[Cite as *Kightlinger v. McGee,* 2012-Ohio-5295.]

IN THE COURT OF APPEALS

SEVENTH APPELLATE DISTRICT

BELMONT COUNTY, OHIO

JOANN E. KIGHTLINGER,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 12 BE 9
- vs -	:	
CINDY MCGEE, SUCCESSOR CLERK OF COURTS TO RANDY MARPLE, et al.,	:	
	:	
Defendants-Appellees.		

Civil Appeal from the Belmont County Court of Common Pleas, Case No. 10cv553.

Judgment: Affirmed.

Patrick Cassidy and *Timothy Cogan*, Cassidy, Myers, Cogan & Voegelin, The First State Capitol, 1413 Eoff Street, Wheeling, WV 26003-3582 (For Plaintiff-Appellant).

Cheri Hass, Downes, Fishel, Hass, Kim, LLP, 400 South Fifth Street, Suite 200, Columbus, OH 43215 (For Defendant-Appellee).

Dated: **November 13, 2012**

THOMAS R. WRIGHT, J.

{¶1} Plaintiff-Appellant, Joann E. Kightlinger, appeals from the judgment of the Belmont County Court of Common Pleas entered in favor of defendant-appellee, Cindy McGee, successor to Randy L. Marple ("Marple") in the capacity of Belmont County Clerk of Courts.[1] Appellant challenges the trial court's determination that appellee did

1. Former Clerk of Courts, Randy Marple, was the elected Clerk of Courts from January 5, 1985 until February 28, 2011. Substitute Clerk of Courts, appellee-Cindy McGee ("McGee"), was appointed Clerk of

not violate the age discrimination provision of R.C. 4112.14(A) when appellee "forced" her to retire on January 9, 2009. For the reasons that follow, we affirm.

{¶2} Appellant was born on December 6, 1941. She began her career with the Belmont County Clerk of Courts in 1973. The Belmont County Clerk of Courts has two divisions, Legal and Title. Appellant worked as Supervisor of the Legal Division, which is funded with money from the county general fund as appropriated annually by the County Commissioners. On December 17, 2008, Marple received a memorandum from the County Commissioners advising him that due to a "real fiscal crisis," he and all other elected officials and department heads would have to decrease their appropriations budget by at least 10 percent for the fiscal year 2009. The memorandum further requested that each department's appropriation needs for 2009 be submitted by not later than December 22, 2008.

{¶3} The 2008 general fund budget for the Clerk of Courts was approximately $360,000. Thus, based upon the directives in the Commissioners' letter, Marple determined that he would have to cut $36,000 from his budget in order to meet the 10 percent reduction requirement, and that payroll was the only available source. Marple then decided that since appellant was the only employee earning over $36,000, the best option was to terminate her, rather than two employees with lower salaries, in order to reduce the budget by the required amount.

{¶4} On December 22, 2008, the day the Commissioners advised Marple to return his anticipated appropriations budget, Marple wrote a letter to appellant advising her that she would be "laid off" effective January 9, 2009. However, instead of giving

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Courts on March 9, 2011 and on December 31, 2011 was substituted as a party-defendant in the underlying case.

her the letter, Marple met with appellant on December 23, 2008, and again on December 29, 2008, to discuss the possibility of her retirement. Marple informed appellant of the Commissioners' notice regarding the budget crisis and advised her that given her 37 years of service in the PERS system, she could retire and not lose her health care benefits, which she would lose upon a termination. Appellant expressed that she did not wish to retire, and believed the Commissioners' notice was one of many threatened budget cuts that had been made over the years. On January 7, 2009, Marple gave appellant the letter and told her that if she did not retire, she would be terminated and lose her health insurance benefits. On February 1, 2009, appellant involuntarily retired and was considered permanently laid off.

{¶5} Appellant filed a complaint against appellee alleging age discrimination. Following a bench trial, the trial court issued findings of fact and conclusions of law, determining that appellant failed to prove her age discrimination claim and rendered judgment in favor of appellee. The trial court entered judgment accordingly, ruling that Marple's decision to terminate appellant was based solely on his need to reduce the budget and desire to terminate only one employee, rather than two, in order to meet his objective. Appellant timely filed the present appeal, asserting the following assignments of error:

{¶6} "[1.] The trial court committed errors of (sic) in the Conclusions of Law, including but not limited to applying a decision of the U.S. Supreme Court, *Hazen Paper v. Biggins*, and ignoring a case from the Ohio Supreme Court, *Kohmescher v. Kroger Co*. holding that selection for RIF because the employee was 'eligible for (the) retirement window' was direct evidence of age discrimination.

{¶7} "[2.] The Findings of Fact important to the ultimate conclusions of the trial court were unsupported by competent, credible evidence to support the Verdict, such that the Verdict was against the manifest weight of the evidence, in that the trial court found that, since the county appeared to be presented with a budget crisis, the clerk of courts could force the retirement of Plaintiff because she had the 'best' retirement benefits.

{¶8} "[3.] The trial court erred to the prejudice of Plaintiff in ignoring evidence admitted in the trial of this matter, including but not limited to two other older employees in Plaintiff's office that the clerk of courts fired or attempted to fire, such that substantial justice was not done.

{¶9} "[4.] In assessing credibility, and finding no evidence of discriminatory animus in selecting Plaintiff for discharge, the trial court erred in ignoring evidence, including but not limited to the fact that the discharge of Plaintiff enabled the retention of a substantially younger employee; age-related statements by and in front of the decision-maker; that the decision-maker refused despite urging to consider using methods that other departments were using to reduce their budgets, such that the Verdict was unsupported by competent, credible evidence it was against the manifest weight of the evidence.

{¶10} "[5.] The trial court erred to the prejudice of Plaintiff in ignoring conflicts in the evidence regarding the conclusion that the sole reason to terminate plaintiff was the need to reduce budget and 'a desire to terminate only one employee to meet his objective (which) was because she had a salary above $36,000 and her termination

would affect her less than any other employee or employees because of her excellent PERS benefits.'"

{¶11} When viewed as a whole, appellant's assignments of error allege that the trial court's judgment was against the manifest weight of the evidence. Accordingly, for ease of disposition, we will address them in a consolidated fashion.

{¶12} "A court of appeals, in reviewing a trial court's judgment, will give considerable deference to a trial court's findings of fact and conclusions of law." *Marble Builder Direct Internatl., Inc. v. Hauxhurst*, 11th Dist. No. 2011-L-040, 2012-Ohio-1674, ¶61. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co*., 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. Deference is extended to the trial court's determination because "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc., v. City of Cleveland*, 10 Ohio St.3d 77, 80 (1984). Thus, "an appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge." *Id.*

{¶13} As a general proposition, courts have consistently held that questions of witness credibility are primarily for the trier of fact to decide. *State v. DeHass*, 10 Ohio St.2d 230, paragraph one of the syllabus (1967). The basis of this proposition is that the trier of fact is in a much better position to observe the body language, demeanor,

and voice inflections of the witnesses. *State v. Cook*, 9th Dist. No. 21185, 2003-Ohio-727, *7-8.

{¶14} Appellant asserts that appellee terminated her employment based on her age in violation of R.C. 4112.14(A), which provides:

{¶15} "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." The statute further provides that any person age 40 or over who is discharged without just cause in violation of R.C. 4112.14(A) may institute a civil action against the employer. R.C. 4112.14(B).

{¶16} "Absent direct evidence of age discrimination, 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 discharge permitted the retention of, a person of substantially younger age." *Coryell v. Bank One Trust Co*., 101 Ohio St.3d 175, paragraph one of the syllabus (2004). The parties agree that appellant meets the criteria expressed in the first three elements of the *Coryell* test. However, the parties disagree as to the resolution of the fourth prong of the analysis.

{¶17} "[W]hen a plaintiff's position is eliminated as part of a work force reduction, courts modify the fourth element of the prima facie case to require the plaintiff to 'come forward with additional evidence, be it direct, circumstantial, or statistical, to establish

that age was a factor in the termination.'" *Woods v. Capital Univ*., 10th Dist. No. 09AP-166, 2009 Ohio 5672, ¶57. "In a reduction-in-force case * * * an employee carries a greater burden of establishing a prima facie case of discrimination with respect to the fourth requirement." *Hunt v. Trumbull Community Action Program*, 11th Dist. No. 2005-T-0036, 2006-Ohio-1698, ¶27.

{¶18} "In determining whether a valid work force reduction occurred, the key inquiry is whether or not the employer replaced the plaintiff." *Woods*, at ¶58. "[I]f an employer did not replace the plaintiff, but rather consolidated jobs in order to eliminate excess worker capacity, then a work force reduction took place." *Id.* "'Where a company is reorganizing or reducing its work force, an employee must present "additional direct, circumstantial, or statistical evidence that [the discriminatory reason] was a factor in the termination in order to establish a prima facie case." *Hunt*, 2006-Ohio-1698, at ¶27. Moreover, "[i]t is well settled that a budget shortfall is a legitimate, non-discriminatory reason to reduce work force, if the employer shows additional evidence why the reduction-in-force happened to the employee.'" *Id*. at ¶42.

{¶19} The trial court found that this was a reduction in force ("RIF") case and applied the modified fourth element of the Coryell test, concluding appellant was not singled out for termination because of her age. Accordingly, we must first determine whether the trial court's conclusion that appellant was discharged pursuant to RIF was supported by competent, credible evidence.

{¶20} Appellant does not dispute that Marple received the memorandum from the Commissioners advising of the fiscal crisis and directing that budget cuts of at least 10 percent would be necessary for fiscal year 2009. Appellant testified that she was

informed that there may be layoffs and that she saw the memorandum prior to her termination. The details and extent of the fiscal crisis were further supported by the testimony of Cindy Henry, fiscal manager for the Belmont County Clerk of Courts. Also, Marple testified that after appellant left the Clerk's office, no one replaced her, but instead, her duties were spread out among others. Marple himself took over the supervisor duties in place of appellant, and the rest of appellant's job functions were redistributed to Nancy Otto, Cindi Henry, and Kim Shumaker.

{¶21} Appellant argues that her "forced retirement" enabled the retention of McGee, a substantially younger employee. Appellant alleges that McGee took over her duties after she was laid off and essentially replaced her. Appellant supports her argument with the fact that Marple purportedly selected the younger McGee to be appellant's "assistant" while appellant was still working for the clerk's office instead of a more experienced, older employee. Contrary to appellant's contention, the evidence presented clearly shows that McGee was not appellant's "assistant" during her tenure with the Clerk's office. McGee had been appointed "second in command" due, in large part, to appellant's own suggestion, in the rare event that appellant was absent. Furthermore, shortly after appellant's termination, McGee agreed to be considered for her present position upon Marple's retirement. At no times relevant was McGee a replacement or substitute for appellant's position as supervisor.

{¶22} Thus, based on the foregoing, there was competent credible evidence to support the trial court's conclusion that a valid RIF occurred due to budget constraints, and that appellant's position was not replaced, but instead, eliminated.

{¶23} We turn now to the trial court's conclusion that appellant failed to satisfy the modified fourth prong of the prima facie standard by not bringing forth evidence to establish that she was singled out for termination because of her age. Appellant argues that Marple's "take it or leave it" choice between retirement and discharge means that her retirement status was simply a proxy for age and that her pension eligibility was a cover-up for age discrimination. Specifically, appellant contends that the trial court's findings relied in error on only one reason for her termination, i.e., the budget cuts, and that she would not have been laid off if she did not also qualify for good retirement benefits with PERS. The basis for appellant's argument is that a person subject to layoff on a "best retirement" rationale means that he or she would have to be well into the protected class, over age 40, meaning that age was a key factor in the termination decision. We disagree with appellant's argument.

{¶24} At trial, when asked on cross-examination whether Marple ever made comments to her about her age, appellant responded, "No. The comments were made more about my retirement." When questioned further about Marple's retirement comment and whether "he had [ever] made any comments to you about your age throughout your employment there," appellant responded, "Not so much, no."

{¶25} Michael Kinter ("Kinter"), the Belmont County human resources manager, also testified on behalf of appellee. Kinter testified that based on his conversations with Marple on this subject, Marple's objective was to reduce his staff by terminating the highest paid employee rather than terminate two lower paid employees to meet the budget constraints. When asked upon cross-examination whether there was "anything

in any of the conversations that Mr. Marple had with you that gave you an indication that he was wishing to lay people off based on their age[,]" he responded, "No."

{¶26} Marple, the sole decision-maker regarding the budget reduction, testified that he chose appellant for layoff as opposed to someone else within the Legal division because "[s]he was the highest salaried employee – that [$]36,000 became *the key* – she was the highest salaried employee * * *." (Emphasis added). Thus, appellant was the only one who could be singly laid off and reduce the budget by the required 10 percent. When asked whether he laid appellant off due to her age and whether age was a factor in his decision, he responded, "No" to both questions. Marple also testified that appellant's years of service in the PERS system were simply an additional consideration.

{¶27} Based on the foregoing, our review of the testimony presented at trial reveals that there was competent, credible evidence to support the trial court's conclusion that appellant was not singled out for layoff because of her age, but instead, *primarily* because she was the only one who had a salary above the threshold appropriation reduction level of $36,000. The totality of the evidence does not suggest that appellant was targeted for discharge because of age or that age was a *motivating* factor in the termination decision.

{¶28} Appellant argues that the trial court ignored age-related comments made by Marple and others in the office. "'There is a vital difference between comments which demonstrate a discriminatory animus in the decisional process and stray remarks made by nondecisionmakers.'" *Wise v. Ohio State University*, 10th Dist. No. 11AP-383, 2011-Ohio-6566, ¶18. "[A]n isolated discriminatory remark made by someone with no

managerial authority over the challenged personnel decision is not considered indicative of discrimination." *Hunt,* 2006-Ohio-1698, at ¶37. Furthermore, "[i]n order to rise to the level of direct evidence, isolated comments 'must be contemporaneous with the discharge or causally related to the discharge making process.'" *Id*.

{¶29} Appellant directs this court's attention to the fact that Marple's comments were "more about like my retirement," and that others in the office asked about when she was going to retire. Even if this court were to construe Marple's comments regarding her retirement plans as age-related, which appellant testified that they were not, appellant does not contend that those comments were made "contemporaneous with the discharge or causally related to the discharge making process." *Hunt* at ¶37. Assuming the comments made to appellant by fellow employees might arguably demonstrate age-related bias, such stray comments by nondecisionmakers cannot be considered an indication of discrimination. *Id*. Most significantly, appellant has not presented evidence of age-related discrimination by Marple, the person responsible for selecting her position to be abolished.

{¶30} Appellant further argues that the trial court erred in ignoring evidence that two other older employees were either fired or considered for firing, and that this evidence is proof of Marple's discriminatory intent in discharging appellant. Appellant refers to the fact that Marple terminated co-employee, Joanne Kolanski ("Kolanski"), and talked about terminating Thelma Barton ("Barton"), the oldest employee in the office. Appellant has failed to support her premise that the trial court ignored the aforementioned evidence. Appellant fails to cite to any portion of the record or the trial court's judgment entry indicating that the trial court ignored these facts. Simply because

appellant did not prevail, and the trial court did not reference Kolanski's termination or Barton's potential termination in its findings of fact and conclusions of law does not mean that the court did not consider those facts, merely that, in light of the trial court's overall findings, those facts played no role in the decision to lay off appellant.

{¶31} Last, appellant argues that the trial court ignored binding precedent from the Ohio Supreme Court. Specifically, appellant maintains that the case of *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501 (1991) supports her argument that Marple's request that she retire or be terminated constitutes direct evidence of age discrimination. In *Kohmescher*, the plaintiff produced evidence of a memo clearly indicating he was selected for RIF solely because he was "eligible for [the] retirement window." *Id*. at 504. The Court held that summary judgment had been improperly granted to the employer because, inter alia, the court below ignored clear direct evidence of age discrimination. *Id*. at 504, 506.

{¶32} Unlike the instant case, *Kohmescher* was decided on summary judgment, which entitled the plaintiff-employee, as the nonmoving party, to have the evidence construed most strongly in his favor in deciding whether a genuine issue of material fact existed sufficient to defeat summary judgment, entitling him to a trial. *See* Civ.R. 56 (C); *Link v. Leadworks Corp*., 79 Ohio App. 3d 735, 74*1* (1992). Simply because the plaintiff in *Kohmescher* was entitled to a trial because reasonable minds could come to more than one conclusion in light of conflicting evidence and testimony regarding the knowing and voluntary acceptance of his early retirement does not mean that the plaintiff was entitled to prevail at trial. *Kohmescher* at 506. However, in the instant case, the trial court heard testimony and evidence from both sides, and issued a

conclusion based upon its own observations and determination of the credibility of the witnesses without any requirement to view the evidence in a favorable manner to appellant. Accordingly, *Kohmescher* is not controlling in the case at bar.

{¶33} While *Kohmescher* is distinguishable, even if appellant here had presented evidence at trial to establish that age was a factor in her termination, Marple propounded a legitimate, non age-related reason for appellant's discharge, thus rebutting any presumption of age discrimination that may have been raised by appellant's evidence. See *Kohmescher,* at 503, citing *Barker v. Scovill, Inc*., 6 Ohio St.3d 146 (1983), paragraph one of the syllabus. Furthermore, appellant did not show that the rationale set forth by Marple was only a pretext for age-related discrimination. *Id*. at 503-504.

{¶34} Finally, this court's research reveals that in a recent similar case, the Eighth Appellate District soundly rejected appellant's arguments. In *Ramacciato v. Argo-Tech Corp*., 8th Dist. No. 84557, 2005-Ohio-506, the plaintiff was told he was due to be laid off and was advised to accept an early retirement package pursuant to the employer's efforts to reduce its costs by 15 percent and to implement an early retirement program as a means to minimize the number of employees who would be laid off. *Id*. at ¶2. The court held that summary judgment in favor of the employer was warranted because the employer had used non-age-based criteria to select employees for lay-off. *Id*. at ¶19.

{¶35} Based upon our review of the evidence and applicable legal authorities, this court concludes that the trial court's findings of fact and conclusions of law are supported by competent, credible evidence, and its judgment in favor of appellee was

not against the manifest weight of the evidence nor contrary to law. The trial court concluded that Marple's decision to terminate appellant was based solely on Marple's need to reduce his budget and a desire to terminate only one employee. Thus, the trial court was obviously persuaded by Marple's testimony that his selection of appellant was based on the fact that she was the single employee who could be laid off and still meet budgetary constraints.

{¶36} For the foregoing reasons, appellant's assignments of error are overruled, and the judgment of the Belmont County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.