

[Cite as *Bogdas v. Ohio Dept. of Rehab. & Corr.*, 2009-Ohio-6327.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

David Bogdas et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 09AP-466 (C.C. No. 2005-08638)
Ohio Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on December 3, 2009

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*Jonathan E. Rosenbaum*, for appellants.

*Richard Cordray*, Attorney General, *Susan M. Sullivan*, and  
*Stephanie Pestello-Sharf*, for appellee.

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APPEAL from the Ohio Court of Claims.

BROWN, J.

{¶1} David Bogdas and Scott Bernard, plaintiffs-appellants, appeal from a judgment of the Ohio Court of Claims, in which the court ruled in favor of defendant-appellee, the Ohio Department of Rehabilitation and Correction ("ODRC").

{¶2} In May 2003, Bogdas, who was 47 years old and a parole services coordinator with the Cleveland region of ODRC's Adult Parole Authority ("APA"), applied for the position of parole services supervisor in the Cleveland Region, Unit 8 (referred to

as position "PCN 5114"). In April 2003, Bernard, who was 57 years old and also a parole services coordinator with the Cleveland region of ODRC's APA, applied for PCN 5114. Bogdas was interviewed for the position, while Bernard was not interviewed. ODRC awarded the PCN 5114 job to a 37-year-old female, Joy Reid.

{¶3} In August 2003, Bogdas applied for the position of parole services supervisor in the Cleveland Region, Unit 3 (referred to as position "PCN 5104"). There were 22 applicants for this position, and they were required to take a screening test that would be rated by a subject-matter expert screener. The new ODRC hiring policies in place since the PCN 5114 position was filled called for the top one-third test scorers to receive an interview, termed the "primary applicant pool," by a panel consisting of one minority male, one minority female, one Caucasian male, and one Caucasian female. Thus, the top seven or eight should have qualified for interviews. Apparently, Regional Administrator Ron Stevenson increased by one point the score of Jacqueline Miller, a 37-year-old female, making her the eighth highest scorer. Stevenson then expanded the interview process to the entire 22-person applicant pool, claiming he did so, with the alleged permission of the Deputy Director for Parole and Community Services, Harry Hageman, to include more applicants from the local Cleveland regional office and to include Earl Hall, who had worked at the Cleveland regional office for a long time and had served as temporary work level ("TWL"), which means he would sometimes act as the acting unit supervisor in the absence of the normal unit supervisor. Bogdas received an interview. In the interview process, a panel scored Carl Sannitti, a male over 50 years old, with ten points; Miller with nine points; and Hall with eight points, and the three were

declared prime candidates. Stevenson conducted a background check on Sannitti, found he had bad references, and chose Miller for the position.

{¶4} In September 2003, Bernard applied for a volunteer position as an agent with the United States Marshal's fugitive task force. ODRC awarded positions to a male applicant who was 34 years old, Manual Muniz, and a female applicant who was 39 years old, Linda Morgan.

{¶5} In December 2003, Bernard applied for a volunteer position as an agent with the Federal Bureau of Investigation's ("FBI") fugitive gang task force. ODRC awarded the position to a male applicant who was 31 years old, Tim Bacha. Bernard claimed that a person on the selection committee made a reference to his age and the fact he had had cancer.

{¶6} Appellants filed a complaint against ODRC on July 25, 2005, an amended complaint on July 3, 2006, and another amended complaint on July 10, 2006. In their July 10, 2006 amended complaint, Bogdas and Bernard claimed they were denied the PCN 5114 position based upon gender and age discrimination; Bogdas claimed he was denied the PCN 5104 position based upon gender and age discrimination; and Bernard claimed he was denied the task force agent positions based upon age discrimination and a perceived disability.

{¶7} On October 30, 2006, a bifurcated trial on liability only was held before a magistrate. On June 12, 2008, the magistrate ruled in favor of ODRC on all counts. Appellants filed objections to the magistrate's decision. On April 15, 2009, the trial court overruled appellants' objections and affirmed the magistrate's decision. Appellants appeal the judgment of the trial court, asserting the following assignments of error:

[I.] The trial court abused it[s] discretion when the court and the magistrate found that the ODRC has articulated a legitimate, nondiscriminatory reason why Miller was chosen for the position after finding that "Bogdas and Bernard have established a prima facie case of discrimination with regard to PCN 5114 and that Bogdas has established a prima facie case of discrimination with regard to PCN 5104 . . ." when ODRC officials conceded at trial that no legitimate reason could have existed under the circumstances of the promotion process.

[II.] The trial court abused its discretion when it adopted the magistrate's finding that the ODRC "has articulated a legitimate, nondiscriminatory reason for Appellants' rejection" after finding that "Bogdas and Bernard have established a prima facie case of discrimination with regard to PCN 5114 and that Bogdas has established a prima facie case of discrimination with regard to PCN 5104 . . ." when the "legitimate business reason" advanced is itself discriminatory, ageist, and is not supported by the evidence.

[III.] The magistrate failed to properly consider and analyze the statistical evidence compiled by the Appellants and failed to consider the statistics compiled by the ODRC. The trial court's adoption of the magistrate's findings was an abuse of discretion when the un-refuted statistical expert testimony of the defense supported an inference of age and sex discrimination.

[IV.] The trial court abused its discretion when it failed to consider the totality of the evidence adduced at trial with a common sense cumulative approach that takes into account how each piece of the puzzle confirms and proves the other eventually leading to proof beyond a preponderance of the evidence.

[V.] The trial court abused its discretion when it upheld the magistrate's decision which found "no gender based discrimination" in light of the law and the evidence presented at trial.

[VI.] The trial court abused its discretion in light of the evidence when it upheld the magistrate's finding that Appellant Bernard "has not proven age discrimination with regard for the selection for the FBI Task Force," and that he

was not discriminated against when he was not selected for the US Marshall's task force based upon age and perceived disability.

[VII.] The trial court abused its discretion when it found that Appellant Bernard was properly denied a promotion for PCN 5104 even though he did not apply because his application would have been a futile act and found that he failed to properly apply for PCN 5114.

{¶8} Appellants argue in their first assignment of error that the Court of Claims erred when it found ODRC had articulated a legitimate, non-discriminatory reason for choosing Miller for position PCN 5104 when ODRC officials conceded at trial that no legitimate reason could have existed under the circumstances of the promotion process. R.C. 4112.02(A), Ohio's general anti-discrimination statute, states that it is an unlawful discriminatory practice for any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to refuse to hire that person.

{¶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. 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.

{¶10} To establish a prima facie case of age discrimination, where no direct evidence is available, a plaintiff must demonstrate that he or she: (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.

{¶11} Under their first assignment of error, appellants only contest the finding with regard to Bogdas and position PCN 5104. The trial court found that Bogdas demonstrated a prima facie case for age discrimination with regard to PCN 5104, and appellants argue that the trial court's finding that ODRC, in turn, had supplied a non-discriminatory reason for Bogdas' rejection was in direct conflict with the testimony of ODRC officials who conceded that promotions resulting from Regional Administrator Ron Stevenson's conduct could never be predicated upon legitimate business reasons. Appellants contend it was not refuted at trial that Stevenson consciously defeated the ODRC's hiring policies and procedures in an effort to promote females under 40 years old.

{¶12} Our review of the record fails to demonstrate that any ODRC official conceded at trial that no legitimate reason existed for rejecting Bogdas, and appellants' interpretation of the testimony is misguided. Appellants' first contention, that Rebecca Fair, a personnel manager with the Division of Parole and Community Services, testified that ODRC's actions could not be justified by any legitimate business reason, is inaccurate. Appellants first point out that Fair agreed in her testimony that to expand the

hiring pool solely to include an applicant that was favored by the region would not be a valid reason to expand the pool. However, such does not equate with ODRC engaging in a discriminatory practice. A discriminatory practice is one in which an employer refuses to hire a person because of, in this case, age. See R.C. 4112.02(A). That Stevenson may have violated this hiring procedure by expanding the pool of applicants by trying to include a male employee who had worked in the Cleveland region for a long time does not prove the contention that Bogdas was not hired because of his age. It merely shows that Stevenson may have expanded the pool for an improper reason. As detailed infra, the record demonstrates that Bogdas was not hired, and Miller was hired, based upon legitimate, non-discriminatory bases.

{¶13} Appellants next point out that Fair agreed that it would be improper to increase an applicant's screening test score to insure that the applicant's score made it into the top one-third of the scores by all applicants. However, this was a hypothetical question, and the record here does not establish that Stevenson increased Miller's score to insure that she made it into the top one-third of all scores. Rather, Stevenson testified that he increased Miller's score due to an unintentional error on his behalf in adding up her scores.

{¶14} Appellants also point to Fair's testimony that she agreed that it would be wrong to alter a score for a female under 40 years old so that she could be included in the applicant pool. Again, this was a hypothetical question that was not consistent with the facts here. The record does not support the allegation that Stevenson altered Miller's score so that she could be included in the applicant pool. Miller was included in the applicant pool because Stevenson decided to open the pool to include interviews for all

applicants in order to interview more employees from the Cleveland region and to interview a long-time Cleveland employee. Whether Miller's score was wrongly increased was immaterial to whether she received an interview, because all applicants received interviews regardless of the scoring error.

{¶15} Appellants also cite Fair's testimony that she agreed there would exist no legitimate business reason to explain a person's promotion where a regional administrator falsified that person's score in order to put that person into the top one-third interview pool but then, unsure the falsified score would be sufficient to place that person into the top one-third, proceeded to grant interviews to all applicants to be certain that person received an interview. However, again, this question was hypothetical, and there is no evidence that Stevenson falsified Miller's score to push her into the top one-third, and then, uncertain the score would be sufficient, opened up interviews to all applicants under false pretenses to assure Miller would get an interview. Stevenson specifically testified that he did not expand the pool in order to include Miller. He expanded the interview pool to include Hall, a long-time employee who did not qualify as a top one-third scorer, and to include more applicants from the local Cleveland office.

{¶16} Next, appellants cite portions of Hageman's testimony to claim he conceded that the alleged conduct of Stevenson would not serve any business purpose and that any promotion that resulted from such conduct would be improper and a violation of department policy. Appellants first point to Hageman's testimony that it would be improper to expand the applicant pool solely to include a favored person that may not have qualified otherwise, and if that person received the promotion, that would not serve any legitimate business purpose. However, this was also a hypothetical question that

does not match the evidence in this case. There was no evidence Stevenson expanded the pool so that Miller could receive an interview. Thus, this argument is without merit.

{¶17} Appellants next point to Hageman's testimony that, if a regional director changed an applicant's screening score in an effort to place that person in the pool, and that person was ultimately promoted, no legitimate business reason could possibly exist to justify the promotion. Again, there is no evidence Stevenson changed Miller's screening score in an effort to place her in the pool.

{¶18} Appellants next cite portions of Stevenson's testimony to support their contention that Stevenson conceded his actions were discriminatory. Appellants first point to Stevenson's testimony that failure to follow department policies in the promotion process could lead to discrimination if done recklessly or irresponsibly. However, Stevenson went on to say that there was some latitude given because of his personal knowledge of Hall's effort, attitude, and length of employment with the agency, and he articulated these things when he requested an expansion of the pool, and he believed his actions were acceptable. Thus, Stevenson's testimony was not a concession as appellants portray it to be. In fact, Stevenson vigorously defended his actions.

{¶19} Appellants next point to Stevenson's testimony that it would be age discrimination to place a person under 40 years old in the primary applicant pool who did not otherwise qualify solely because the interviewer wanted that person to have the job. Again, this was a hypothetical question unsupported by the facts in the present case. As explained in detail above, there was no evidence that Stevenson placed Miller in the interview pool because he wanted her to receive the position. Therefore, these arguments are without merit.

{¶20} Although not specifically included in the assignment of error, appellants also argue under their first assignment of error that the trial court erred when it found the statistical evidence offered by their expert to be unpersuasive, and by failing to consider the ODRC's own statistical evidence, both of which demonstrated ODRC favored females under 40 years old as a result of discrimination. Pursuant to App.R. 12(A)(1)(b), this court is required to determine an appeal based upon the assignments of error set forth in the briefs under App.R. 16, and we can sustain or overrule only assignments of error and not mere arguments. *State v. White*, 10th Dist. No. 05AP-1178, 2006-Ohio-4226, ¶34; *Bohanon v. Farmers Ins. of Columbus, Inc.*, 5th Dist. No. 05-CAE-02010, 2005-Ohio-5399. As this argument is not included within the first assignment of error, we need not address it under this assignment of error. However, appellants present this same argument, and argue it much more fully, under their third assignment of error, and we will address it therein. For the above reasons, appellants' first assignment of error is overruled.

{¶21} Appellants argue in their second assignment of error that the trial court erred when it adopted the magistrate's finding that ODRC articulated a legitimate, non-discriminatory reason for rejecting appellants for position PCN 5114 and hiring Reid, when the reason advanced was discriminatory, ageist, and not supported by the evidence. Specifically, the trial court concluded the record demonstrated that, prior to 2003, the philosophy of the APA began to shift away from a law enforcement approach that focused upon apprehension of parole violators to a community re-entry social work approach that focused upon keeping offenders out of prison, and Reid had the type of educational background and work experience to supervise the unit in accordance with

ODRC's new philosophy. Appellants maintain that claiming appellants could not adjust to this "new philosophy" is the same as saying appellants were too old to learn. In support of their view, appellants cite Stevenson's testimony that appellants "may not catch on," "can't adapt" and could not "go with the new flow." Appellants also cite the testimony of interview panel member Joyce Chisar, who testified her decision was justified because Reid's interview was "[a] little more energetic, a little more enthusiastic, some fresh ideas." Appellants claim these are all ageist reasons.

{¶22} We disagree with appellants' interpretation of Stevenson's and Chisar's testimony. As to Stevenson's testimony, appellants fail to put the cited statements in context and describe the rest of his testimony. Stevenson said that he thought both appellants had the ability to adapt to the new philosophy of the department, but they refused to adapt. Stevenson went on to explain that, in assessing appellants' performance and what he knew about their work, he believed that they could adapt, but whether they would adapt was always the issue. He testified that appellants may not understand what the department is trying to do and gave an example of how Bernard did not understand the department's operating platform, which entry-level parole officers would understand. Stevenson said Bernard has not connected, or will not connect, with some of the new systems. He further explained that he has adapted to other kinds of work well, but Bernard does not seem to like office work, leadership, management, and "nuts and bolts" sorts of things, so maybe he does not adjust because he does not want to. As for Bogdas, Stevenson said Bogdas has shown the same unwillingness or inability as Bernard, except to not as great of a degree. When read in full context, Stevenson's comments that appellants cannot "catch on," "adapt," or "go with the new flow" were not

ageist, but reflections of their lack of personal motivation and desire to learn a new system. Indeed, Stevenson explicitly stated that appellants possessed the ability to adapt to the new philosophy of the departments.

{¶23} As for Chisar's statements, again, appellants take them out of context without noting Chisar's full explanation, which demonstrates that they were not a reflection on appellants' ages, but on their abilities to perform the jobs. As for Bernard, Chisar stated that he had expertise in the gang area, but the panel was not looking for someone that had that expertise for PCN 5114. The panel was looking for a leader who could manage the daily functions of the unit. Although the units do specialize in services involving gangs, there were other functions that needed to be managed. These qualities reflect specifically upon the skills of Bernard, and not his age. The panel also seemed to be looking for more of an administrator and business manager for the department, qualities for which would involve very different skills than working with gangs. Stevenson and Chisar both said the agency was looking for communication skills, the ability to work as a team, and attitude. Stevenson said they wanted managers that provided leadership, understood managerial fundamentals, understood operation and tracking procedures, were flexible, and were resourceful. Hageman similarly testified that because someone has an extensive background with fugitives and gang task forces does not necessarily qualify that person for a supervisory position because that experience does not include leadership or management roles.

{¶24} Furthermore, Chisar described Bogdas' interview as "okay" for being a parole officer within the department. As for Reid, Chisar explained her "fresh ideas" comment. Chisar said Reid gave answers that were a little different than Bogdas'

because she did not work for the department. Coming from another agency with varied experience, her ideas and answers were "different." Chisar described the responses from other candidates within the department as "routine." Reid's ideas were outside of the box of what the panel normally hears. Her interview was "upbeat" and "positive," which was "refreshing" after hearing the same answers that the panel generally hears from candidates from the department. After the interviews, the panel was unanimous that Reid was the top candidate. Thus, Chisar's full explanation of the "fresh," "more energetic," and "more enthusiastic" comments reveal that she was not referring to the age of appellants, but, as she saw it, the tendency of the department candidates to see the department as it currently exists, instead of looking at it from a more objective outside perspective, and, perhaps, their tendency to view the department with the more cynical attitude of those already rooted in the system. These traits are wholly unrelated to the ages of the candidates.

{¶25} Appellants also argue the claim that the agency was taking a "new direction" that emphasized keeping parolees out of prison, rather than emphasizing chasing down parole violators, was not a legitimate business reason for denying the positions to appellants because that new philosophy had not yet occurred as of 2003. Appellants cite Hageman's statement that the parole violator units, which focused on apprehending parole violators, did not disband until 2004 or 2005, and, thus, this could not have been a factor in who to hire or promote in 2003. However, appellants attempt to solely correlate the disbanding of the parole violator units with the start of the new philosophy of the department. This contention is not accurate. There was testimony that, before the parole violator units disbanded, the philosophy of the department was shifting.

Steve Vukmer, Bernard's unit supervisor, testified that, in November 2001, a parole unit and fugitive unit merged, and some of the fugitive unit staff members started getting cases to supervise offenders. Even before the merger, Vukmer's fugitive unit had been significantly reduced through attrition. By mid-2002, all of the former fugitive unit officers had a parole caseload, which emphasized keeping offenders from going back to prison instead of apprehending parole violators. Chisar also testified that the new re-entry initiative was underway by the time of the interview for PCN 5104, and applicants would have been judged on their re-entry knowledge and how well they were rolling out the initiative. Therefore, it appears that the change in philosophy of the APA was already in motion at the time of the promotions in the present case. Thus, appellants' argument, in this respect, is not well-taken. For all the above reasons, appellants' second assignment of error is overruled.

{¶26} Appellants argue in their third assignment of error that the magistrate failed to properly consider and analyze the statistical evidence compiled by appellants and failed to consider the statistics compiled by ODRC, when such statistical evidence supported an inference of age and sex discrimination. Specifically, appellants contend they presented the testimony of Melvin Ott, Ph.D., who testified that, based on the age and gender of those individuals who were promoted compared with those who were granted interviews, there was a 1.5 chance in 10,000 that the promotion results of 2003-2004 would happen by chance alone. Dr. Ott opined that gender and age discrimination were the most likely causes of the promotion results. ODRC presented statistics compiled by Fair that demonstrated employees under 40 years old were over twice as likely to be promoted as those over 40 years old.

{¶27} With regard to Dr. Ott, the magistrate found his testimony was "not particularly persuasive." The magistrate reasoned that Dr. Ott testified his data classified applicants solely by their age and gender, and Dr. Ott did not take into account the education levels of the applicants, their prior work experience, their answers to the interview questions, their demeanor during the interviews, or their individual attitudes toward the department's shift toward a social approach. Appellants counter that Dr. Ott testified there was no reason to control for education and experience because the only persons considered in the data pool that was analyzed were those who were granted interviews and, thus, had already survived the screening process and were deemed by ODRC to have been qualified for the job based upon their education and experience.

{¶28} We find appellants' arguments unconvincing. Although appellants contest that there was no need to control for education and experience because the pool was "homogeneous," appellants do not address several key factors in the hiring process that interviewers take into account that render applicants substantially heterogeneous, namely, those traits identified by the magistrate, including their answers to interview questions, their demeanor during interviews, or, in this case, their individual attitudes toward the department's shift toward a social approach. Undoubtedly, personal presentation, overall behavior, and attitude play important factors in an applicant's interview. To call the interview group "homogenous" merely because they met the education and experience requirements is to ignore some of the most vital factors in the hiring process. If these factors were not of great weight, jobs would be awarded based purely on resumes, which is not how ODRC conducted its hiring process here.

{¶29} Furthermore, as Fair testified, the purpose of the screening process is to determine whether the applicant meets the "minimum" qualifications. As these are minimum qualifications, there still may exist significant education and experience disparities between applicants that qualified for an interview who met the minimum education and experience requirements, versus those who qualified for an interview and possessed much greater education and experience qualifications. To proclaim the pool "homogenous" based merely on the fact that the applicants met minimum education and experience qualifications for a job is injudicious and not theoretically well-founded, given there still may exist vast education and experience inequalities even among those candidates meeting the minimum qualifications. Therefore, as found by the magistrate here, we do not find the statistical evidence particularly persuasive. Even the ODRC's calculations detailing the age of those promoted, as relied upon by appellants, do not offer a full view of the complex process of hiring or promoting employees.

{¶30} We also note that Dr. Ott's testimony was that, to see the differences in promotions between the genders and those above and below 40, there must be "some other mechanism" or "something else" at work. He never explained why his assumption was that this "other mechanism" was necessarily age and gender discrimination, and not due to some other less nefarious factors. The lack of explanation, in this regard, also diminished the persuasive value of the statistics. For all these reasons, we find the Court of Claims did not err when it failed to rely upon the statistical evidence cited by appellants. Appellants' third assignment of error is overruled.

{¶31} We will next address appellants' fifth assignment of error. Appellants argue in their fifth assignment of error that the trial court erred when it upheld the magistrate's

decision that found no gender discrimination. In cases involving reverse gender discrimination, courts have modified the *McDonnell* standard to enable plaintiffs who are members of a dominant group to prove a prima facie case of discrimination. To establish a prima facie case for a reverse gender discrimination claim, the plaintiff must show: (1) background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority; and (2) that the employer treated employees who were similarly situated, but not members of the protected group, more favorably. *Murray v. Thistledown Racing Club, Inc.* (C.A.6, 1985), 770 F.2d 63, 67.

{¶32} Here, the trial court found that neither appellant demonstrated a prima facie case for reverse gender discrimination with regard to PCN 5114 and 5104. The magistrate found that appellants failed to present evidence that background circumstances support the suspicion that ODRC is that unusual employer who discriminates against the majority, or that ODRC treated appellants differently than the successful applicants. Appellants first argue that the trial court failed to consider the statistical evidence in discussing the reverse gender discrimination claim. However, we have already addressed the inherent problems with the statistical analysis conducted by Dr. Ott. We fail to find that the statistical evidence establishes a prima facie case of reverse gender discrimination.

{¶33} Appellants next argue that the evidence clearly established background circumstances that supported a suspicion that the ODRC was the unusual employer who discriminates against the majority. Appellants claim Stevenson's admitted misconduct in assuring that a female would receive the promotion for PCN 5104 alone established a prima facie case. However, we have already addressed similar arguments above in

addressing appellants' claims regarding age discrimination, and the same rationale applies to thwart appellants' gender discrimination claims. Stevenson's hiring procedures, although questionably inconsistent with some of ODRC's guidelines, were not corrupted by gender discrimination. Furthermore, as noted by ODRC, Stevenson expanded the interview pool, albeit maybe improperly, in order to include a male employee. This fact flies in the face of a claim of reverse gender discrimination. Furthermore, the record revealed legitimate, non-discriminatory reasons existed for hiring Miller. Stevenson testified Miller had 13 years of experience, had counseling experience, was a manager at a halfway house, and had a positive attitude. Miller had an outstanding interview, in which she demonstrated knowledge of the mechanics of how the department could be improved. Miller also had volunteered her time for a committee, demonstrating that she did not expect a reward for everything or an immediate monetary payoff. Chisar testified that Miller's interview responses to questions were "on target," she was very proficient, and she demonstrated organization techniques that she would use to manage the unit. Miller also had ideas on how to improve relations with halfway houses and community agencies, which was important for the position. Chisar thought Bogdas' written interview gave superficial responses to the re-entry questions, versus Miller's more detailed responses that were more of a "buy in" of the new initiative.

{¶34} Although appellants point out that Bogdas was physically fit when he applied for the position, this argument demonstrates appellants' failure to acknowledge that ODRC was clearly more interested in a candidate who had leadership skills, a good attitude, creativity, and the ability to understand the new direction the department was taking. That Bogdas was a social worker for one year in 1983 and that he had experience

indeed weigh in his favor, but this background does not address the other factors that the hiring panel apparently found to be important aspects of the position.

{¶35} With regard to PCN 5114, we have already found that ODRC cited several legitimate, non-discriminatory reasons for hiring Reid over appellants. Stevenson also testified the panel picked Reid because she had over 14 years of parole experience; worked her way up to a supervisor level of a specialized unit; had a master's degree; and taught psychology, which was a key element to the APA's social work re-entry philosophy. Reid also had an outstanding interview, in which she demonstrated creativity for achieving the department's goals, was positive, and was insightful about ways to achieve the department's goals. Also, despite appellants' claim that Bernard was more qualified than anyone in the state of Ohio to run a fugitive unit, we addressed Bernard's possible shortcomings above and also detailed the evolution of the department away from being a fugitive unit. These same reasons apply equally to appellants' gender discrimination claims. Furthermore, Bogdas admitted at trial that he cannot say that Reid was not qualified for the position. For the above reasons, appellants' fifth assignment of error is overruled.

{¶36} Appellants argue in their sixth assignment of error that the trial court erred when it found Bernard had not proven age discrimination with regard to the selection for the FBI task force and that he was not discriminated against when he was not selected for the United States Marshal's fugitive task force based upon age discrimination and perceived disability. Appellants begin their argument by reciting Bernard's various qualifications for each position, including his service as a parole officer and parole services coordinator, his physical fitness, his service in the TWL capacity 14-15 times, his

many career commendations, his co-authoring of ODRC's policy concerning fugitives, his aid in drafting the Ohio statutes concerning gangs, his status as ranking officer of state and regional gang investigators associations, and his expertise in fugitive and gang work.

{¶37} Appellants first contend that, when Bacha was awarded the FBI Task Force position, Stevenson told Bernard that the hiring panel believed he could probably have run the task force based upon his experience and knowledge, but it was "all about" his age and his prostate cancer in 2001. Michelle Jindra, who was a parole officer with the APA, testified that, while she was on the hiring panel for the FBI Task Force position, Stevenson made reference to Bernard's age and that he recently had cancer. Stevenson said he did not know if Bernard would be able to do the job because of his age and recent bout with cancer.

{¶38} However, Stevenson denied he made the remarks, and the magistrate did not appear convinced that he did. The magistrate concluded that, even if Stevenson actually made those statements, stray comments in the workplace are insufficient to prove discrimination absent a showing that they are related to the decision-making process, citing *Brewer v. Cleveland City Schools Bd. of Edn.* (1997), 122 Ohio App.3d 378, 384 (even comments made by the decision maker did not warrant reversal of summary judgment). There is no evidence that the alleged comments were made within the actual decision-making process or during an informal discussion. Stevenson also testified it was common knowledge that Bernard had cancer, and if he made any remark as claimed, it was taken out of context. Furthermore, in his responses to ODRC's interrogatories, Bernard did not mention that Stevenson told him he was being denied the position because of his cancer. Nevertheless, even if Stevenson made the remarks, there

was simply no evidence as to if or how they affected the hiring process. There was no evidence that Stevenson made this statement to other panel members, and Jindra said none of the other panelists made any references to Bernard's age or bout with cancer. Jindra testified that, based on the panel members' scoring, Bernard was not one of the top two candidates. Jindra also explained some of the reasons why Bacha was considered one of the top candidates. She said that Bacha had already been working with the FBI, he knew a person that was on the FBI Task Force and had experience working with him, he interviewed well, he answered questions appropriately, and he showed the panel certificates demonstrating his accomplishments. Furthermore, the FBI's preferred candidate was Bacha. Without further evidence of the extent or impact of Stevenson's alleged comments, it is not possible to find that ODRC did not hire Bernard because of his age or perceived disability.

{¶39} With regard to the United States Marshal's fugitive task force, Stevenson told him that the panel picked a better candidate. Stevenson told him that he needed Bernard for the in-house program, and with his vast amount of experience and knowledge, he needed him to train the other officers in the fugitive unit that they were putting together within the state. This explanation alone provides a non-discriminatory reason for not hiring Bernard. Furthermore, Bernard admitted that the United States Marshal preferred a bilingual person for the position, and Muniz, who was given one of the positions, spoke Spanish. Also, representatives from the United States Marshal's office made the final hiring decision, not ODRC. For all the above reasons, appellants' sixth assignment of error is overruled.

{¶40} Appellants argue in their seventh assignment of error that the trial court erred when it found that Bernard was properly denied a promotion for the PCN 5104 position, even though he did not apply, because his application would have been a futile act, and that he failed to properly apply for PCN 5114. With regard to PCN 5114, appellants claim it is clear that Bernard was denied an interview on the fabricated technicality that he did not properly complete his application. He claims any information omitted from his application was included in his resume that was attached to his application, as he was permitted to do. Appellants contend Bernard's application was "sabotaged" because ODRC claimed no resume was attached to his application.

{¶41} The magistrate found that Bernard's failure to complete his application was a legitimate, non-discriminatory reason why ODRC did not offer Bernard an interview for PCN 5114. We agree and find appellants' argument unavailing. Yvonne Jackson, Bernard's secretary, testified she attached the resume to the application, and there was testimony that the application had what looked like staple marks. However, there was also testimony that employment files were handled extremely carefully, and the loss of any papers would be highly unusual. Given the discrepancy in testimony, this court simply has no way of knowing whether the resume was actually attached, and there is a total lack of any evidence to suggest "sabotage" by Stevenson or any other ODRC employee. In light of this equivocal evidence, we cannot second-guess the trial court's finding that Bernard's failure to accurately complete the application was a legitimate, non-discriminatory reason for not interviewing Bernard for PCN 5114. We also note that Fair testified that Bernard failed to complete the summary of qualifications section on the application. The application specifically provided that no applications would be reviewed if

not fully completed, and said resumes may be submitted "in addition to" completing the application, not in lieu of.

{¶42} With regard to PCN 5104, appellants argue that the magistrate did not address Bernard's argument that he was wrongfully denied a promotion for that position. Appellants claim it was of no consequence that Bernard did not apply for PCN 5104. Appellants vaguely claim that the law does not require one to do a futile act. However, appellants' argument that continuing the application process would have been "futile" is without any factual support in the record. Appellants cite *Hartman v. Wick* (D.D.C.1984), 600 F.Supp. 361, in support of their contention, but we find that case is not analogous to the present case. In *Hartman*, the plaintiff, a female employee, introduced evidence that raised a material issue of fact whether the defendant had pre-selected a male employee to fill a position and then posted a job notice tailored to match the male employee's qualifications. *Id.* at 364. In the present case, we have already found above that there was no evidence that ODRC pre-selected Miller for the PCN 5104, and appellants do not even make the argument that the job notice was specifically tailored to Miller's qualifications. Therefore, we find appellants' reliance upon *Hartman* is misplaced and their "futility" argument is without merit. For these reasons, appellants' seventh assignment of error is overruled.

{¶43} Appellants argue in their fourth assignment of error that the trial court erred when it failed to consider the totality of the evidence adduced at trial with a common sense cumulative approach that takes into account how each piece of the puzzle confirms and proves the other, leading to proof beyond a reasonable doubt. Appellants reiterate the argument regarding the failure of the magistrate to consider the statistical evidence for

all of the issues, the magistrate's failure to properly consider the testimony of Hageman and Fair concerning Stevenson's "thwarting" of the hiring procedures, Hageman's testimony that the department's "new direction" had not yet started when the promotions took place, the magistrate's failure to consider Stevenson's age- and perceived-disability-based comments as evidence of pretext and direct evidence of discrimination, and the ageist "new direction" comments by department officials. Appellants seem to be attempting to invoke the cumulative error doctrine, by which a judgment may be reversed if the cumulative effect of multiple errors deprives a defendant of his constitutional rights even though, individually, the errors may not rise to the level of prejudicial error or cause for reversal. See *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168. However, this court has previously noted that the cumulative error doctrine is not typically employed in civil cases. See *Westlake v. Ohio Dept. of Agriculture*, 10th Dist. No. 08AP-71, 2008-Ohio-4422, ¶25, citing *Sykes v. Gen. Motors Corp.*, 11th Dist. No. 2003-T-0007, 2003-Ohio-7217, ¶39. In addition, having discussed all these issues in the previous assignments of error and failing to find any error, we discern no basis for considering the question of cumulative error. See *id.* ("without error, harmless or otherwise, there can be no cumulative error"). Therefore, appellants' fourth assignment of error is overruled.

{¶44} Accordingly, appellants' seven assignments of error are overruled, and the judgment of the Ohio Court of Claims is affirmed.

*Judgment affirmed.*

SADLER and CONNOR, JJ., concur.

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