[Cite as *McCarthy v. Lordstown*, 2015-Ohio-955.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

VERONICA MCCARTHY, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2014-T-0050**
- vs -	:	
VILLAGE OF LORDSTOWN, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2013 CV 1204.

Judgment: Affirmed.

Raymond J. Masek, 183 West Market Street, Suite #300, Warren, OH 44481-1022 (For Plaintiffs-Appellants).

Neil D. Schor, Harrington, Hoppe & Mitchell, Ltd., 26 Market Street, Suite #1200, Youngstown, OH 44503 and *Matthew M. Ries*, Harrington, Hoppe & Mitchell, Ltd., 108 Main Avenue, S.W., Suite 500, Warren, OH 44481 (For Defendants-Appellees).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the Trumbull County Court of Common Pleas. Appellant Veronica McCarthy filed a complaint for age discrimination against appellees Village of Lordstown ("Lordstown") and William Blank, an employee of Lordstown, alleging that appellees declined to hire Veronica as a full-time clerk with the Lordstown Clerk's Office due to her age. The complaint was later amended to add John McCarthy as a plaintiff and a claim for John's loss of consortium due to appellees' conduct. The

trial court granted summary judgment in favor of appellees. On appeal, appellants assert that the trial court erred in concluding they did not establish a prima facie case of age discrimination and that Veronica's inferior qualifications was a legitimate, nondiscriminatory reason for not hiring her. For the following reasons, we affirm.

{¶2} Veronica McCarthy, who was sixty-three years-old at the time of the incident in question was a part-time payables clerk at the Lordstown Clerk's Office. In 2012, the Lordstown Clerk's Office posted a job vacancy for a full-time clerk position that required computer and typing skills. She did not get the job, and consequently, filed suit alleging that her employer discriminated against her because she only had a couple of years before the age of sixty-five. The trial court granted summary judgment for appellees. This appeal followed.

{¶3} As appellants' assignments of error are interrelated, we consider them together. For appellants' assignments of error, they assert:

{¶4} "[1.] The trial court committed prejudicial error in granting defendants-appellees' motion for summary judgment, finding that, Plaintiff has completely failed to establish the prima facie case of age discrimination, as she simply does not have the right to the full-time position, and was not as qualified as the person ultimately chosen."

{¶5} "[2.] The trial court committed prejudicial error in granting defendants' motion for summary judgment in its finding of plaintiff-appellant being less qualified for the full-time position than the person selected by appellees."

{¶6} Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66, 609 N.E.2d 144 (1993). Summary judgment is proper where (1) there is no

genuine issue of material fact remaining to be litigated; (2) the movant 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 the evidence in the non-moving party's favor, that conclusion favors the movant. *See, e.g.*, Civ.R. 56(C).

{¶7} When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 121, 413 N.E.2d 1187 (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, 604 N.E.2d 138 (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfork Southern Corp.*, 11th Dist. Ashtabula No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶8} "R.C. 4112.02(A) states:

{¶9} "'It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms,

conditions, or privileges of employment, or any matter directly or indirectly related to employment.' In interpreting the Ohio anti-discrimination statutes, Ohio courts have consistently looked to federal cases interpreting federal civil rights and age discrimination legislation, in addition to Ohio case law. *See, e.g.*, *Mauzy v. Kelly Svcs., Inc.*, 75 Ohio St.3d 578, 582, 1996-Ohio-265, 664 N.E.2d 1292; *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 147, 451 N.E.2d 807.

{¶10} "When a plaintiff alleges disparate treatment discrimination, liability depends on whether the protected trait, i.e., age, actually motivated the employer's decision; that is, the plaintiff's age must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome. *Reeves v. Sanderson Plumbing Prod., Inc.* (2000), 530 U.S. 133, 141, 120 S.Ct. 2097, 147 L.Ed.2d 105. 'Disparate treatment * * * captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.' *Hazen Paper Co. v. Biggins* (1993), 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338.

{¶11} "There are two methods by which a plaintiff-employee may establish a prima facie case of disparate treatment age discrimination: (1) with direct evidence that the termination or other adverse action was motivated by age, or (2) in the absence of direct evidence, through a special burden-shifting means, often referred to as the '*McDonnell Douglas*' proof method. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668; *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 504-506, 575 N.E.2d 439. Regardless of the method utilized, the plaintiff at

all times bears the burden of proof. *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407, 416; *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207, 215.

{¶12} "Because discriminatory intent is seldom evidenced by overt actions and direct evidence, plaintiffs are more likely to raise a presumption of discrimination by utilizing the *McDonnell Douglas* evidentiary framework to establish a prima facie case. The initial burden is upon the plaintiff-employee to demonstrate by a preponderance of evidence that: (1) the plaintiff was a member of the statutorily protected class; (2) the plaintiff applied and was qualified for the position; (3) that, despite his or her qualifications, the plaintiff was rejected; and, (4) after the rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *McDonnell Douglas*, 11 U.S. at 802, 93 S.Ct. 1817, 36 L.Ed.2d 668; *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, 837 N.E.2d 1169, ¶ 10." (Footnotes omitted.) *Miller v. Potash Corp. of Saskatchewan, Inc.*, 3rd Dist. Allen No. 1-09-58, 2010-Ohio-4291, ¶16-19. In hiring cases, the fourth element can alternatively be satisfied if "the position was awarded to a person of substantially younger age." *Dautartas v. Abbott Laboratories*, 10th Dist. Franklin No. 11AP-706, 2012-Ohio-1709, ¶26.

{¶13} "Once a plaintiff establishes a prima facie case, a presumption of age discrimination is created. The burden of production then shifts to the defendant-employer to overcome the presumption of discrimination by coming forward with evidence of a legitimate, nondiscriminatory reason for its actions. *See Allen v. Totes/Isotoner Corp.*, 123 Ohio St.3d 216, 2009-Ohio-4231, 915 N.E.2d 622, ¶ 4. If the

employer articulates a nondiscriminatory reason, then the employer has successfully rebutted the presumption of discrimination that was raised by the prima facie case. *Weiper v. W.A. Hill & Assoc.* (1995), 104 Ohio App.3d 250, 263, 661 N.E.2d 796. The plaintiff must then present evidence that the employer's proffered reason was a mere pretext for unlawful discrimination. *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 668, 591 N.E.2d 752. The plaintiff's burden is to prove that the employer's reason was false and that discrimination was the real reason for the employer's actions. *Weiper v. W.A. Hill Assoc.*, 104 Ohio App.3d at 263, 661 N.E.2d 796. The ultimate inquiry in an employment-based age discrimination case is whether an employer took adverse action "because of" age; that age was the "reason" that the employer decided to act. *Gross v. FBL Financial Svcs. Inc.* (2009), ---U.S. ----, 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119 ('To establish a disparate treatment claim, * * * a plaintiff must prove that age was the 'but for' cause of the employer's adverse decision.')" *Miller*, *supra*, ¶20-21.

{¶14} Here, appellants have not provided any direct evidence of age discrimination and instead rely solely upon the *McDonnell Douglas* evidentiary framework. Under that framework, appellees do not contest appellants' claim that appellants have satisfied the first, third, and fourth elements of the *McDonnell Douglas* test. Thus, determining whether appellants have demonstrated a prima facie case hinges on whether Veronica was qualified for this full-time clerk position.

{¶15} William Blank's affidavit averred that the full-time position in the Lordstown Clerk's Office would require someone with computer skills, "who is fluent with Microsoft Excel, and who could use electronic databases to update and optimize the office

procedures, improve the document management processes and focus on a 'going paperless' direction. The desired computer skills required knowledge of how to create sophisticated spreadsheets in Microsoft Excel to track vendor purchase orders as well as the ability to upload voluminous amounts of documents electronically to make them accessible online to the general public." Consequently, Lordstown placed a newspaper ad for a clerk position seeking someone with "computer and typing skills."

{¶16} In support of her being qualified, appellant points to Blank's deposition where he acknowledged that Veronica could "somewhat" use the computer and "somewhat" type. In Veronica's deposition, she claimed that she used the Microsoft Office suite 100% of the time at work and had used various typing programs to help her improve her typing. Finally, appellants note that Veronica has worked as a part-time clerk for Lordstown Clerk's Office for nine years.

{¶17} In contrast, appellees note that Veronica admitted she had no experience uploading documents to a website and had little familiarity with using formulas in Excel. In fact, Veronica admitted that she only uses Microsoft Excel one percent of the time while at work. At one point in her deposition, Veronica admitted that her main computer skills consisted of data entry. Finally, Veronica also admitted that using the computer was not her "thing."

{¶18} As Blank's characterization of the job requirements is uncontested, the evidence overwhelming indicates Veronica lacks the advanced knowledge of Microsoft Excel and familiarity with uploading documents to web pages necessary for the job. As such, summary judgment for appellees was proper.

{¶19} Even if we found appellants established a prima facie case, the evidence only supports the conclusion that appellees hired the chosen candidate because Lordstown and Blank viewed her as more qualified. Appellants' attorney has provided the following in support of his challenge to this non-discriminatory reason:

{¶20} "The trial court herein further left totally unaddressed the crucial connection between McCarthy's need to leave the job she did so well for over nine (9) plus years and physician (sic) linkage to the age discrimination she encountered. [Appellants' Response to Appellees' Motion for Summary Judgment.] While not a separate claim that provides entitlement to relief, constructive discharge is a means of showing an adverse employment action as in the case at bar. *Logan v. Denny's Inc.*, 259 F.3d 558, 568 (6th Cir. 2001)."

{¶21} The contours of appellants' argument and how it relates to this step of the *McDonnell Douglas* test are not entirely clear. Furthermore, appellants' attorney has not directed us to portions in the record that support his contention that a constructive discharge took place. App.R. 16(A)(7) requires a party's merit brief to contain in pertinent part: "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." In this regard, we have previously held that it is not the appellate court's responsibility to root out meritorious arguments for the parties. *Tally v. Patrick*, 11th Dist. Trumbull No. 2008-T-0072, 2009-Ohio-1831, ¶22. Therefore, we will not address the substance of this argument. However, as appellants have appeared to challenge the evidentiary sufficiency of appellees' non-discriminatory reason for not

hiring Veronica, and appellees need to establish a legitimate, nondiscriminatory reason not to hire Veronica to rebut the presumption of discrimination, we will consider whether the evidence conclusively establishes that appellees did not believe the chosen candidate was more qualified than Veronica.

{¶22} In addition to the job requirements for this full-time clerk position, Blank further averred that he did not think anyone at the clerk's office possessed the requisite computer skills for the job. Blank also averred that he was Veronica's supervisor at the Clerk's Office when this full-time position was advertised and filled. He therefore was familiar with Veronica's capabilities as well as some repeated mistakes she made on the job. Finally, Blank averred that he hired the chosen candidate because she was the most qualified person for the job.

{¶23} As for job qualifications for this position, Veronica lacked a college education, while the chosen candidate has a B.S. in Business Education, graduating magna cum laude from Kent State University. Veronica has no licenses or certification listed on her resume, while the chosen candidate has an International Computer Driving License, which certified her in spreadsheets, computer file management, word processing, databases, presentation software and information. As for work experience, Veronica had worked as a payables clerk for Lordstown since 2004, was a receptionist for the Cole Valley Motor Group from 1996-2004, and was a nurse's aide at Shepherd of the Valley from 1992-1996. The chosen candidate's work experience consisted of an EMR Software Support Specialist at Henry Schein MicroMD from 2009-2012, a Business Department and Computer Education Instructor at the Trumbull Career and Technical Center from 1994-2009, an Office Training Coordinator at the Trumbull

County Joint Vocational School from 1995-1998, an account clerk at the Trumbull Courier from 1991-1998, a computer lab assistant at Kent State University from 1993-1994, an account clerk at Husman, Taylor & Co. from 1991-1992, an accounts receivables clerk at Health Enterprises of America from 1985-1989, and an account clerk at General Computer Systems, Inc. from 1978-1985. Finally, when she was an instructor for the Trumbull Career and Technical Center, she taught courses on the following subjects: computer theory, software applications, information technology, accounting, economics, business law, spreadsheet presentations, office management, web page development, computer programming languages, software presentations and business management.

{¶24} Last, in her deposition, Veronica admitted that she "did not mess much with the computer" and that "[t]he computer is not my thing."

{¶25} While appellants have pointed to evidence indicating that Veronica had experience using a computer and could type, they never contest appellees' claim that appellees viewed the chosen candidate as possessing superior qualifications to Veronica. On the contrary, in their brief, appellants assert that "[t]he issue before the trial court [was] whether plaintiff-appellant Veronica applied for and was qualified for the full-time position and not as defendants-appellees laboriously argue that someone else in the universe was more qualified." That statement, however, ignores well-settled Ohio law that a defense to age discrimination is hiring someone with superior qualifications. *See Limberg v. Roosa*, 2nd Dist. Montgomery No. 19988, 2004-Ohio-1480, ¶25; *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 815 (6th Cir.2011).

{¶26} Accordingly, we find there is no question of fact as to whether appellees have provided a legitimate nondiscriminatory reason for hiring the chosen candidate. Therefore, appellees have overcome the presumption that hiring the chosen candidate was a form of age discrimination.

{¶27} As to whether the non-discriminatory reason was pretextual, appellees note that appellants did not argue that appellees' non-discriminatory reason for not hiring Veronica was pretextual to the trial court. Because appellants failed to raise the issue to the trial court, this issue is waived. *See Babcock v. Albrecht*, 11th Dist. Lake No. 2010-L-150, 2012-Ohio-1129, ¶16 ("Because appellants failed to raise the issues asserted in their assigned errors in the trial court, these issues are waived.") Accordingly, summary judgment for appellees was proper.

{¶28} Appellants' first and second assignments of error are without merit.

{¶29} The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.