[Cite as *Fearn v. Longaberger Co.*, 2010-Ohio-1736.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

J. BRAD FEARN Plaintiff-Appellant -vs- LONGABERGER CO. Defendant-Appellees	JUDGES: Hon. Julie A. Edwards, P.J. Hon. William B. Hoffman, J. Hon. Sheila G. Farmer, J. Case No. CT2009-0013 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas, Case No. CH2007-0468
JUDGMENT:	Reversed and remanded
DATE OF JUDGMENT ENTRY:	April 19, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
RUSSELL A. KELM JOANNE W. DETRICK Law Offices of Russell A. Kelm Suite 860 37 W. Broad Street Columbus, Ohio 43215	D. LEWIS CLARK JR. TARA A. ASCHENBRAND Squire, Sanders & Dempsey L.L.P. 2000 Huntington Center 41 South High Street Columbus, Ohio 43215

Hoffman, J.

{¶1} Plaintiff-appellant J. Brad Fearn appeals the judgment entered by the Muskingum County Court of Common Pleas, entered on a jury verdict returned in favor of defendant-appellee Longaberger Co.

STATEMENT OF THE CASE AND FACTS

{¶2} On July 10, 2007, Appellant filed a Complaint in the Muskingum County Court of Common Pleas, naming Longaberger Company (hereinafter "Longaberger") and Russell Deaton, as defendants, and asserting claims of promissory estoppel and age discrimination.

{¶3} Longaberger owns and operates the Longaberger Golf Club ("the Club") through its Development Division. Russell Deaton is Longaberger's Vice-President of Treasury and Real Estate. Appellant was employed as the first assistant golf course superintendent at the Club, commencing in 1998. In 2004, as the result of declines in its core business sales, Longaberger went into forbearance on its bank loan. As a result, the bank placed the company in a work-out group, which closely monitored Longaberger and set financial expectations for the company. Longaberger eliminated 174 management and supervisor positions during this time.

{¶4} In 2005, Appellee Deaton met with department heads to discuss additional means of reducing expenses. Mark Rawlins, the golf course superintendent, was responsible for deciding which positions in the Maintenance Department could be eliminated. Rawlins considered three positions for possible elimination: the irrigation technician, the first assistant golf course superintendent, and the second assistant golf course superintendent. Rawlins ultimately decided the first assistant position would be

eliminated, if necessary, as he believed the job responsibilities of the first assistant could be absorbed into his own position with little effect on the operations of the golf course.

{¶5} The recommended eliminations became necessary when Longaberger, including the Club, suffered greater losses than anticipated. On March 2, 2005, Rawlins and Scott Frazier, a representative in the Human Resources Department, informed Appellant his position was eliminated. Appellant was 54 years old at the time. The first assistant position was one of 115 management positions eliminated by Longaberger in 2005. Longaberger did, however, retain 22 year old Nathan Hiener, who held the position of second assistant. According to Rawlins, he assumed Appellant's responsibilities as part of his position. Hiener was not given any responsibilities previously performed by Appellant. In July, 2005, Hiener resigned from his position as second assistant for employment at another golf course. Rawlins subsequently promoted two employees as second assistants. Rawlins testified neither of these employees performed any of the duties previously carried out by Appellant.

{¶6} The matter proceeded to jury trial on January 27, 2009, on Appellant's age discrimination claim.[1] After Appellant presented his case, the trial court granted Longaberger's and Deaton's motions for directed verdict as to Appellant's claim for punitive damages. The jury returned an unanimous verdict in favor of Longaberger and Deaton on February 2, 2009.

{¶7} Appellant appeals the jury's verdict, raising as his sole assignment of error:

[1] The trial court had previously granted judgment on the pleadings in favor of Longaberger on Appellant's promissory estoppel claim.

{¶8} "I. THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY ON PLAINTIFF'S CLAIM OF AGE DISCRIMINATION."

{¶9} Ohio courts examine state employment discrimination claims under federal case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C.2000 et seq. *Coryell v. Bank One Trust Co., N.A.,* 101 Ohio St.3d 175, 179, 2004-Ohio-723. Title VII jurisprudence imposes upon the plaintiff the initial burden of establishing a prima facie case of discrimination. *Bucher v. Sibcy Cline, Inc.* (2000), 137 Ohio App.3d 230, 239, citing *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, 93 S .Ct. 1817, 1824.

{¶10} To establish a prima facie case of age discrimination, where no direct evidence is available, a plaintiff must demonstrate he: (1) was a member of the statutorily protected class, i.e., was at least 40 years old at the time of the discrimination, (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,* paragraph one of the syllabus. Once a plaintiff establishes a prima facie case, the employer is required to set forth some legitimate, non-discriminatory basis or bases for its action. *Id.* If the employer is able to meet this burden, the plaintiff is then afforded an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253, 101 S.Ct. 1089,1093

{¶11} Appellant takes issue with the following portion of the trial court's instruction:

{¶12} "Mr. Fearn claims that Longaberger discriminated against him by terminating his employment because of his age. Specifically, Mr. Fearn alleges that Longaberger violated the law by replacing him with a significantly younger employee after a reduction in force. Longaberger denied the charge and contends that his employment was terminated due to financial reason and that he was not replaced."

{¶13} Prior to the trial court's instructing the jury, the parties were given an opportunity to review the charge. Counsel for appellant objected, explaining:

{¶14} "The next page, the objection I have isn't to your age instruction. I think that's fine, it's from OJI. It's right before the age instruction. You say what Mr. Fearn's – you say that he 'claims that Longaberger discriminated against him by terminating his employment because of his age. Specifically, Mr. Fearn claims that Longaberger violated the law by replacing him with a significantly younger employee.'

{¶15} "We claim, in fact, that they replaced him or they treated a younger employee, significantly younger employee better, and these – these are my allegations. This is not a charge from OJI. That's the one we object to."

{¶16} Tr. Vol. III at 619.

{¶17} The trial court noted Appellant's objection for the record, but stated it would leave the instruction as written.

{¶18} A single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph four of the syllabus, following *Cupp v. Naughten* (1973), 414 U.S. 141, 146-147, 94 S.Ct. 396, 38 L.Ed.2d 368. However, an incomplete jury instruction will constitute grounds for reversal of a judgment where the charge as

given misleads the jury. See *Columbus Ry. Co. v. Ritter* (1902), 67 Ohio St. 53, 65 N.E. 613. A jury instruction "should also be adapted to the case and so explicit as not to be misunderstood or misconstrued by the jury." *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12, 482 N.E.2d 583, citing *Aetna Ins. Co. v. Reed* (1878), 33 Ohio St. 283, 295. "An inadequate jury instruction that misleads the jury constitutes reversible error." *Groob v. KeyBank* (2006), 108 Ohio St.3d 348, 355, 843 N.E.2d 1170. Additionally, the jury must have been misled to the prejudice of the party seeking reversal. *Laverick v. Children's Hosp. Med. Ctr. of Akron, Inc.* (1988), 43 Ohio App.3d 201, 202, 540 N.E.2d 305.

{¶19} Despite Longaberger's assertion to the contrary, we find Appellant properly objected to the jury instruction; therefore, has not waived the issue on appeal.

{¶20} As set forth, supra, in order to establish a prima facie case of age discrimination, a plaintiff must demonstrate four factors. The parties do not dispute Appellant established the first three factors. However, they disputed the fourth factor, whether Appellant was replaced by or the discharge permitted the retention of a person of substantially younger age. The trial court's instruction only informed the jurors of one of the two alternative ways to prove age discrimination, to wit: replacement.

{¶21} The evidence presented at trial established Longaberger eliminated Appellant's position, but retained a younger, substantially less experienced employee. Months later when that employee left his employment at Longaberger, Longaberger replaced him with two individuals, both of whom were substantially younger than Appellant. Obviously, from the unanimous verdict, we know the jury found Appellant did not establish the replacement element. However, we find there was sufficient evidence to support instructing on the alternative method; i.e., the retention of a younger

employee. The incomplete nature of the instruction effectively eliminated part of Appellant's cause of action. While the jury would have been free to also find in favor of Appellees on this prong of Appellant's claim based upon the evidence presented, we nonetheless find omission prejudicial.

{¶22} Based upon the foregoing, we find the trial court abused its discretion by providing the jurors with an incomplete instruction.

{¶23} Appellant's sole assignment of error is sustained.

{¶24} The judgment of the Muskingum County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with this opinion and the law.

By: Hoffman, J.

Edwards, P.J. and

Farmer, J. concurs separately

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER

Farmer, J., concurs

{¶25} I respectfully concur with the majority's analysis. I concur to reinforce the decision of my brethren. The complaint in this case is styled in particular to cover not only the replacement of appellant by a younger employee, but the preferential treatment of a younger employee over a member of a protected class:

{¶26} "At the time of the elimination of plaintiff's position, defendants retained Nathan Hiener in the position of Second Assistant Golf Course Superintendent. At age 22, Hiener was a former summer intern and a recent Technical School graduate who was far less qualified and substantially younger than plaintiff.

{¶27} "***

{¶28} "In determining which position to be eliminated, plaintiff was treated, because of his age, less favorably than Nathan Hiener, who performed a similar function." Complaint filed July 10, 2007 at ¶5 and 8, respectively.

s/ Sheila G. Farmer
JUDGE SHEILA G. FARMER

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

J. BRAD FEARN	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
LONGABERGER CO.	:	
Defendant-Appellees	:	Case No. CT2009-0013

For the reasons stated in our accompanying Opinion, the judgment of the Muskingum County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with our opinion and the law. Costs assessed to Appellees.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Sheila G. Farmer
HON. SHEILA G. FARMER