of Strategic Relationships, Witzigreuter shifted her focus almost exclusively to the oncology department although she was not officially a part of that department. Matlack was terminated around that same time, which resulted in Witzigreuter reporting to Laura Gronowski ("Gronowski"), the chief of staff, and Salvano reporting to Witzigreuter.

{¶ 5} In March 2017, CHS hired a male employee, Joe Castellano ("Castellano"), as client relations manager in the oncology department. The oncology department was then and at all times predominantly comprised of female workers. Witzigreuter testified that she and Castellano shared identical job duties yet her description of his responsibilities stated that he was an ambassador for the oncology department, focusing on the department's software product.

{¶ 6} Towards the end of 2017, Witzigreuter's business development department was eliminated. The two salespeople were transferred back to group purchasing and Witzigreuter and Salvano were transferred to the oncology department where they reported to Hare. After Witzigreuter's transfer to the oncology department, the company's organizational chart was updated to reflect her placement in the department.

{¶ 7} In December 2017, CHS employees learned there was to be a reduction in force ("RIF"). Hare arranged to meet Witzigreuter at Starbucks to discuss the RIF and the women met before work hours. Hare had not determined at that time which oncology department employees she would terminate under the

RIF. Hare asked for Witzigreuter's opinion on Castellano, Salvano, and other roles within the department. It was Witzigreuter's impression that Hare was having a difficult time deciding who should be terminated from the oncology department. Following the conversation, Witzigreuter felt either she or Castellano would be terminated under the RIF, and believed Hare wanted to eliminate Castellano.

{¶ 8} On January 31, 2018, Witzigreuter was contacted at home and told to cancel her client meeting scheduled for the next morning and report directly to CHS. Witzigreuter cancelled the meeting at which she anticipated securing an executed sales contract. Upon arriving at the office, Forneris and Mario Franco ("Franco"), the head of the finance department, informed Witzigreuter she was being terminated under the RIF. Both Witzigreuter and Salvano, the two employees who transferred from the business development department to the oncology department in December 2017, were terminated. They were the only oncology department employees that were subject to the RIF; Castellano was not terminated. While Forneris informed Witzigreuter of her termination, the decision to terminate Witzigreuter and Salvano was made exclusively by Hare. Hare's reasoning for terminating Witzigreuter and Salvano was because they had the least seniority in the oncology department and their dismissal would have the least impact on the department. CHS did not replace Witzigreuter but divided her job responsibilities among Castellano, Hare, and Karen Schmidt ("Schmidt"), the Associate Vice President of the oncology department. At the time of her termination, Witzigreuter was 49 years old and Castellano was 37 years old.

{¶ 9} With regard to her compensation at CHS, Witzigreuter received only a salary when first hired, but starting in 2016 she also received commissions. Commissions were paid in accordance with a verbal agreement entered between Witzigreuter and Matlack. Once Witzigreuter closed a sales contract and the executed contract was received at CHS, Witzigreuter notified her superior that she was in receipt of a signed contract and a commission check was generated. Witzigreuter's commissions consisted of a small stipend plus a percentage of the dollar value of the contract. The percentage was payable for the life of the contract. Witzigreuter had no recollection of any discussions with management regarding the continuation of her commissions should her employment with CHS terminate.

{¶ 10} In addition to her age and gender discrimination claims, Witzigreuter filed a breach of contract, promissory estoppel, unjust enrichment, and declaratory judgment causes of action in an attempt to recover commission payments on several contracts that she allegedly facilitated prior to her termination, even though the signed contracts were not returned to CHS by the date of Witzigreuter's termination. Witzigreuter also sought continuing commission payments — for the life of the contracts — on finalized contracts for which she was receiving commissions on the date of her termination. CHS had not issued any commissions checks since the date of Witzigreuter's termination.

{¶ 11} CHS, Mazanec, Hare, and Forneris filed motions for summary judgment on July 19, 2019. Witzigreuter filed opposition briefs, and the trial court granted the summary judgment motions on October 15, 2019.

{¶ 12} On November 11, 2019, Witzigreuter filed a timely appeal presenting, verbatim, these assignments of error for our review:

> Assignment of Error #1: The trial court erred in granting summary judgment to defendants on plaintiff's claims of age and gender based wrongful termination in violation of Chapter 4112 of the Ohio Revised Code.
>
> Assignment of Error #2: The trial court erred in granting defendant Central Hospital Services' motion for summary judgment on plaintiff's commission claims.

II. <u>Law and Analysis</u>

A. Standard of Review

{¶ 13} Before a trial court grants a motion for summary judgment, pursuant to Civ.R. 56(C), the court must determine that:

> (1) No genuine issue as to any material fact remains to be litigated; (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, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶ 14} On a motion for summary judgment, the moving party's initial burden is to identify specific facts in the record that demonstrate its entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party does not satisfy this burden, summary judgment is not appropriate. If the moving party meets the burden, the nonmoving party has a reciprocal burden to point to evidence of specific facts in the record that demonstrate the existence of a genuine issue of material fact for trial. *Id.* at 293.

Where the nonmoving party fails to meet this burden, summary judgment is appropriate. *Id.*

{¶ 15} An appellate court applies a de novo standard when reviewing a trial court's decision that granted summary judgment. *Bayview Loan Servicing, L.L.C. v. St. Cyr*, 2017-Ohio-2758, 90 N.E.3d 321, ¶ 11 (8th Dist.).

B. Age and Gender Discrimination

1. Prima Facie Case

{¶ 16} In her first assignment of error, Witzigreuter argues that the trial court erred when it granted CHS's motion for summary judgment on her age and gender discrimination claims because genuine issues of material fact existed. Witzigreuter filed her discrimination claims pursuant to R.C. Chapter 4112, which makes it unlawful to discharge an employee without just cause because of age or gender. To the extent that the rights presented in R.C. Chapter 4112 are comparable to those expressed in Title VII of the Civil Right Act of 1964, 42 U.S.C. 2000 et seq., we can apply federal precedent to interpret R.C. Chapter 4112. *Southworth v. N. Trust Secs., Inc.*, 195 Ohio App.3d 357, 2011-Ohio-3467, 960 N.E.2d 473, ¶ 2 (8th Dist.).

{¶ 17} A party can prove age and gender discrimination claims either with direct evidence of discrimination or, absent direct evidence, by establishing a prima facie case of discrimination. To establish a prima facie case of age and gender discrimination in an employment discharge action, a plaintiff must show that she (1) was a member of a statutorily protected class, (2) was discharged, (3) was

qualified for the position, and (4) the position was filled by a person outside the protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

{¶ 18} The fourth prong of the *McDonnell Douglas* test is modified in RIF cases where a new employee is not hired to replace the terminated employee, but the discharged employee's duties are distributed among the remaining employees. *Karsnak v. Chess Fin. Corp.*, 8th Dist. Cuyahoga No. 97312, 2012-Ohio-1359, ¶ 25, citing *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 690 (7th Cir.2006). Under the modified fourth prong, the employee offers additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled her out for termination for impermissible discriminatory reasons unrelated to the RIF. *Karsnak* at ¶ 26. A plaintiff may establish the fourth prong of the prima facie test through circumstantial evidence that she was treated less favorably than younger, male employees during the RIF. *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir.1988).

{¶ 19} Once the plaintiff establishes a prima facie case of age or gender discrimination, a presumption of discrimination is created and the burden of production shifts to the employer who, to overcome the presumption, must articulate a legitimate, nondiscriminatory reason for the termination. *McDonnell*, at 802-803. If the employer successfully satisfies this burden, the burden shifts back to the employee to show, by a preponderance of the evidence, that the employer's proffered reason for discharge was a mere pretext for the unlawful discrimination.

Manofsky v. Goodyear Tire & Rubber Co., 69 Ohio App.3d 663, 668, 591 N.E.2d 752 (9th Dist.1990).

{¶ 20} In the present case, the parties do not dispute that Witzigreuter satisfied the first three elements of the *McDonnell Douglas* test: Witzigreuter is female and over 40 years old, she was qualified for her job, and CHS terminated her position. The dispute focuses on the fourth prong of the *McDonnell Douglas* test and whether Witzigreuter was terminated for impermissible considerations — her age or gender.

{¶ 21} In an age or gender discrimination case, the plaintiff, if singled out for discharge for an impermissible reason,

> should be able to develop enough evidence through the discovery process or otherwise to establish a prima facie case. For example, a plaintiff could establish a prima facie case by showing that he or she possessed qualifications superior to those of a younger co-worker working in the same position as the plaintiff. Alternatively, a plaintiff could show that the employer made statements indicative of a discriminatory motive as in *Laugesen* [*v. Anaconda Co.*], 510 F.2d [307 (6th Cir.1975)] at 313. The guiding principle is that the evidence must be sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of age [or gender].

Barnes v. Gencorp, Inc., 896 F.2d 1457, 1465-1466 (6th Cir.1990). Where the plaintiff bases her prima facie case on the allegation that she possessed superior qualifications to those of a younger, male employee, working in the same position, and who was retained by the employer following the RIF, the plaintiff must show that all relevant components of her work were similar to those of the employee with whom she seeks to compare herself. *Lascu v. Apex Paper Box Co.*, 8th Dist.

Cuyahoga No. 95091, 2011-Ohio-4407, ¶ 8, citing *Kroh v. Continental Gen. Tire, Inc.*, 92 Ohio St.3d 30, 32, 748 N.E.2d 36 (2001).

{¶ 22} Witzigreuter contends that she was more qualified than Castellano, a younger, male employee who allegedly held a comparable position to Witzigreuter and who was not discharged under the RIF. Witzigreuter had to produce evidence that she and Castellano were similarly situated or that their positions were nearly identical. *Lascu* at ¶ 8. When determining whether an employee is similarly situated to another, courts review the "relevant aspects" of the employees' job positions:

> "In order for two or more employees to be considered similarly situated for the purpose of creating an inference of disparate treatment in a Title VII case, the plaintiff must prove that all of the relevant aspects of [her] employment situation are 'nearly identical' to those of the [younger or male] employees who [s]he alleges were treated more favorably. The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances."

Lascu at ¶ 20, quoting *Ruth v. Children's Med. Ctr.*, 6th Cir. No. 90-4069, 1991 U.S. App. LEXIS 19062, 22 (Aug. 8, 1991), quoting *Payne v. Illinois Cent. Gulf R.R.*, 665 F.Supp. 1308, 1333 (W.D. Tenn.1987).

{¶ 23} The evidence presented indicated that the relevant aspects of Witzigreuter's and Castellano's jobs were not "nearly identical" and reasonable minds could not view these former co-workers as similarly situated. Witzigreuter explained Castellano's duties as follows:

> He was to help identify opportunities for the software, if the software was sold, work directly with the client to make sure they knew how to use the software. He was, you know, an ambassador for the division.

> So looking for opportunities, you know, for the division in general. He attended some trade shows. He made some efforts to sell the services, work with I guess the other departments as well. So the programmers with i2o, the IT department, even marketing.

(Tr. 77.)[1] Witzigreuter averred that "Joe [was] the only one still working there in any kind of capacity related to sales." (Tr. 135.) Following the above description of Castellano's job responsibilities, Witzigreuter commented that she and Castellano's jobs were the same but the record does not support those statements.

{¶ 24} As for her own employment as Director of Strategic Relationships, Witzigreuter testified "the bulk" of her job entailed sales and included these various tasks: developing strategies and sales processes, working on marketing for distribution at trade shows, and customer meetings. (Tr. 67.) Witzigreuter was also responsible for developing customer relationships and supporting multiple divisions.

{¶ 25} Witzigreuter's argument that she and Castellano had "strikingly similar job titles" and performed the same job duties is not supported by her own deposition testimony. We do not find the job titles — Client Relationship Manager and Director of Strategic Relationships — synonymous and the fact that the titles reflected a director-level position and a manager-level position, respectively, further demonstrated a disparity between the two roles. Witzigreuter's description of Castellano's work indicated he had a significant role after a sale of the software, with minimal involvement with sales, trade show attendance, and other related activities

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[1] Witzigreuter's deposition transcript is referenced by page number herein as "Tr.___."

whereas "the bulk" of Witzigreuter's job responsibilities related to sales, whether it was actual meetings with customers or developing marketing materials. A large gap between the two employees' compensation further supported the conclusion that the two employees were not similarly situated. Witzigreuter earned $106,823.34 in salary and commission in 2017 in comparison to Castellano's salary of $48,627.30. We recognize that Witzigreuter had seniority over Castellano and earned commissions that likely contributed to her higher salary. But we cannot ignore that the imbalance in salaries supported a conclusion that the employees held different roles from one another.

{¶ 26} Castellano's employment in the oncology department since March 2016 versus Witzigreuter's transfer there in December 2017 was another inequity between the employees. Witzigreuter alleged that she performed work for oncology since 2016, and her subsequent transfer in December 2017 was merely a formality. Witzigreuter testified that she worked almost exclusively for the oncology department yet she was not assigned there until December 2017. CHS hired Witzigreuter to work in the business development department where she remained from 2014, until the department's elimination in 2017. During her tenure, Witzigreuter initially reported to Matlack and then Gronowski. Neither of those supervisors were part of the oncology department. In contrast, CHS hired Castellano directly into the oncology department where he worked exclusively and reported to a supervisor within the department. The assignments of the two employees within different departments further supported the difference between

their positions.[2] We find Witzigreuter did not demonstrate that her role was similarly situated in all relevant aspects to Castellano's.

{¶ 27} Witzigreuter claimed that, in contrast to Castellano, she was more qualified and was an income-producing employee. Witzigreuter and Castellano performed different jobs at CHS. Witzigreuter worked primarily sales while Castellano completed some sales and worked with clients and other departments with regard to the company's software products. Witzigreuter held a college degree and had related work experience prior to her employment with CHS while Castellano did not. However, Witzigreuter did not introduce any evidence that her skill set was more beneficial to CHS. And Hare averred that the oncology department had been operating successfully prior to Witzigreuter joining the department and she determined Witzigreuter's termination would result in the least disruption to the department. Further, "[i]t is well established that [a] plaintiff's own subjective view of * * * her qualifications, without more, is insufficient to maintain a claim for unlawful discrimination." *Minter v. Cuyahoga Community*

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[2] Witzigreuter contended that she was an oncology department employee since the spring of 2016 — based upon working almost exclusively for the department dating from 2016 — and denied that she had the least seniority in the oncology department. She suggested that CHS purposefully changed the company's organizational chart to show she was an oncology department employee starting in December 2017, so that the company could premise her termination on her lack of seniority in the oncology department. The evidence showed Witzigreuter was not placed within the oncology department and did not report to an oncology supervisor until December 2017. There was no evidence to demonstrate that CHS's RIF compelled it to update the organizational chart and thereby fabricate Witzigreuter's new assignment to, and lack of seniority in, the oncology department.

College, 8th Dist. Cuyahoga No. 76707, 2000 Ohio App. LEXIS 598, 17-18 (Feb. 17, 2000).

{¶ 28} Witzigreuter claimed she satisfied the fourth prong of the *McDonnell Douglas* test by demonstrating she was singled out based upon her age or gender. Witzigreuter referenced meetings conducted by Hare and Mazanec that included Castellano and excluded her. Those meetings allegedly concerned Witzigreuter's job duties or clients she had secured. Witzigreuter also claimed Castellano was provided training and other benefits that she was denied. Witzigreuter offered no evidence that these decisions were premised on age or gender bias.

{¶ 29} Witzigreuter referenced Schmidt's statement that "it is good to have a man in the negotiations" as evidence that CHS discriminated against her based upon her gender. (Tr. 137.) However, a single, isolated statement does not support a discrimination claim. *Karaba v. Alltell Communications, Inc.*, 8th Dist. Cuyahoga No. 80546, 2002-Ohio-4583, ¶ 15, citing *Dobozy v. Gentek Bldg. Prods., Inc.*, 8th Dist. Cuyahoga No. 77047, 2000 Ohio App. LEXIS 5469 (Nov. 22, 2000), citing *Brewer v. Cleveland Schools Bd. of Edn.*, 122 Ohio App.3d 378, 701 N.E.2d 1023 (8th Dist.1997).

{¶ 30} Further, Witzigreuter referenced (1) CHS's offer of a severance package in exchange for a general release of claims, including age and gender discrimination claims, and (2) a federally mandated disclosure form that identified the ages of the terminated employees as indicators that she was singled out for termination based upon age and gender discrimination. Witzigreuter's reliance on

Srail v. RJF Internatl. Corp., 126 Ohio App.3d 689, 711 N.E.2d 264 (8th Dist.1998) — where an employer was subject to punitive damages where it conditioned the receipt of postemployment benefits upon execution of a release — is inapplicable here. We do not find the documents presented at Witzigreuter's termination meeting served as evidence of gender or age discrimination.

{¶ 31} Witzigreuter's proposed evidence of Castellano's preferential treatment was not sufficiently probative to allow the trier of fact to believe that CHS intentionally engaged in age or gender discrimination. When asked for justification of her age discrimination claim, Witzigreuter responded, "All I can say is that our jobs were the same and Joe is still there and I'm not. What else could it be? I had great reviews." (Tr. 138.) As to her gender discrimination claim, Witzigreuter stated, "I think [Hare] was under significant pressure and despite maybe what she chose or wanted was influenced by others." (Tr. 165.) Witzigreuter's allegations amounted to conjecture and "[m]ere personal beliefs, conjecture and speculation are insufficient to support an inference of age discrimination." *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 268 (6th Cir.1986).

{¶ 32} Witzigreuter was terminated due to a RIF. CHS did not hire an employee to fill her position, but divided her work between three remaining employees: Hare, Schmidt, and Castellano. Castellano was a member of a nonprotected class, however, he and Witzigreuter were not similarly situated. Witzigreuter offered no evidence to prove that CHS's decision to terminate her was based on age or gender.

{¶ 33} A review of the record demonstrated that construing the evidence most favorably to Witzigreuter, there were no general issues of material fact. We find Witzigreuter failed to meet the fourth prong of the *McDonnell Douglas* burden-shifting framework. Thus, the trial court did not err when it granted CHS's motion for summary judgment on Witzigreuter's age and gender discrimination claims.

2. Mixed-Motive Analysis

{¶ 34} Witzigreuter's claim that her discrimination claims would survive summary judgment under a mixed-motive framework — where CHS's termination was motivated by both a prohibited and lawful reason — is unfounded. *Thomas v. Columbia Sussex Corp.*, 10th Dist. Franklin No. 10AP-93, 2011-Ohio-17, ¶ 27. We find that Witzigreuter presented straightforward claims of gender and age discrimination where she contended that but for her age and gender she would not have been terminated and, therefore, a mixed-motive analysis is not applicable. *Id.* at ¶ 28.

3. Liability of Hare, Mazanec, and Forneris

{¶ 35} Witzigreuter's motion for summary judgment named not only CHS as a defendant, but also Hare, Mazanec, and Forneris.

{¶ 36} Supervisors and managers named as party defendants under a R.C. Chapter 4112 claim may be personally liable for their own unlawful discriminatory acts. *Genaro v. Cent. Transport*, 84 Ohio St.3d 293, 296, 703 N.E.2d 782 (1999).

{¶ 37} Hare, the oncology department Vice President, made the decision to terminate Witzigreuter under the RIF. Hare averred she was not influenced or instructed by any other employee in her decision-making process. Witzigreuter testified she had no reason to doubt Hare was the individual who selected her for termination under the RIF. Hare could have been personally liable for her own alleged discriminatory acts, however, because Witzigreuter failed to establish her prima facie case for discrimination against CHS, her claim against Hare, based upon disparate treatment under R.C. 4112.02(A), was not supported by the record.

{¶ 38} No liability attaches to an employee who is not the decision maker with regard to the adverse employment action. *Jones v. Kilbourne Med. Laboratories*, 162 F.Supp.2d 813, 830 (S.D.Ohio 2000). No evidence was introduced that created a genuine issue of material fact as to whether Mazanec and Forneris were involved with the selection of Witzigreuter for termination. Witzigreuter believed Hare's selection of Witzigreuter was influenced by other CHS employees but she had no evidence to substantiate her feelings. Witzigreuter's beliefs were conjecture and unsupported by evidence. Subjective beliefs about how another person feels cannot satisfy the requirements of a motion for summary judgment. *Putney v. Contract Bldg. Components*, 3d Dist. Union No. 14-09-21, 2009-Ohio-6718, ¶ 67. Absent evidence to show Mazanec or Forneris were involved in the decision to terminate Witzigreuter under the RIF, liability against them could not attach under R.C. 4112.02(A).

{¶ 39} Witzigreuter also claimed that Hare, Mazanec, and Forneris were liable pursuant to R.C. 4112.02(J) that provides:

> It shall be an unlawful discriminatory practice:
>
> * * *
>
> (J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice. [3]

"R.C. 4112.02(J) makes it unlawful for 'any person' to participate in another's discriminatory practices." *Johnson-Newberry v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 107424, 2019-Ohio-3655, ¶ 30.

{¶ 40} In support of her R.C. 4112.02(J) allegations, Witzigreuter declared that upon CHS's hiring of Castellano, a younger male employee, her supervisors displayed disparate treatment to her based upon her age and gender. Mazanec and Hare allegedly conducted meetings with Castellano that concerned Witzigreuter's job duties and Witzigreuter was excluded from the meetings. Similarly, Hare, Mazanec, and Castellano held client meetings without Witzigreuter even though Witzigreuter developed the client relationships. Hare purportedly denied Witzigreuter training programs, sales opportunities, and the use of company tools

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[3] Appellees argue that Witzigreuter did not raise this cause of action in her complaint and, therefore, she is barred from raising this cause of action. However, a review of Witzigreuter's complaint shows that pursuant to Ohio's notice pleading requirements, this cause of action was sufficiently pleaded.

that were provided to Castellano. Witzigreuter also alleged Castellano received preferential treatment at a trade show in comparison to Witzigreuter.[4]

{¶ 41} The record demonstrated that Witzigreuter and Castellano were not similarly situated employees and they did not share comparable job duties. Therefore, it was reasonable that they did not receive the same opportunities or were included in the same meetings. Further, such behavior in and of itself does not establish age or gender discrimination.

{¶ 42} Witzigreuter claims discrimination was demonstrated when Mazanec, with knowledge of Hare's discriminatory conduct towards Witzigreuter, instructed Hare to select employees for dismissal under the RIF and he did not provide objective criteria for the selection process. Hare and Forneris allegedly updated CHS's organizational chart in anticipation of stating Witzigreuter had the least seniority in the oncology department and subsequently terminating her on that basis. Lastly, Forneris conducted Witzigreuter's termination meeting and presented documents that supposedly further demonstrated her discriminatory behavior.

{¶ 43} Again, Witzigreuter's accusations are premised on conjecture and no factual basis. These allegations did not create genuine issues of material fact with

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[4] Witzigreuter averred in her affidavit that she met with Forneris in December 2017, and described that she had been subject to discriminatory treatment by Hare and Mazanec. However, this affidavit statement was inconsistent with Witzigreuter's prior sworn deposition testimony where Witzigreuter stated she never made any complaints of discrimination during her employment with CHS. Absent an explanation for the inconsistency between her deposition testimony and the subsequent affidavit, the affidavit statement could not create a genuine issue of material fact. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 29.

regard to Mazanec, Hare, and Forneris's liability under R.C. 4112.02(J). Absent any evidence to support age or gender discrimination towards Witzigreuter, no liability could attach under R.C. 4112.02(J).

{¶ 44} The trial court did not err when it granted summary judgment in favor of CHS, Hare, Mazanec, and Forneris. For the foregoing reasons, we find Witzigreuter's first assignment of error is without merit and is overruled.

C. Commissions

{¶ 45} In her second assignment of error, Witzigreuter contends that CHS promised to pay her commissions for the life of each sales contract she executed and, therefore, she was entitled to receive ongoing commissions on any contracts she executed prior to her termination. Further, Witzigreuter sought payment of commissions on contracts that were almost completed, even if the executed document had not been secured by Witzigreuter prior to her termination date.

{¶ 46} Per Ohio law, an employee must specifically negotiate the continuation of commissions beyond her termination date. "Absent a contract for future commissions, an employee is not entitled to post-employment commissions on previously generated business." *Internatl. Total Servs. v. Glubiak*, 8th Dist. Cuyahoga No. 71927, 1998 Ohio App LEXIS 486, 5, (Feb. 12, 1998), quoting *Weiper v. W.A. Hill & Assocs.*, 104 Ohio App.3d 250, 259, 661 N.E.2d 796 (1st Dist.1995). An employee must present "some colorable evidence that the employer assented or agreed to pay his employee wages after he terminated his employment" or else "the employee's 'subjective expectations' do not constitute an implied contract to receive

such wages." *Mellino v. Charles Kampinski Co., L.P.A.*, 163 Ohio App.3d 163, 2005-Ohio-4292, 837 N.E.2d 385, ¶ 15 (8th Dist.), citing *Weiper at* 258. To create a genuine issue of material fact with regard to the existence of an implied contract for postemployment commissions, an oral promise to that effect would be sufficient. *Id.*

{¶ 47} During her tenure with CHS, Witzigreuter and Matlack orally agreed to a commission schedule. The parties stipulated that upon execution of a new contract, and presentment of the contract to CHS, CHS would pay Witzigreuter a small stipend plus a percentage payable through the life of the contract. Witzigreuter does not recollect any discussions that addressed payment of postemployment commissions.

{¶ 48} During Witzigreuter's deposition, CHS introduced a written proposed sales incentive plan ("incentive plan"). Witzigreuter received the incentive plan via her work email on February 5, 2016. The incentive plan identified individual incentives and team incentives. Two paragraphs at the bottom of the attachment read, verbatim:

1. Must be employed to receive incentives

2. Team incentives will not be paid if org is not profitable

(Incentive plan.)

{¶ 49} On October 25, 2017, Witzigreuter forwarded a copy of the incentive plan to Mazanec and Franco to verify her verbal commission agreement previously entered with Matlack:

> This was my effort to prove that there was some draft out there that replicated the verbal promise I got from [Matlack] about a commission

> structure. Because somebody — it might have been [Franco] — was asking questions as to how I was going to be – or how the commissions were paid and the only evidence I had of the verbal promise from [Matlack] about the commission plan we discussed was this. * * *

(Tr. 90-91.)

{¶ 50} Witzigreuter denied the incentive plan mirrored exactly her verbal agreement. In particular, team incentives were historically a goal of CHS but had never been implemented. Witzigreuter also testified she did not recall the presence of the two paragraphs at the bottom of the incentive plan. While there was no evidence introduced that the incentive plan was formally adopted by CHS, we find it persuasive that Witzigreuter relied on this document in 2017 to verify her commission structure. Equally influential was Witzigreuter's testimony that she never discussed with Matlack — or any other CHS employee — the payment of her commissions post-termination.

{¶ 51} "Simply because a commissioned employee through his or her efforts makes a company more profitable does not entitle that person to post-employment commissions. Such a result would be tantamount to giving the employee a perpetual equitable share of that company's earnings." *Weiper*, 104 Ohio App.3d 250 at 259, 661 N.E.2d 796. Further, where no evidence suggests the contracting parties considered a lifetime obligation, there is no meeting of the minds and "it would be unreasonable to presume that the defendant would have agreed to a contract provision which would have imposed such an onerous obligation." *Id.* at 260.

{¶ 52} Here, absent an oral or written agreement that guaranteed commission payments would continue after the termination of Witzigreuter's employment, CHS had no obligation to continue such payments following Witzigreuter's dismissal.

{¶ 53} Witzigreuter argues that CHS's promise to pay commissions for the life of the contract created a unilateral contract whereby she continued to work on reliance of that promise to pay and CHS was not permitted to revoke that unilateral promise to pay. She also contends a subsidiary, unilateral contract was formed when she orally agreed to her commission schedule and CHS could not alter that agreement without incurring liability. Witzigreuter relies on *Helle v. Landmark, Inc.*, 15 Ohio App.3d 1, 472 N.E.2d 765 (6th Dist.1984), in support of these arguments. In *Helle*, the employer's agent provided oral assurances of severance pay and the employees' continued employment established the formation of a unilateral contract. The parties agreed to postemployment benefits and the employer was not permitted to disregard those contractual obligations. Here, CHS never promised to pay Witzigreuter beyond her termination from the company. And as the *Weiper* court declared, unless an employee and employer enter a contract for future commissions, the employee is not permitted to receive postemployment commissions on previously generated business. Therefore, CHS was not obligated to pay postemployment commissions and Witzigreuter's references to *Helle* are unsupported here.

{¶ 54} Witzigreuter also argues she was cheated out of several commissions. Specifically, Witzigreuter argues there were several client contracts where she completed all of the work and all that remained to be done was either to pick the contract up from the client or to secure the client's signature on the contract. Witzigreuter looked to the case of *Finsterwald-Maiden v. AAA S. Cent. Ohio*, 115 Ohio App.3d 442, 685 N.E.2d 786 (4th Dist.1996), to support her position. In *Finsterwald-Maiden*, the at-will plaintiffs were discharged and sought payment of unpaid commissions and bonuses. Witnesses testified the commissions and bonuses could be negated if the travel package, from which the commissions and bonuses were generated, were cancelled. The trial court determined the commissions and bonuses were earned prior to the employees' termination; they were not negated by cancellations; there was no express written contract dictating the terms of the commissions and bonuses; and, therefore, the plaintiffs were entitled to the commissions and bonuses they earned prior to their termination.

{¶ 55} While the plaintiffs in *Finsterwald-Maiden* performed all the required tasks to earn their commissions and bonuses, the same cannot be said here. Witzigreuter earned commissions after she secured an executed contract from a client and requested payment of her commission. Witzigreuter's supervisor then generated a commission report and forwarded it to Franco who, in turn, processed a commission check for Witzigreuter. Witzigreuter sought payment on contracts that were not completed — the contracts had not been retrieved from the client and submitted to CHS. Witzigreuter claimed at least one contract had been executed by

the client but she was unable to pick it up due to CHS's demands that she cancel the appointment and report to the office for her termination meeting. The uncontroverted evidence was that Witzigreuter did not submit that contract, or any other questioned contract, to CHS for processing prior to her termination. We find Witzigreuter was not entitled to commissions on contracts that were not executed and delivered to CHS prior to her dismissal under the RIF.

{¶ 56} The trial court properly granted CHS's motion for summary judgment on Witzigreuter's commissions claims. We find Witzigreuter's second assignment of error lacks merit and is overruled.

{¶ 57} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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RAYMOND C. HEADEN, JUDGE

EILEEN T. GALLAGHER, A.J., and
EILEEN A. GALLAGHER, J., CONCUR