

Mauzy v. Kelly Servs.

Supreme Court of Ohio

March 5, 1996, Submitted ; June 12, 1996, Decided

No. 95-301

Reporter

75 Ohio St. 3d 578; 664 N.E.2d 1272; 1996 Ohio LEXIS 366; 1996-Ohio-265; 78 Fair Empl. Prac. Cas. (BNA) 901; 69 Empl. Prac. Dec. (CCH) P44,297

Mauzy et al., Appellants, v. Kelly Services, Inc. et al., Appellees.

Subsequent History: [***1] As Amended.

Prior History: Appeal from the Court of Appeals for Lake County, No. 94-L-029.

Plaintiff-appellant, Phyllis Ruth Mauzy, began employment with defendant-appellant, Kelly Services, Inc. ("Kelly") in April 1974 as Resident Branch Manger of Kelly's Mentor, Ohio office. Throughout her employment, Mauzy consistently received exceptional performance evaluations from her supervisors. She was classified as a "Number 1 Manager" and, in 1987, received the "Manager of the Year Award."

In September 1987, defendant-appellee Patricia N. Hart became the Vice President and Regional Manager in charge of the Cleveland Region for Kelly, and thus Mauzy's supervisor. On August 6, 1992, Hart notified Mauzy that she was being reassigned to manage Kelly's recently downsized Mayfield office and to fill the newly created position of workers' compensation manager, and that her salary and benefits would remain the same. Mauzy refused the reassignment and her employment ended on August 18, 1992. Mauzy was sixty-one years of age at the time.

Hart and Mauzy disagree sharply on the series of events leading to Mauzy's reassignment. [***2] According to Hart, she attended a meeting during the week of June 1, 1992, at Kelly's corporate headquarters in Troy, Michigan, at which there was discussion concerning cost-cutting approaches that could be implemented by Kelly's regional managers. In particular, it was suggested that some of Kelly's full-service offices could be downsized to "employment centers" and the downsized territory incorporated into other full-service centers in the same geographic area. Also discussed was the creation of the position of regional workers' compensation manager who would monitor claims filed by Kelly temporary employees and develop safety programs in conjunction with Kelly's customers.

Accordingly, Hart made the decision to downsize the Mayfield office and incorporate its territory into the Mentor office. She also determined that Mauzy was the most qualified person in the Cleveland region to fill the job of workers' compensation manager. In order to implement this regional reorganization, Hart decided to transfer the manager of the Mayfield branch, Pamela Vaughn, to serve as regional branch manager of the Mentor office, and transfer Mauzy to the Mayfield office to serve as both manager of the [***3] Mayfield employment center and workers' compensation manager.

When Hart informed Mauzy of her reassignment, Mauzy first expressed interest in the workers' compensation position but, upon learning that she would be relocated to the Mayfield office, refused the job. After several attempts to convince Mauzy to accept the transfer, Hart finally told Mauzy that if she did not report to Mayfield on August 17, 1992, Kelly would assume that she wished to terminate her employment. When Mauzy failed to report to Mayfield on August 17, she was given one more chance to report on August 18. When she failed to report to Mayfield on August 18, it was concluded that she had decided to relinquish her employment.

Patricia MacKinnon, Regional Manager, Major Market Division for Kelly, set forth a version of the facts similar to that of Hart's, except to state that Mauzy "left us no alternative but to terminate her employment."

Mauzy's version is markedly different from that of Hart's. According to Mauzy, when Hart took over as her supervisor, Hart "made it absolutely clear that she wanted younger people hired, and would only allow consideration of recent college graduates." Hart's first question was, [***4] "What is the applicant's age?" Hart asked Mauzy when she planned to retire and told her that "if I were you, I would take the money and run." Hart also wrote a note in Mauzy's final



performance evaluation that "you can't teach an old dog new tricks."¹

[***5] Between 1988 and 1992, Hart consistently gave Mauzy negative evaluations. Hart berated Mauzy in front of coworkers for things Hart allowed younger employees to do. Hart removed three of Mauzy's four office staff; reduced Mauzy's territory in half; and, in April 1992, had already introduced Vaughn to Mauzy's key customers. Mauzy further testified that Vaughn was rated a "No. 5 manager"; and that the workers' compensation manager position was never filled and the Mayfield office was eventually "phased-out."

On September 24, 1992, Mauzy and her husband, appellants, instituted this action in the Lake County Court of Common Pleas against Kelly and Hart, alleging in part that Mauzy's termination was the result of unlawful age discrimination in violation of former R.C. 4101.17. The trial court entered summary judgment for Kelly and Hart, concluding that Mauzy "was not discharged from her employment within the meaning of the statute so as to maintain a claim for age discrimination but instead voluntarily relinquished her employment."

The court of appeals affirmed the decision of the trial court. In so doing, the court agreed with Mauzy that "the four elements [to establish a prima ***6] facie case of age discrimination] set forth in the syllabus of *Kohmescher v. Kroger Co.* (1991), 61 Ohio St. 3d 501, 575 N.E.2d 439] need not be proven where direct evidence of age discrimination is presented." The court found, however, that Mauzy failed to present such direct evidence of age discrimination. In so finding, the court relied on the definition of "direct evidence" as set forth in Black's Law Dictionary (5 Ed.1979) 414: "Evidence that directly proves a fact, without an inference or presumption, and which in itself, if

true, conclusively establishes that fact." The court of appeals then reasoned that "as a result, appellants were required to present a prima facie case of discrimination by proving the four elements set forth in the syllabus of *Kohmescher*." Since Mauzy was offered a lateral transfer and voluntarily chose to reject it, "she was not terminated within the meaning of R.C. 4101.17."

The cause is now before the court pursuant to the allowance of a discretionary appeal.

Disposition: Judgment reversed and cause remanded.

Syllabus

1. The phrase "Absent direct evidence of age discrimination," as used in *Kohmescher v. Kroger Co.* (1991), 61 Ohio St. 3d 501, 575 N.E.2d 439, at the syllabus, refers to a method of proof, not a type of evidence. It means that a plaintiff may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent.
2. Irrespective of whether an inference of discriminatory intent is created directly or indirectly, the plaintiff must show that she was "discharged" in order to establish a prima facie case of age discrimination under former R.C. 4101.17.
3. Where a plaintiff alleging unlawful age discrimination chooses termination in lieu of transfer, her decision cannot be construed as an actual ***8] discharge under former R.C. 4101.17. However, she may establish by sufficient evidence that she was constructively discharged.
4. The test for determining whether an employee was constructively discharged is whether the employer's actions

¹ This note is the subject of much dispute. During Mauzy's deposition, Kelly's former counsel handed Mauzy an exhibit consisting of several pages reflecting an evaluation of Mauzy for 1991. The note was mixed in loosely with this evaluation. Mauzy read the note, stated, "I don't think you want me to have this note. I already read it, though," and handed it back. Later, upon retaining new counsel, Mauzy served a document request upon Kelly and Hart seeking the note. Kelly's former counsel filed an affidavit in which he stated that the note was a memorialization of his own thought process, was not made by Kelly or any of its representatives and was inadvertently mixed in between pages of the exhibit, and that the characterizations ascribed to the note were inaccurate. In particular, he stated that the note was written on "my own 'notepad stationery,' with the heading 'From The Desk Of: Robert S. Gilmore.'" Moreover, Gilmore claimed that "he searched [his] files, but was unable to locate the notepaper," and that in any event the note was protected under the attorney work-product doctrine. Mauzy, however, filed an affidavit stating that "during [her] deposition, [she] looked at both sides of the note and it did not contain any printing, and specifically did not contain the printed words 'From the Desk of: ROBERT S. GILMORE.'" In addition, Mauzy's affidavit recited that "the note did contain handwriting in thin black ink which [she] recognized to be the handwriting of Patricia Hart."

We do not purport by this rendition to resolve any issues of fact or law that may arise from the circumstances surrounding this note. Our only concern at this point is with Mauzy's testimony regarding the note and the role it plays in light of the issues on appeal and Civ.R. 56(C).

made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign.

Counsel: Dworken & Bernstein Co., L.P.A., Patrick J. Perotti and Robert J. Hoffman, for appellants.

Thompson, Hine & Flory, Michael J. Frantz and Daniel A. Ward, for appellees.

Louis A. Jacobs; Spater, Gittes, Schulte & Kolman and Frederick M. Gittes, urging reversal for amici curiae, Ohio Employment Lawyers Association, Ohio Now Education and Legal Fund, National Conference of Black Lawyers, Columbus Chapter, Mid Ohio Board for an Independent Living Environment, Ada-Ohio, and Police Officers for Equal Rights.

Cathy Ventrell-Monsees, urging reversal for amicus curiae, American Association of Retired Persons.

Vorys, Sater, Seymour & Pease and David A. Westrup, urging affirmance for amicus curiae, Ohio Chamber of Commerce.

Judges: Alice Robie Resnick, J. DOUGLAS, HILDEBRANDT, F.E. SWEENEY and PFEIFER, JJ., concur. [***9] MOYER, C.J., and COOK, J., dissent. LEE H. HILDEBRANDT, JR., J., of the First Appellate District, sitting for WRIGHT, J. COOK, J., dissents. MOYER, C.J., concurs in the foregoing dissenting opinion.

Opinion by: ALICE ROBIE RESNICK

Opinion

[*581] [**1276] Alice Robie Resnick, J. There are two issues presented for our determination -- one involving the grant of summary judgment in favor of appellees on Mauzy's claim of unlawful age discrimination under former R.C. 4101.17, and the other involving the denial of two requests by Mauzy for additional discovery. The facts pertaining to the second issue will be set forth *infra*. We proceed first to the issue of summary judgment because this issue can be resolved without regard to the further issue of discovery.

[*582] I

The broad issue here is whether Mauzy presented sufficient evidence to withstand a motion for summary judgment. Ultimately, this issue turns on whether the circumstances surrounding Mauzy's separation from Kelly can properly be viewed as a "discharge" under former R.C. 4101.17. However, in light of the opinions below and the arguments advanced by the parties, we find it necessary to clarify certain aspects of the requirements for establishing a prima [***10] facie case of age discrimination.

Former R.C. 4101.17 (now renumbered R.C. 4112.14) provided in part as follows:

"(A) 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."

In *Barker v. Scovill, Inc.* (1983), 6 Ohio St. 3d 146, 6 Ohio B. Rep. 202, 451 N.E.2d 807, we adopted the analytic framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, for use in Title VII cases, and modified the elements of a prima facie case to fit the contours of former R.C. 4101.17. Thus, we held that:

"In order to establish a prima facie case of age discrimination, violative of R.C. 4101.17, in an employment discharge action, plaintiff-employee must demonstrate (1) that he was a member of the statutorily-protected class, (2) that he was discharged, (3) that he was qualified for the position, and (4) that he was replaced by, or that his discharge permitted the [***11] retention of, a person not belonging to the protected class. Defendant-employer may then overcome the presumption inherent in the prima facie case by propounding a legitimate, nondiscriminatory reason for plaintiff's discharge. Finally, plaintiff must be allowed to show that the rationale set forth by defendant was only a pretext for unlawful discrimination."²

In *Kohmescher v. Kroger Co.* (1991), 61 Ohio St. 3d 501, 575 N.E.2d 439, at the syllabus, we modified *Barker*, in relevant part, by prefacing the first paragraph of its syllabus with the phrase, "Absent direct evidence of age discrimination." In so doing, we explained as follows:

² The fourth element for the establishment of the prima facie case set forth herein is questionable in light of the recent United States Supreme Court decision in *O'Connor v. Consol. Coin Caterers Corp.* (1996), 517 U.S. ___, 116 S. Ct. 1307, 134 L. Ed. 2d 433, 1996 WL 142564.

"Research indicates that the *McDonnell Douglas* standards borrowed in *Barker*, [***12] *supra*, were never intended to be applied strictly. ***

[*583] "Moreover, as the high court stated in *Trans World Airlines, Inc. v. Thurston* (1985), 469 U.S. 111, 121, 105 S. Ct. 613, 621, 83 L. Ed. 2d 523, 533, *** ' *** the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. *** '

" *** As the court stated in *Barnes v. GenCorp., Inc.* (C.A.6, 1990), 896 F.2d 1457, 1464: ' *** the importance of the *McDonnell* [*1277] *Douglas* "test" is its discussion of the elements a plaintiff must prove to establish a prima facie case of discrimination *absent direct, circumstantial, or statistical evidence of discrimination.*' (Emphasis added.) ***

" ***

"Therefore, based on all of the foregoing, we modify the first sentence of paragraph one of the syllabus in *Barker, supra*, *** . Under this modified standard, it should be abundantly clear that direct evidence of age discrimination will be sufficient to establish a prima facie case." *Id.*, 61 Ohio St. 3d at 504-506, 575 N.E.2d at 442-443.

The court of appeals interpreted the words "direct evidence" to mean "'evidence that directly proves a fact, without an inference or presumption.'" [***13] Both parties agree that this interpretation, as stated and applied by the court of appeals, amounts to a rendition of a dichotomy between "direct" and "circumstantial" evidence. Mauzy argues, however, that the term "direct evidence," as used in *Kohmescher*, "refers to the *method* of proof and not the *type* of evidence." (Emphasis *sic.*) We agree.

In order to prevail in an employment discrimination case, the plaintiff must prove discriminatory intent. "'The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.'" *United States Postal Serv. Bd. of Governors v. Aikens* (1983), 460 U.S. 711, 716-717, 103 S. Ct. 1478, 1482, 75 L. Ed. 2d 403, 411, quoting *Eddington v. Fitzmaurice* (1885), 29 Ch. 459, 483.

The function of the *McDonnell Douglas* prima facie test is to allow the plaintiff to raise an inference of discriminatory intent indirectly. It serves to eliminate the most common nondiscriminatory reasons for the employer's action: lack of

qualifications or the absence of a vacancy. [***14] *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253-254, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207, 215-216; *Internatl. Bhd. of Teamsters v. United States* (1977), 431 U.S. 324, 358, 97 S. Ct. 1843, 1866, 52 L. Ed. 2d 396, 429, fn. 44.

As the Supreme Court explained in *Furnco Constr. Corp. v. Waters* (1978), 438 U.S. 567, 577, 98 S. Ct. 2943, 2949-2950, 57 L. Ed. 2d 957, 967:

[*584] "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. See *Teamsters v. United States, supra*, at 358 [97 S. Ct. at 1866, 52 L. Ed. 2d at 429] n. 44. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible [***15] consideration such as race." (Emphasis *sic.*)

Thus, *McDonnell Douglas* is one method, an indirect method involving the process of elimination, whereby the plaintiff may create an inference that an employment decision was more likely than not based on illegal discriminatory criteria. The process of elimination, however, is not the only method by which such an inference may be created. As the high court explained in *Teamsters, supra*, 431 U.S. at 358, 97 S. Ct. at 1866, 52 L. Ed. 2d at 429:

"The *McDonnell Douglas* pattern [is not] the *only* means of establishing a prima facie case of individual discrimination. Our decision in that case *** did not purport to create an inflexible formulation. We expressly noted that '(t)he facts necessarily will vary in Title VII cases, and the specification *** of the prima facie proof required from (a plaintiff) is not necessarily applicable in every respect to differing factual situations.' The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden [***1278] of offering evidence [***16] adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." (Emphasis *sic.*) (Citation omitted.) Thus, "as in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." *Aikens, supra*, 460 U.S. at 714, 103 S. Ct. at 1481, 75 L. Ed. 2d at 409, fn. 3.

This is clearly what we had in mind in *Kohmescher, supra*, 61 Ohio St. 3d at 505, 575 N.E.2d at 442, when we emphasized the notion that the four-element *McDonnell Douglas* prima facie test comes into play "*absent direct, circumstantial, or statistical evidence of discrimination.*" In fact, the dissenting opinion of Justice Holmes, albeit lamenting this conclusion, interpreted the majority opinion in a similar vein. *Id.*, 61 Ohio St. 3d at 507, 575 N.E.2d at 443.

Appellees argue, however, "that a plaintiff attempting to produce direct evidence to avoid application of the *McDonnell Douglas* test cannot rely upon the presentation of merely circumstantial evidence." In support, appellees cite a litany of federal cases which do, indeed, draw a similar conclusion. In reaching [*585] such a conclusion, these cases invariably rely upon certain [***17] language concerning "direct evidence" used by the United States Supreme Court in *Trans World Airlines, Inc. v. Thurston* (1985), 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523, and by Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268. The cases, however, attempt to apply the term "direct evidence" in a context different from that of its origin.

In *Thurston, supra*, 469 U.S. at 121, 105 S. Ct. at 621, 83 L. Ed. 2d at 533, the Supreme Court stated that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." The "direct evidence" in *Thurston* was a transfer policy under which airline captains disqualified from serving because of their age were not afforded the same privilege as captains disqualified for reasons other than their age to displace less senior flight engineers. The court found this policy to be discriminatory on its face, thus placing the *burden of persuasion* on the employer to prove an affirmative defense. *Id.*, 469 U.S. at 121-122, 105 S. Ct. at 621-622, 83 L. Ed. 2d at 533. The

opinion in *Thurston*, however, does not disclose whether [***18] the term "direct evidence" was being used to refer to the type of evidence required in order to "shift" the burden of persuasion to the employer, or merely to indicate the fact that plaintiff had proven discrimination.

In *Price Waterhouse*, the plurality opinion concluded that when a plaintiff proves that gender played a motivating part in an employment decision, the *burden of persuasion* is then upon the employer to prove that it would have made the same decision even if it had not taken plaintiff's gender into account. In concluding that plaintiff proved discrimination, the plurality focused its attention on certain negative gender-related comments made by Price Waterhouse partners in evaluating Hopkins for partnership. In its opinion, the plurality specifically stated that:

"By focusing on Hopkins' specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, 'standing alone,' would or would not establish a plaintiff's case, since such a decision is unnecessary in this case." *Id.*, 490 U.S. at 251-252, 109 S.Ct. at 1791, [***19] 104 L. Ed. 2d at 288-289.

On the other hand, in her concurring opinion Justice O'Connor indicated that she would require "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." *Id.*, 490 U.S. at 277, 109 S. Ct. at 1805, 104 L. Ed. 2d at 305, O'Connor, J., concurring.³

[***20]

[**1279] [*586] The federal circuits, therefore, were left to grapple with the issue of whether, in light of *Thurston* and *Price Waterhouse*, the plaintiff is required to present "direct

³ The dissent interpreted the holding of the case narrowly:

"In a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision." *Price Waterhouse* 490 U.S. at 280, 109, S.Ct. at 1806, 104 L. Ed. 2d at 307.

Justice White, however, unlike Justice O'Connor, did not indicate a preference for "direct evidence" in his concurring opinion. Thus, only four Justices (three dissenting and one concurring) have indicated a preference for "direct evidence." Moreover, in light of the changed composition of the high court, it is impossible to gauge a majority position on this issue.

4 Not all of the federal circuits agree on the legal standards by which to determine whether a constructive discharge has occurred. See *Levendos v. Stern Entertainment, Inc. (C.A.3, 1988)*, 860 F.2d 1227, 1230-1231. The objective standard appears to be more consonant with the purpose of the prima facie case to raise an inference of discrimination. To require proof that the employer's actions were deliberately aimed at forcing resignation transcends the design of the prima facie case. We note, however, that the result we reach in this case would not be affected by the application of a subjective standard.

evidence" of discrimination as a precondition to "shifting" the burden of persuasion and, if so, what constitutes "direct evidence." Not surprisingly, the various federal courts have about as many solutions to this problem as they do employment discrimination cases. See, e.g., *Manzer v. Diamond Shamrock Chemicals Co.* (C.A.6, 1994), 29 F.3d 1078; *Davis v. Chevron U.S.A., Inc.* (C.A.5, 1994), 14 F.3d 1082; *Ostrowski v. Atlantic Mut. Ins. Cos.* (C.A.2, 1992), 968 F.2d 171; *Tyler v. Bethlehem Steel Corp.* (C.A.2, 1992), 958 F.2d 1176; *Jackson v. Harvard Univ.* (C.A.1, 1990), 900 F.2d 464; *Chipollini v. Spencer Gifts, Inc.* (C.A.3, 1987), 814 F.2d 893.

In this context, however, the term "direct evidence," whatever it means and to the extent it is even required, is used to distinguish a *Thurston* or *Price Waterhouse* case from a *McDonnell Douglas* case. See Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII* (1991), 56 Brook.L.Rev. 1107, [***21] 1137. In other words, the term is inserted as a precondition to "shifting" the burden of persuasion; it was not fashioned by its proponents to create a dichotomy between two opposing methods of establishing a *McDonnell Douglas* prima facie case. The caliber of evidence as "direct" does, indeed, eschew reliance on the *McDonnell Douglas* paradigm, not because it is the sole alternative method by which to create an inference of discrimination, but because it rises to the level of actually proving discrimination. The issue of what is required to "shift" the burden of persuasion, however, is an issue separate and apart from the issue of what is required to raise an inference of discrimination.

Clearly, in *Kohmescher* we were not concerned with the issue of when the burden of persuasion should be placed on the employer. We were only concerned "that direct evidence of discrimination will be sufficient to establish a prima facie case." *Id.*, 61 Ohio St. 3d at 506, 575 N.E.2d at 443. In this context, the phrase "direct evidence of age discrimination" is indicative of a method of proof, not a type of evidence. It is, in a sense, a misnomer. It means that the plaintiff may establish [***22] a prima facie case directly by presenting evidence, of any nature, to [*587] show that the employer more likely than not was motivated by discriminatory animus. *Barnes v. GenCorp., Inc.* (C.A. 6, 1990), 896 F.2d 1457, 1464; *Perry v. Kunz* (C.A.8, 1989), 878 F.2d 1056, 1058-1059; *Oxman v. WLS-TV* (C.A.7, 1988), 846 F.2d 448, 454-455; *Wilhelm v. Blue Bell, Inc.* (C.A.4, 1985), 773 F.2d 1429, 1432; *Equal Emp. Opportunity Comm. v. Electrolux Corp.* (D.C.Va. 1985), 611 F. Supp. 926, 927-928; *Blackwell v. Sun Elec. Corp.* (C.A.6, 1983), 696 F.2d 1176, 1180; *Lovelace v. Sherwin-Williams Co.* (C.A.4, 1982), 681 F.2d 230, 239; *Stanojev v. Ebasco Services, Inc.* (C.A. 2, 1981),

643 F.2d 914, 920-921; *Smith v. Univ. of North Carolina* (C.A.4, 1980), 632 F.2d 316, 335; *Loeb v. Texton, Inc.* (C.A. 1, 1979), 600 F.2d 1003, 1017.

Accordingly, we now clarify that the phrase "Absent direct evidence of age discrimination," as used in *Kohmescher, supra*, at the syllabus, refers to a method of proof, not a type of evidence. It means that a plaintiff may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that the employer [***23] more likely than not was motivated by discriminatory intent.

Mauzy further argues that pursuant to *Kohmescher*, where there is direct evidence of discriminatory animus, "summary judgment is inappropriate, regardless whether the separation from employment is styled a termination, a resignation or a constructive discharge." Indeed, Justice Holmes similarly characterized the holding of *Kohmescher*: "This newly adopted test is that even the slightest bit of evidence of age discrimination adduced by the plaintiff obviates the necessity [***1280] to prove that the plaintiff was discharged *** ." *Kohmescher, supra*, 61 Ohio St. 3d at 507, 575 N.E.2d at 443 (Holmes, J., dissenting). We, however, disagree.

Evidence of discriminatory intent is nothing more than proof of discriminatory thought. Former R.C. 4101.17, like Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, Section 2000e *et seq.*, Title 42, U.S. Code, is not a thought control law. As Justice O'Connor explained:

"[Title VII was meant] to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts. Critics of the bill that became Title VII labeled it a 'thought control bill,' [***24] and argued that it created a 'punishable crime that does not require an illegal external act as a basis for judgment.' 100 Cong.Rec. 7254 (1964) (remarks of Sen. Ervin). Senator Case *** responded:

"The man must do or fail to do something in regard to employment. There must be some specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences." *Price Waterhouse, supra*, 490 U.S. at 262, 109 S. Ct. at 1797, 104 L. Ed. 2d at 295-296.

[*588] Thus, while proof of discriminatory thought is necessary to the establishment of a discrimination claim, it is not sufficient. There must be a consequential prohibited act. The prohibited act under former R.C. 4101.17, as relevant here, is a "discharge." Other actions, such as transfers or promotions, are not prohibited unless they

amount to a "discharge." This is a legislative choice that we cannot disturb.

It is true, as Mauzy urges, that direct evidence of discriminatory animus eschews reliance on the prima facie four-element test of *Barker* and *Kohmescher*, *supra*. This does not mean, however, that a mandate of the statute may be ignored simply because [*589] it happens to be one of the elements of a prima facie case set forth in those cases. Direct evidence of discriminatory thought no more obviates the statutory requirement that plaintiff be discharged than it does the statutory requirement that the plaintiff fall within the protected age group. To hold as Mauzy suggests would result in rewriting the statute or, worse, prohibiting mere thought.

Thus, irrespective of which method is utilized to establish discriminatory intent, plaintiff must show that she was "discharged on account of age." (Emphasis added.) *Kohmescher*, *supra*, 61 Ohio St. 3d at 505, 575 N.E.2d at 442.

Mauzy also contends that her burden to show that she was discharged is satisfied by MacKinnon's statement that Mauzy "left us no alternative but to terminate her [Mauzy's] employment." According to Mauzy, "it is the termination, not the reason for it, that allows the *prima facie* case."

In a general sense, Mauzy is correct; disputing the employer's alleged legitimate, nondiscriminatory reason for discharging a plaintiff is not a requirement of the prima facie case. However, when a plaintiff chooses termination in lieu of transfer, her decision is not construed [***26] as an actual discharge. Instead, she is required to show as a part of her prima facie case that her choice to be terminated was involuntary or coerced. *Kohmescher*, *supra*, 61 Ohio St. 3d at 506, 575 N.E.2d at 443; *Barker*, *supra*, 6 Ohio St. 3d at 148, 6 Ohio B. Rep. at 204, 451 N.E.2d at 810. Mauzy can stand on no better footing by refusing her transfer assignment in the face of termination than do employees who elect termination in lieu of transfer. Former R.C. 4101.17 proscribes discriminatory discharges, not transfers. It cannot be transformed into a palliative for every unattractive workplace transfer by the simple expedient of refusing the assignment. See *Bristow v. Daily Press, Inc.* (C.A.4, 1985), 770 F.2d 1251, 1255.

Since Mauzy in effect chose termination over transfer, she must show that her decision was involuntary or, as the doctrine is more familiarly known, that she was constructively discharged. See *Clowes v. Allegheny Valley Hosp.* (C.A.3, 1993), 991 F.2d 1159, 1160-1161. Courts

generally apply an objective test in determining when an employee was constructively discharged, *viz.*, whether the [*589] employer's actions made working conditions so intolerable that a reasonable [***27] [**1281] person under the circumstances would have felt compelled to resign. 4 *Id.*, 991 F.2d at 1161; *McCann v. Litton Systems, Inc.* (C.A.5, 1993), 986 F.2d 946, 951; *Stephens v. C.I.T. Group/Equipment Financing, Inc.* (C.A.5, 1992), 955 F.2d 1023, 1027; *Spulak v. K Mart Corp.* (C.A.10, 1990), 894 F.2d 1150, 1154; *Levendos v. Stern Entertainment, Inc.* (C.A.3, 1988), 860 F.2d 1227, 1230-1231.

In applying this test, courts seek to determine whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent. They recognize that there is no sound reason to compel an employee to struggle with the inevitable simply to attain the "discharge" label. No single factor is determinative. Instead, a myriad of factors are considered, including reductions in sales territory, poor performance evaluations, criticism in front of coemployees, inquiries about retirement intentions, and expressions of a preference for employees outside the protected group. Nor does the inquiry change solely because an option to transfer is thrown into the mix, lateral though it may be. A transfer accompanied by measurable compensation at a comparable level [***28] does not necessarily preclude a finding of constructive discharge. Our review is not so narrowly circumscribed by the quality and attributes of the transfer option itself. A sophisticated discriminating employer should not be permitted to circumvent the statute by transferring an older employee to a sham position as a prelude to discharge. See *Stephens*, *supra*; *Guthrie v. J.C. Penney Co., Inc.* (C.A.5, 1986), 803 F.2d 202; *Crawford v. ITT Consumer Financial Corp.* (D.C. Ohio 1986), 653 F. Supp. 1184; *Schneider v. Jax Shack, Inc.* (C.A.8, 1986), 794 F.2d 383; *Goss v. Exxon Office Systems Co.* (C.A.3, 1984), 747 F.2d 885; *Jacobson v. Am. Home Products Corp.* (D.C. Ill. 1982), 36 Fair Empl. Prac. Cas. (BNA) 559; Annotation, Circumstances Which Warrant Finding of Constructive Discharge Under Age Discrimination in Employment Act (29 USCS §§ 621 *et seq.*) (1989), 93 A.L.R.Fed. 10, Sections 9-16.

Applying the law as set forth above to the facts of this case, we conclude that summary judgment was improperly granted in favor of Hart and Kelly because of the existence of a genuine issue of material fact over whether Mauzy was constructively discharged on account of her age. Under the record developed [***29] in the trial court, there is evidence showing that Mauzy met with great success over the years in her position as resident branch manager at Kelly's Mentor branch. [*590] When Hart took over as Mauzy's

supervisor, she expressed her preference for younger employees, inquired into Mauzy's plans to retire, and told her to "take the money and run." She berated Mauzy in front of her coworkers, gave her negative evaluations, reduced her staff and territory, introduced a younger employee to Mauzy's key customers, and noted in Mauzy's final evaluation that "you can't teach an old dog new tricks." Subsequently, she sought to transfer Mauzy to a position that was newly created, and which was never filled following Mauzy's separation from employment, while replacing Mauzy with a younger employee with a lower rating. Although appellees' version of the events is markedly different, in our view reasonable minds could conclude from the evidence that appellees were motivated by discriminatory animus and that Mauzy was constructively discharged from her employment. Thus, Mauzy has presented sufficient evidence to raise an inference of age discrimination under former R.C. 4101.17.

Accordingly, the decision [***30] of the court of appeals is reversed as to this issue.

II

The second issue presented for determination involves the trial court's denial of Mauzy's [**1282] requests for further discovery. The facts relevant to this issue are as follows. On February 23, 1993, the trial court entered a pretrial order indicating that discovery had been completed. Following several continuances, appellees filed their motion for summary judgment on April 6, 1993. On April 29, 1993, Mauzy's previous counsel filed a motion to extend the time to respond to appellees' motion for summary judgment and to withdraw as Mauzy's counsel of record, which the trial court granted on May 4, 1993.

On May 13, 1993, Mauzy's present counsel filed a motion for a stay of proceedings, stating that "in order to properly undertake representation *** [he] would require a *** period of time to become completely familiar with the file and perform certain discovery which is necessary to properly respond to the summary judgment motion." On June 22, 1993, the trial court granted a stay of sixty days and scheduled a pretrial conference for August 23.

During July and August 1993, Mauzy's new counsel attempted to schedule depositions [***31] pursuant to Civ.R. 30(B)(4) and (5), seeking a number of documents and to depose Pamela Vaughn. Appellees responded by filing a motion for a protective order. On August 23, 1993, the trial court entered an order prohibiting Mauzy from proceeding with the depositions, noting that "the discovery deadlines *** have long since passed."

On August 24, Mauzy filed a motion pursuant to Civ.R. 56(F) "to complete discovery in this action in order to adequately respond to the pending summary judgment." She also argued, however, that further discovery "is necessary to the [*591] presentation of the merits of her claim." In particular, she sought to depose certain individuals, including her replacement, concerning the issues of discriminatory intent, replacement by a younger employee and the closing of the Mayfield office. On August 27, 1993, the trial court denied Mauzy's request for further discovery on the basis that it had already given Mauzy a reasonable opportunity to conduct discovery when it stayed the proceedings on June 22 for sixty days, "thereby allowing Plaintiff's counsel an opportunity to review the file [and] engage in discovery." The court did indicate, however, that "due to any misinterpretation [***32] of the Court's prior order, the Court will grant Plaintiff an additional leave to 12:00 noon, September 3, 1993," apparently to respond to appellees' motion for summary judgment. Mauzy filed her brief in opposition to appellees' summary judgment motion on September 2.

On September 15, appellees requested a continuance of the trial date along with a motion by their former counsel to withdraw as counsel of record. The motion was necessitated by Mauzy's allegations that prior counsel for appellees had destroyed a key piece of evidence. See fn. 1. On October 6, the court granted appellees' counsel's motion to withdraw.

On December 29 and 30, Mauzy again requested additional discovery in light of the rescheduling of the trial date until April 1994. On January 18, 1994, the trial court denied this request and entered summary judgment in favor of appellees.

The court of appeals held that:

"It is apparent from the record that appellants were afforded ample time within which to conduct discovery. Furthermore, it does not appear that the requested discovery would have affected the disposition of the summary judgment motion, as that motion was decided upon appellant's failure to prove that [***33] she was discharged, as required by *Kohmescher* to establish a prima facie case. Appellants' proffered discovery dealt with the issue of age bias, which is irrelevant under R.C. 4101.17 unless the employee was discharged. See *Kohmescher, supra*. As a result, appellants have failed to demonstrate that the trial court abused its discretion ***."

In light of our holding that summary judgment was improper under the record as presently developed, it is no longer of any concern whether "the requested discovery would have

affected the disposition of the summary judgment motion." Accordingly, the issue of whether the trial court abused its discretion in denying Mauzy's motion for discovery pursuant to Civ.R. 56(F) is moot. Civ.R. 56(F) operates only when it appears that the nonmoving party cannot present facts [**1283] essential to justify opposition to a motion for summary judgment. Such a situation can no longer be said to exist.

Thus, the only issue that confronts us is whether the trial court unreasonably denied Mauzy the pretrial opportunity to fully prepare her case for litigation.

[*592] "In discovery practices, the trial court has a discretionary power not a ministerial duty." *State ex [***34] rel. Daggett v. Gessaman* (1973), 34 Ohio St. 2d 55, 57, 63 Ohio Op. 2d 88, 90, 295 N.E.2d 659, 661. Thus, the standard of review of a trial court's decision in a discovery matter is whether the court abused its discretion. See *Heat & Control, Inc. v. Hester Industries, Inc.* (C.A. Fed. 1986), 785 F.2d 1017, 1022.

Such discretion, however, is not without limits. Although unusual, appellate courts will reverse a discovery order "when the trial court has erroneously denied or limited discovery." 8 Wright, Miller & Marcus, *Federal Practice & Procedure* (2 Ed. 1994) 92, Section 2006. Thus, "an appellate court will reverse the decision of a trial court that extinguishes a party's right to discovery if the trial court's decision is improvident and affects the discovering party's substantial rights." *Rossmann v. Rossmann* (1975), 47 Ohio App. 2d 103, 110, 1 Ohio Op. 3d 206, 210, 352 N.E.2d 149, 153-154. See, also, *Stegawski v. Cleveland Anesthesia Group, Inc.* (1987), 37 Ohio App. 3d 78, 86, 523 N.E.2d 902, 910; *Smith v. Klein* (1985), 23 Ohio App. 3d 146, 151, 23 Ohio B. Rep. 387, 393, 492 N.E.2d 852, 858; *Simmons v. Merrill Lynch, Pierce, Fenner & Smith* (1977), 53 Ohio App. 2d 91, 97, 7 Ohio Op. 3d 65, [***35] 69, 372 N.E.2d 363, 368; *Toledo Edison Co. v. GA Technologies, Inc.* (C.A.6, 1988), 847 F.2d 335, 341; *Weahkee v. Norton* (C.A.10, 1980), 621 F.2d 1080, 1082 (employment discrimination action); *Goldman v. Checker Taxi Co.* (C.A.7, 1963), 325 F.2d 853, 856; Wright, Miller & Marcus, *Federal Practice & Procedure*, *supra*, at 92-93, fn. 33, Section 2006; Annotation (1977), 31 A.L.R.Fed. 657.

In his May 13, 1993 motion for a stay of proceedings, Mauzy's substitute counsel indicated that he would need to conduct further discovery in order to properly undertake representation of Mauzy. There is nothing in the record to suggest that this request was interposed as a dilatory tactic. The record discloses that further discovery was warranted in

order to fully prepare to litigate the issues of discriminatory animus and constructive discharge, and that the discovery that had already been conducted was not overburdensome. Moreover, the initial request for additional discovery was not raised, as appellees suggest, at the "eleventh hour." The motion for summary judgment was not ruled upon until January 18, 1994, with trial having been reset for some time thereafter. Under these circumstances, [***36] we hold that it is improvident to deny further discovery to Mauzy's substitute counsel.

The trial court's order of August 27, standing alone, creates the illusion that Mauzy's second counsel was given the opportunity to conduct additional discovery. That order denied Mauzy's request for further discovery on the purported basis that the court had already granted a sixty-day stay to afford Mauzy's second counsel "an opportunity to *** engage in discovery." Yet, when Mauzy's substitute counsel had attempted discovery during that period, he was [*593] met by the trial court's August 23 order prohibiting the attempted discovery on the basis that "the discovery deadlines *** have long since passed." These incongruous orders effectively denied Mauzy the opportunity to fully prepare her cause for litigation.

Accordingly, we conclude that the trial court abused its discretion in denying Mauzy further discovery, and the decision of the court of appeals is reversed as to this issue.

In light of all the foregoing, the judgment of the court of appeals is reversed, and the cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

Judgment reversed

*and cause [***37] remanded.*

DOUGLAS, HILDEBRANDT, F.E. SWEENEY and PFEIFER, JJ., concur.

MOYER, C.J., and COOK, J., dissent.

[**1284] LEE H. HILDEBRANDT, JR., J., of the First Appellate District, sitting for WRIGHT, J.

Dissent by: COOK

Dissent

Cook, J., dissenting. I respectfully dissent. My disagreement is particularly with the stated proposition that "direct"

evidence is a method of proof rather than a type of evidence, and with the conclusion that it is a factual question whether Mauzy's lateral transfer can amount to a constructive discharge.

DIRECT EVIDENCE

The law is settled that direct evidence of discrimination obviates the necessity of raising an inference of discrimination through a *McDonnell Douglas* showing of a prima facie case. The court of appeals was correct in referring to Black's Law Dictionary to define the term "direct evidence" as used in the *Kohmescher* syllabus. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St. 3d 501, 575 N.E.2d 439. That case had it right in terms of the relationship between direct evidence of discrimination (such as documents disclosing the employer's use of age as a criterion for employment decisions) and the alternative, prima facie showing through a *McDonnell* [***38] *Douglas* presentation.

CONSTRUCTIVE DISCHARGE

Mauzy chose to sue her employer under R.C. 4101.17, which prohibits discharges on the basis of age. Taking all of Mauzy's testimony on the issue of her termination as true, as a matter of law, Mauzy was not discharged. The majority concedes that in order to establish that she was constructively discharged, Mauzy must show that her employer made working conditions so intolerable that a [*594] reasonable person under the circumstances would have felt compelled to resign. The evidence, construed in Mauzy's favor, amounts to the following: Hart had an unjustified, negative, discriminatory attitude toward Mauzy which motivated the transfer decision. That is it. Hart's discriminatory attitude is not actionable under R.C. 4101.17. Hart's *action* is the transfer. This action is not prohibited by R.C. 4101.17, even if it is motivated by a discriminatory animus. What is prohibited is a discriminatory transfer that equates to a discharge.

As a matter of law, Mauzy's transfer cannot be said to equate to a discharge. She must show that the transfer rendered the working conditions so intolerable that a reasonable person under the circumstances would [***39] have felt compelled to resign. The transfer was to a new position in a different branch office, in the same locale (i.e., greater Cleveland), at the same compensation level. Indeed, Mauzy never even worked one day under the working conditions of the new job to which she was assigned. The majority seems to go beyond the evidence presented in the summary judgment proceedings in implying that the new position offered to Mauzy was a sham, just a prelude to discharge. Under the circumstances of this case, involving no change of residence or other such "detrimental reliance," it would be pure speculation to label the voluntary relinquishment of the transfer a constructive discharge on the untested assessment that the position was a sham.

Although Mauzy may have legitimately resented the overtones of her dealings with Hart, Hart did not fire her, did not insist Mauzy accept a transfer across the country as in *Kohmescher*, and did not even reduce Mauzy's pay or her status as a management employee. Whatever unlawful attitude Hart may have harbored and displayed, it is only her decisions as to Mauzy's employment that are actionable, and under R.C. 4101.17, only discharge decisions.

DISCOVERY

[***40] I would affirm the judgment of the court of appeals on the discovery issue because, like that court, I find that the requested discovery would not have affected the issue of whether or not Mauzy was discharged.

For the foregoing reasons, summary judgment was properly granted and I would affirm the judgment of the court of appeals.

MOYER, C.J., concurs in the foregoing dissenting opinion.

Ercegovich v. Goodyear Tire & Rubber Co.

United States Court of Appeals for the Sixth Circuit

May 1, 1998, Argued ; August 31, 1998, Decided ; August 31, 1998, Filed

No. 97-3431

Reporter

154 F.3d 344; 1998 U.S. App. LEXIS 21184; 1998 FED App. 0268P (6th Cir.); 77 Fair Empl. Prac. Cas. (BNA) 1224; 74 Empl. Prac. Dec. (CCH) P45,676

EDWARD E. ERCEGOVICH, Plaintiff-Appellant, v. GOODYEAR TIRE & RUBBER COMPANY, Defendant-Appellee.

Subsequent History: [**1] As Corrected September 1, 1998. Rehearing Denied October 19, 1998, Reported at: 1998 U.S. App. LEXIS 29661.

Prior History: Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 95-02837. Sam H. Bell, District Judge.

Disposition: REVERSED the district court's granting of summary judgment to Goodyear on this claim. REMANDED for further proceedings consistent with this opinion.

Counsel: ARGUED: Joseph W. Diemert, Jr., JOSEPH W. DIEMERT, JR. & ASSOCIATES, Cleveland, Ohio, for Appellant.

ARGUED: Vincent J. Tersigni, BUCKINGHAM, DOOLITTLE & BURROUGHS, Akron, Ohio, for Appellee.

ON BRIEF: Joseph W. Diemert, Jr., Laura J. Gentilcore, JOSEPH W. DIEMERT, JR. & ASSOCIATES, Cleveland, Ohio, for Appellant.

ON BRIEF: Vincent J. Tersigni, James D. Kurek, BUCKINGHAM, DOOLITTLE & BURROUGHS, Akron, Ohio, for Appellee.

Judges: Before: JONES, MOORE, and COLE, Circuit Judges.

Opinion by: KAREN NELSON MOORE

Opinion

[**2] [*348] OPINION

KAREN NELSON MOORE, Circuit Judge. The plaintiff-appellant, Edward Ercegovich, was formerly employed by

the defendant-appellee, the Goodyear Tire & Rubber Company ("Goodyear"), as the Quality Systems Coordinator [**2] in Human Resources Development, Retail Sales Division. Ercegovich claims that he is the victim of employment discrimination, alleging 1) that Goodyear eliminated his position because of his age, and 2) then refused to offer him the opportunity to transfer to other positions within the corporation because of his age, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") as amended, 29 U.S.C. § 623(a), and Ohio's age-discrimination laws, OHIO REV. CODE ANN. § 4101.17, *recodified as* § 4112.14 (Banks- Baldwin West 1994 & Supp. 1998). The district court granted Goodyear's motion for summary judgment after concluding that Ercegovich failed to present evidence satisfying his prima facie burden, and in the alternative failed to show that Goodyear's explanation for eliminating his position was pretextual. Although we agree that Ercegovich failed to produce sufficient evidence of pretext with respect to his first claim challenging the reason for the elimination of his position, the district court erred in determining that Ercegovich failed to establish a prima facie case with respect to his second age-discrimination claim. After reviewing Ercegovich's [**3] evidence of pretext, we conclude that there is a genuine issue of material fact on which reasonable jurors could differ with respect to whether Goodyear discriminated against Ercegovich on the basis of age by reassigning younger employees to new positions without affording Ercegovich the [**3] same opportunity. Accordingly, we affirm in part and reverse in part and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Edward Ercegovich was born on October 15, 1937. He began working for Goodyear in 1962, and continued in Goodyear's employment until his dismissal in 1994. At the time of his firing, Ercegovich, then age fifty-seven, served as a Quality Systems Coordinator in Human Resources Development, Retail Sales Division in Akron, Ohio. Ercegovich was responsible for the training of retail managers throughout the country for the purpose of improving customer service. Ercegovich reported to Kim



Lauritzen, Manager of Human Resources Development, who in turn reported to Paul Evert, Manager of Human Resources. Evert reported to Vice President Ed Gallagher, who oversaw the entire Retail Sales Division. J.A. at 503 (Pl.'s Ex. 2).

In 1994, Goodyear allegedly determined [**4] that improvements in customer service could [*349] be best achieved by reassigning responsibility for the training of retail store managers from Ercegovich to district managers. Goodyear claims that the decision to eliminate Ercegovich's position was made by Evert and Lauritzen, although Ercegovich believes Vice President Gallagher also had some input into the decision. On October 28, 1994, Ercegovich was informed of his termination by Lauritzen and Bob Morris, Personnel Manager. Ercegovich then met with Cathy Smith, Human Resources Consultant, who offered him the choice of either retirement or recallable layoff status. Rather than elect recallable layoff status and face the possibility of losing his medical benefits if not recalled within six months, Ercegovich elected to retire so that he could receive his full pension and medical benefits. Although Goodyear claims that it searched for other positions within the company for which Ercegovich was qualified and that other positions were available to him in Washington, D.C. and Detroit, Ercegovich claims that Lauritzen and Morris advised him that no alternative positions were available to him, J.A. at 406-07 (Ercegovich Dep.), [**5] and that Smith never discussed with him the possibility of transferring [***4] to another position within the company. J.A. at 402 (Ercegovich Dep.). Goodyear disputes Ercegovich's version of events and claims Ercegovich informed Smith that he was unwilling to relocate from Akron. See Def.-Appellee's Br. at 14, 28-29.

As part of the continued reorganization of Human Resources Development, Goodyear eliminated two other positions in April of 1995 -- Manager of Human Resources and Personnel Development Specialist. J.A. at 378 (Attachment M -- Movement of Associates); 686, 697-98 (Lauritzen Dep.). After the elimination of his position as Manager of Human Resources, Paul Evert, age forty, received a transfer to another position within the Retail Sales Division. J.A. at 378 (Attachment M -- Movement of Associates). Karen Cohn, who was hired two weeks prior to the elimination of Ercegovich's position, J.A. at 70-71 (Ercegovich Dep.), was transferred to the position of Personnel Administrator after the elimination of her position as Personnel Development Specialist. J.A. at 378 (Attachment M -- Movement of Associates). Cohn was twenty-eight years old at the time. See *id.*

On December 27, 1994, Ercegovich [**6] filed a complaint with the Equal Employment Opportunity Commission

("EEOC"). On October 13, 1995, the EEOC issued to the Ercegovich a right to sue notice. Ercegovich then filed suit in federal court, raising claims under the ADEA, 29 U.S.C. § 623(a), and Ohio's age-discrimination laws. OHIO REV. CODE ANN. § 4101.17, *recodified as* § 4112.14. The district court granted Goodyear's motion for summary judgment on the ground that Ercegovich failed to establish a prima facie case of age discrimination. Alternatively, the district court held that even if Ercegovich established a prima facie case, he failed to show that Goodyear's proffered explanation for the elimination of his position was pretextual. This appeal followed.

The district court had jurisdiction over the plaintiff-appellant's federal claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over the plaintiff-appellant's state claims under 28 U.S.C. § 1367. We have appellate [***5] jurisdiction over the district court's final order pursuant to 28 U.S.C. § 1291.

II. FEDERAL AGE DISCRIMINATION CLAIMS

We review [**7] *de novo* the district court's grant of summary judgment. See *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 372 (6th Cir. 1997). Summary judgment is appropriate when there is no dispute as to a material question of fact and one party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56. We must view all facts and inferences drawn therefrom in the light most favorable to the nonmoving party. See *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). If after reviewing the record as a whole a rational factfinder could not find for the nonmoving party, summary judgment is appropriate since there is no genuine issue for trial. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

Ercegovich's complaint raises two related but separate claims of age discrimination. [**350] First, Ercegovich claims that the decision to eliminate his position was motivated not by economic reasons, but by age bias. J.A. at 8 (Compl. PP 9, 13). Second, Ercegovich claims that in contrast to his younger counterparts whose positions also were terminated [**8] as part of the reorganization, Goodyear did not offer him the opportunity to transfer to other positions in the company for which he was qualified, and its failure to do so was due to age bias. J.A. at 8 (Compl. PP 10,

13).¹ We hold that although the district court properly granted Goodyear's motion for summary judgment with respect to Ercegovich's first claim of age discrimination, the district court improperly granted [***6] summary judgment to Goodyear on Ercegovich's second claim.

A. Elimination of Ercegovich's Position

The ADEA prohibits employers from discriminating "against any individual [**9] with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a). Where the plaintiff fails to present direct evidence of discrimination, the courts analyze ADEA cases under the three-step *McDonnell Douglas* framework. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Initially, the plaintiff must present evidence sufficient to establish a prima facie case of age discrimination. See *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993). Once a plaintiff satisfies his or her prima facie burden, the burden of production shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. See *id.* If the employer meets this burden, the burden of production shifts back to the plaintiff to show that the employer's nondiscriminatory explanation is a mere pretext for intentional age discrimination. See *id.*

Where the employer eliminates an employee's position pursuant to a reduction in force or a reorganization, the employee establishes [**10] a prima facie case of age discrimination when he or she shows (1) that he or she was forty-years old or older at the time of his or her dismissal; (2) that he or she was qualified for the position; (3) that he or she was discharged; and (4) "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir.), *cert. denied*, 498 U.S. 878, 112 L. Ed. 2d 171, 111 S. Ct. 211 (1990). A plaintiff satisfies the fourth prong where he or she demonstrates that a "comparable non-protected person was treated better." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir. 1992) (quotation omitted). The district court concluded that although Ercegovich met the first three elements of the prima facie case, he failed to present evidence sufficient to satisfy the [***7] fourth element because he did not identify one or more similarly-situated employees outside the protected

class who received more favorable treatment, J.A. at 20 (Dist. Ct. Order at 6), a finding the parties vigorously dispute on [**11] appeal. Rather than address whether Ercegovich satisfied the fourth prong of the prima facie case, we will assume for purposes of this appeal regarding this claim that the plaintiff met his prima facie burden. We therefore focus our analysis on Goodyear's non-discriminatory explanation for the elimination of Ercegovich's position and the plaintiff's evidence of pretext.

Goodyear offered the following legitimate business reason for its decision to terminate Ercegovich:

Plaintiff's employment position was eliminated due to the fact that it was redundant with other positions at the Company and the Company's management wanted to distribute his quality assurance duties to the District Managers in the Retail Sales Division throughout the country so that they would become more involved in the Company's quality program.

[*351] J.A. at 37 (Def.-Appellee's Mem. in Supp. of Def.'s Mot. for Summ. J. at 1). In seeking to show that this explanation is pretextual, Ercegovich argues that Goodyear has been inconsistent in explaining its decision and has offered three "different" reasons for the elimination of Ercegovich's position: (1) economics, (2) restructuring, and (3) redundancy. [**12] The district court properly found no inconsistency among these assertions because they all "revolve around a single idea: Plaintiff's position could no longer be justified as being cost-effective." J.A. at 26 (Dist. Ct. Order at 12). The district court similarly rejected Ercegovich's argument that because he had not trained every district manager in the skills necessary for improving customer service, he remained valuable to the company, and thus that Goodyear's assertions to the contrary must be false. The district court properly rejected this argument, noting not only that district managers who had previously received quality assurance training could train the remaining district [***8] managers, but also that Goodyear's goal of broadening the responsibilities of its district managers and eliminating redundancy was served by redistributing Ercegovich's duties to district managers. J.A. at 26 (Dist. Ct. Order at 12); see also J.A. at 449 (Evert Dep. at 48 ("The redundancy issue was there as well as turning over the responsibility for quality to the field organization and that they take complete ownership of it.")). Accordingly, we

¹ In his complaint, Ercegovich also alleges that from April 1994 through October 1994, Goodyear created a hostile work environment with the intent to cause him to resign from his employment. J.A. at 8 (Compl. PP 8, 13). The district court never addressed this allegation. On appeal, Ercegovich's counsel explicitly waived his client's hostile work environment claim during oral arguments before this court.

affirm the district court's conclusion that [**13] no genuine issue of material fact exists with respect to whether Goodyear's proffered explanation for its decision to eliminate Ercegovich's position is a mere pretext for intentional age discrimination. Summary judgment was properly granted to Goodyear on this claim.

B. Opportunity to Transfer

Ercegovich claims that, unlike younger employees in Human Resources Development whose positions were eliminated, he was not offered the opportunity to transfer to other positions within the company. Several months after it eliminated Ercegovich's position, Goodyear eliminated two other positions in Human Resources Development -- Paul Evert's position as Manager of Human Resources and Karen Cohn's position as Personnel Development Specialist.

² Both Evert, age forty, and Cohn, age twenty-eight, were transferred to other positions. J.A. at 378 (Attachment M -- Movement of Associates).

[**14] 1. Prima Facie Case

Although an employer is under no obligation to transfer to another position in the company an employee whose position has been eliminated, the employer violates the ADEA when it transfers other displaced employees but does not place the plaintiff in a new position because of age discrimination. See [***9] *Hawley v. Dresser Indus., Inc.*, 958 F.2d 720, 723 (6th Cir. 1992); cf. *EEOC v. Chrysler Corp.*, 733 F.2d 1183 (6th Cir.) (holding that the district court did not err in issuing an injunction requiring the defendant-employer to offer forced retirees "layoff status" when younger employees also affected by the reduction in force were afforded "layoff status"), *reh'g denied*, 738 F.2d 167 (1984). In other words, a plaintiff denied an opportunity to transfer establishes a prima facie case of age discrimination when he or she produces evidence demonstrating that 1) he or she is a member of a protected class; 2) at the time of his or her termination he or she was qualified for other available positions within the corporation; 3) the employer did not offer such positions to the plaintiff; and 4) a similarly-situated [**15] employee who is not a member of the protected class was offered the opportunity to transfer to an available position, or other direct, indirect, or circumstantial evidence supporting an inference of discrimination.

Ercegovich claims that at the time of his termination, he was qualified for at least two available positions within the

Goodyear corporation, one in Detroit and one in Washington, D.C., and that Goodyear failed to offer him either position. Ercegovich also believes his previous experience qualified him for the personnel position later assumed by Cohn. [**352] J.A. at 233-39 (Ercegovich Aff. 1/28/97). Ercegovich contends that Goodyear's decision not to place him in one of the available positions while transferring Evert and Cohn supports an inference of age discrimination on the part of Goodyear. The district court, however, disagreed and held that Ercegovich did not meet his prima facie burden. Relying on our decision in *Mitchell v. Toledo Hosp.*, 964 F.2d 577 (6th Cir. 1992), the district court concluded that Ercegovich was not similarly-situated to either Evert or Cohn, neither of whom performed the same job functions as Ercegovich, and thus plaintiff [**16] failed to identify a similarly-situated employee outside the protected class receiving more favorable treatment. J.A. at 26-27 (Dist. Ct. Order at 12-13). We believe the district court misconstrued this circuit's precedent [***10] in applying an exceedingly narrow reading of the *Mitchell* decision.

We explained in *Mitchell* that when the plaintiff lacks direct evidence of discrimination, "the plaintiff must show that the 'comparables' are similarly-situated in all respects," absent other circumstantial or statistical evidence supporting an inference of discrimination. *Id.* at 583. Although this statement appears to invite a comparison between the employment status of the plaintiff and other employees in every single aspect of their employment, *Mitchell* has not been so narrowly construed. In *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994), this court explained that the plaintiff was simply "required to prove that all of the *relevant* aspects of his employment situation were 'nearly identical' to those of [the non-minority's] employment situation." *Id.* at 802 (emphasis added); see also *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) [**17] (citing *Mitchell* in support of the proposition that "to make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all *relevant* respects" (emphasis added)); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 310 U.S. App. D.C. 82, 43 F.3d 1507, 1514 (D.C. Cir. 1995) (quoting *Pierce*); *Byrd v. Ronayne*, 61 F.3d 1026, 1032 (1st Cir. 1995) ("A disparate treatment claimant bears the burden of proving that she was subjected to different treatment than persons similarly situated in all relevant aspects." (quotation omitted)). *Mitchell* itself only relied on those factors relevant to the factual context in which the *Mitchell* case arose -- an allegedly discriminatory disciplinary

² Ercegovich was terminated on October 28, 1994. Kim Lauritzen testified that Evert and Cohn's positions were eliminated in April of 1995 as part of the continuing reorganization of Human Resources Development. J.A. at 686, 697 (Lauritzen Dep.).

action resulting in the termination of the plaintiff's employment. We held that to be deemed "similarly-situated" in the disciplinary context, "the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating [**18] circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell*, 964 F.2d at 583. These factors generally are all relevant considerations in [***11] cases alleging differential disciplinary action. *Cf. Pierce*, 40 F.3d at 802 (explaining that the distinction in supervisory status between plaintiff and non-minority employee also accused of sexual harassment was relevant because company's liability under Title VII for sexual harassment could depend on employee's status). Courts should not assume, however, that the specific factors discussed in *Mitchell* are relevant factors in cases arising under different circumstances, but should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee. The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated;" rather, as this court has held in *Pierce*, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in [**19] "all of the relevant aspects." *Pierce*, 40 F.3d at 802 (emphasis added).³

[*353] A prima facie standard that requires the plaintiff to demonstrate that he or she was similarly-situated in every aspect to an employee outside the protected class receiving more favorable treatment removes [**20] from the protective reach of the anti-discrimination laws employees occupying "unique" positions, save in those rare cases where the plaintiff produces direct evidence of discrimination. As the plaintiff-appellant points out in his reply brief, if the non-protected employee to whom the plaintiff compares himself or herself must be identically situated to the plaintiff in every single [***12] aspect of their employment, a plaintiff whose job responsibilities are unique to his or her position will *never* successfully establish a prima facie case (absent direct evidence of discrimination). Pl.-Appellant's Reply Br. at 4. Thus, under the district court's narrow reading of *Mitchell*, an employer would be free to discriminate against those employees occupying "unique"

positions. This circuit has never endorsed such a narrow construction of *Mitchell*. Rather, as explained above and as held previously by this court in *Pierce*, we simply require that the plaintiff demonstrate that he or she is similarly-situated to the non-protected employee in all *relevant* respects. A contrary approach would undermine the remedial purpose of the anti-discrimination statutes.

The district [**21] court concluded that the individuals with whom Ercegovich sought to compare his treatment must perform the same job activities as Ercegovich. J.A. at 20 (Dist. Ct. Order at 6). Because none of the individuals with whom Ercegovich sought to compare himself (i.e., Lauritzen, Evert, and Cohn) carried out the same job functions as the plaintiff, the district court concluded that Ercegovich failed to establish a prima facie case. J.A. at 20, 26-27 (Dist. Ct. Order at 6, 12-13). The district court did not address the relevancy of these factors to the plaintiff's claim that Goodyear denied him the opportunity to transfer to open positions within the company on the basis of age. We believe that when an employer makes selective offers of transfer following a reduction in force or a reorganization, differences in the job activities previously performed by transferred and non-transferred employees do not automatically constitute a meaningful distinction that explains the employer's differential treatment of the two employees. Common sense suggests that when an employer harboring age-discriminatory animus eliminates several employees' positions, its decision to transfer its younger workers to [**22] new positions while denying its older workers the same opportunity irrespective of past differences in their particular job functions may reflect proscribed age bias. Because the positions previously held by Ercegovich, Evert, and Cohn were all related human resources positions that [***13] were all eliminated pursuant to a general reorganization of the department of Human Resources Development at Goodyear's Akron location, we conclude that Ercegovich was sufficiently similarly-situated to Evert and Cohn to satisfy the fourth component of Ercegovich's prima facie case. *Cf. Hawley*, 958 F.2d at 723 (concluding that where the employer failed to transfer the plaintiff, the 62-year old vice president of planning for a corporate division, but transferred his assistant and a planner in another division following a corporate reorganization, a jury could conclude that the employer was motivated by age bias). We therefore hold that Ercegovich presented sufficient

³ This court has previously followed the *Pierce* decision and focused on relevant aspects of the employment situation in a number of unpublished opinions. *See, e.g., Heideman v. Airborne Freight Corp.*, 132 F.3d 33 (Table), 1997 WL 745502, at *3 (6th Cir. 1997); *Jones v. Ciba-Geigy, Inc.*, 124 F.3d 198 (Table), 1997 WL 595083, at *5 (6th Cir. 1997); *Gore v. Runyon*, 113 F.3d 1234 (Table), 1997 WL 225660, at *1 (6th Cir. 1997); *Boggs v. Kentucky*, 101 F.3d 702 (Table), 1996 WL 673492, at *5 (6th Cir. 1996); *Mitchell v. Georgia-Pacific Corp.*, 91 F.3d 144 (Table), 1996 WL 397427, at *5-6 (6th Cir. 1996).

evidence to support a prima facie showing of age discrimination.

2. Defendants' Proffered Reason and Plaintiff's Pretext Evidence

Rather than offer a legitimate non-discriminatory reason for the differential [**23] treatment between Ercegovich and his younger colleagues, Goodyear in effect denies a differential treatment. In other words, its "proffered reason" is that it did in fact offer Ercegovich the opportunity to transfer to other positions within the corporation. According to Goodyear, its agents sought other positions for Ercegovich and identified open positions in Washington, D.C. and Detroit, [*354] but the plaintiff was unwilling to relocate from Akron. *See* Def.-Appellee's Br. at 29.

Once Goodyear articulated a non-discriminatory "reason" for not reassigning Ercegovich to another position, the plaintiff-appellant bore the burden to prove by a preponderance of the evidence that the proffered explanation was a pretext for intentional age discrimination. *See Barnes*, 896 F.2d at 1464. We believe a reasonable jury viewing the evidence as a whole could believe Ercegovich's version of events, which is that he was not offered the opportunity to transfer because of age discrimination. *See* J.A. at 402, 406-07 (Ercegovich Dep.). In her witness statement to the EEOC, Cathy Smith, a human resource consultant at Goodyear, stated that at her October 28, 1994 meeting [**24] with Ercegovich, she informed him about the available positions in Washington, [***14] D.C. and Detroit. J.A. at 989. Contradicting Smith's EEOC affidavit, Bob Morris, Personnel Manager, stated that when he spoke to Smith the day of or the day after Smith's meeting with Ercegovich, Smith told Morris that she was unaware of any available positions for which the plaintiff-appellant was qualified. J.A. at 717-18 (Morris Dep.). Goodyear also submitted to the EEOC a memo written by Fred Cooper, dated February 15, 1995, stating that on December 2, 1994, Ercegovich returned Cooper's November 30th call, at which time Cooper informed Ercegovich of an opening for a Personnel Counselor. J.A. at 375. Ercegovich's long distance phone records, however, show that he did not call Akron on December 2nd. ⁴ J.A. at 339-42 (Pl.'s Ex. 8). Moreover, a reasonable jury could discount Cooper's memo since it was written over two months after the alleged phone conversation between Cooper and Ercegovich took place. Ultimately, whether a jury chooses to believe the plaintiff-appellant or the defendant-appellee's version of events depends on the

credibility of each party's witnesses, and credibility [**25] determinations are for the jury to decide. *See Wells v. New Cherokee Corp.*, 58 F.3d 233, 237 (6th Cir. 1995). Viewing the record in the light most favorable to Ercegovich, we believe that a genuine issue for trial exists as to whether Goodyear afforded Ercegovich the same opportunity to transfer to available positions within the company that it offered younger employees similarly affected by the reorganization of the Human Resources Development group.

In further support of his age-discrimination claim, Ercegovich relies on numerous age-biased statements allegedly made by several individuals occupying high positions in Goodyear's Retail Sales Division, including the vice president overseeing the entire division, Ed Gallagher. According to Ercegovich, on or about December of 1993, Gallagher remarked at a retail staff meeting shortly [**26] after his promotion to vice president that "this company is being run [***15] by white haired old men waiting to retire, and this has to change." J.A. at 411 (Ercegovich Dep. at 57). Ercegovich also claims that at or about the same time one of the personnel managers told him that Gallagher "had directed that he did not want any employee over 50 years old on his staff." J.A. at 236 (Ercegovich Aff.). The district court concluded that even assuming the truth of Ercegovich's allegations, neither of these discriminatory remarks was relevant because solely Evert decided to eliminate Ercegovich's position. J.A. at 23 (Dist. Ct. Op. at 9). We disagree.

In assessing the relevancy of a discriminatory remark, we look first at the identity of the speaker. An isolated discriminatory remark made by one with no managerial authority over the challenged personnel decisions is not considered indicative of age discrimination. *See McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1161 (6th Cir. 1990) ("Statement by an intermediate level management official is not indicative of discrimination when the ultimate decision to discharge is made by an upper level official."). This court later [**27] explained, however, that the *McDonald* rule was never intended to apply formalistically, and that remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision [*355] to terminate the plaintiff, were relevant. *See Wells*, 58 F.3d at 237-38; *see also Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 347-48 (1st Cir. 1998) (statement by head of human resources who "participated closely" in plaintiff's termination was admissible to show a

⁴ Ercegovich alleges that because Akron is a toll call from his home in Strongsville, any call to Goodyear in Akron would have appeared on his phone bill.

discriminatory atmosphere); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) (age-related statements of corporate vice president who may have "played a role" in the decision to terminate the plaintiff were relevant and could "properly be used to build a circumstantial case of discrimination"). Similarly, the discriminatory remarks of those who may have influenced the decision not to reassign the plaintiff to other positions in the company may be relevant when the plaintiff challenges the motive behind that decision.

[***16] We must therefore determine [**28] whether a reasonable jury could conclude that Gallagher was in a position to influence the alleged decision to deny Ercegovich the possibility of transferring to available positions within the company. When asked whether Gallagher reviewed the decision to eliminate Ercegovich's position, Lauritzen stated that Gallagher "was involved in some parts of the discussion." J.A. at 700 (Lauritzen Dep. at 59). Moreover, we note that Gallagher, as head of the entire Retail Sales Division, was in a position to shape the attitudes, policies, and decisions of the divisions's managers, including Evert and Lauritzen. See *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 632 (7th Cir. 1996) (biased remarks corroborate plaintiff's discrimination claim where remarks were made by "top policymakers in the company . . . who were ultimately responsible for the company's employment practices"); *Tuck v. Henkel Corp.*, 973 F.2d 371, 376-77 (4th Cir. 1992) (biased statements of head of corporation's R & D Group were probative evidence of age discrimination against plaintiff where speaker may have influenced actual decisionmakers), *cert. denied*, 507 U.S. 918, 122 L. Ed. 2d 671, 113 S. Ct. 1276 (1993). [**29] "When a major company executive speaks, 'everybody listens' in the corporate hierarchy." *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 546 (3d Cir.) (quoting *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989)), *cert. denied*, 510 U.S. 826 (1993). Therefore, we conclude that a genuine issue of fact exists as to whether Gallagher was involved in the employment decisions adverse to Ercegovich, and we must assume for purposes of summary judgment that Gallagher did in fact play a meaningful role in those decisions. Gallagher's statements thus cannot be excluded under the *McDonald* rule, and the district court erred in concluding otherwise.

Our consideration of a speaker's role in the employment decision adversely affecting the plaintiff does not end our inquiry. We must also examine the substance of the discriminatory remarks in determining their relevancy to a plaintiff's claim that an impermissible factor motivated the adverse employment action taken against him or her.

"Isolated [***17] and ambiguous comments 'are too abstract, in addition to being irrelevant and prejudicial, to support a finding [**30] of age discrimination.'" *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025 (6th Cir.) (quoting *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989)), *cert. denied*, 510 U.S. 861 (1993). Goodyear argues that discriminatory remarks are irrelevant unless the plaintiff demonstrates a nexus between the discriminatory remarks and the adverse employment action. See Def.-Appellee's Br. at 19-21. Although we believe a direct nexus between the allegedly discriminatory remarks and the challenged employment action affects the remark's probative value, the absence of a direct nexus does not necessarily render a discriminatory remark irrelevant. See *La Pointe v. United Autoworkers Local 600*, 8 F.3d 376, 380 (6th Cir. 1993) (supervisor's ageist remarks about "oldtimers" constitute direct evidence of age discrimination even though the comments were not specifically about or directed to the plaintiff). In addition, neither of Gallagher's alleged remarks ("this company is being run by white haired old men waiting to retire, and this has to change" and that he does "not want any employee over 50 years old on his staff") [**31] can be fairly characterized as "ambiguous" or "abstract." Both remarks on their face strongly suggest that the speaker harbors a bias against older workers. Moreover, [*356] when assessing the relevancy of an allegedly biased remark where the plaintiff presents evidence of multiple discriminatory remarks or other evidence of pretext, we do not view each discriminatory remark in isolation, but are mindful that the remarks buttress one another as well as any other pretextual evidence supporting an inference of discriminatory animus. Cf. *Wells*, 58 F.3d at 237 (holding manager's discriminatory remark indicative of age bias where buttressed by other evidence of discrimination and thus remark was not an isolated comment). Viewing Gallagher's remarks in the light most favorable to Ercegovich and against a backdrop of other evidence of pretext, we conclude that Gallagher's remarks support the inference that age-discriminatory animus entered in Goodyear's alleged decision to deny Ercegovich the opportunity to transfer to available positions within the company.

[***18] In addition to Gallagher, the plaintiff alleges that other members of the Retail Sales Division's [**32] senior management made age-biased remarks. According to Ercegovich, on August 25, 1994, during the 1995 Budget/Business Plan meeting, Gordon Hewitt, Director of Finance for the Retail Sales Division, remarked that "there were some people losing their jobs and they will -- but they will be replaced by younger college grads at less money." J.A. at 413 (Ercegovich Dep. at 66). Finally, Ercegovich claims that George Campbell, former Director of Human Resources,

informed his personnel managers during a meeting in August of 1993 that "there will be no more promotions of anyone -- to different departments -- for anyone over age 51." J.A. at 72 (Ercegovich Dep. at 70). See also J.A. at 236 (Ercegovich Aff. P 40) (stating that "Campbell had directed that no one over 51 years of age would be cross-trained for development due to age."). Both Hewitt and Campbell reported directly to Gallagher. J.A. at 504 (Pl.'s Ex. 3 (Organizational chart for Retail Sales Division)).

The district court concluded that Hewitt and Campbell's statements were irrelevant to the plaintiff-appellant's claims because neither speaker participated in the decision to eliminate Ercegovich's position. J.A. at 23 (Dist. [**33] Ct. Order at 9). Although discriminatory statements by a nondecisionmaker, standing alone, generally do not support an inference of discrimination, the comments of a nondecisionmaker are not categorically excludable. See *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 521 (3d Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1516 (1998). Circumstantial evidence establishing the existence of a discriminatory atmosphere at the defendant's workplace in turn may serve as circumstantial evidence of individualized discrimination directed at the plaintiff. See *Parker v. Secretary, U.S. Dep't of Housing and Urban Dev.*, 282 U.S. App. D.C. 17, 891 F.2d 316, 322 (D.C. Cir. 1989). "While evidence of a discriminatory atmosphere may not be conclusive proof of discrimination against an individual plaintiff, such evidence does tend to add 'color' to the employer's decisionmaking processes and to the influences behind the actions taken with [***19] respect to the individual plaintiff." *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987); cf. *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 610 (8th Cir. 1997) [**34] ("Such comments are surely the kind of fact which could cause a reasonable trier of a fact to raise an eyebrow, thus providing additional threads of evidence that are relevant to the jury." (quotations omitted)).

Discriminatory statements may reflect a cumulative managerial attitude among the defendant-employer's managers that has influenced the decisionmaking process for a considerable time. Thus, management's consideration of an impermissible factor in one context may support the inference that the impermissible factor entered into the decisionmaking process in another context. See *Conway*, 825 F.2d at 597-98. We therefore believe that "evidence of

a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment." *Conway*, 825 F.2d at 597. This is especially true when the discriminatory statement is "not an off-hand comment by a low-level supervisor" but a remark by a senior official evidencing managerial policy. [**357] *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 334 (3d Cir. 1995). [**35]

We do not mean to imply that any ageist comment by a corporate executive is relevant as evidence of a discriminatory corporate culture. Rather, the courts must carefully evaluate factors affecting the statement's probative value, such as "the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action," *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 133 (3d Cir. 1997), cert. denied, ___ U.S. ___, 140 L. Ed. 2d 115, 118 S. Ct. 1052 (1998), as well as whether the statement buttresses other evidence of pretext. Cf. *Wells*, 58 F.3d at 237. Both Hewitt and Campbell occupied senior positions in the Retail Sales Division. Their alleged statements, both of which occurred in the context of meetings attended by individuals in higher [***20] management, evidence a managerial policy hostile to the Division's older workers. Hewitt's alleged comment occurred only two months prior to Ercegovich's termination, while Campbell's alleged remark was made fourteen months prior to the elimination of the plaintiff's [**36] position. Finally, we note that the alleged hostility on the part of the most senior managers of the Retail Sales Division may stem from the top, as evidenced by the allegedly discriminatory remarks of Gallagher, the head of the Division. Accordingly, we conclude that the alleged ageist remarks of Hewitt and Campbell are not too attenuated to support a finding that age bias motivated Goodyear's allegedly differential treatment of Ercegovich, as compared to Evert and Cohn. We therefore hold that the statements of both Hewitt and Campbell constitute relevant circumstantial evidence for the jury's consideration, and that the district court erred in concluding that their statements were of no evidentiary value. [***21] 5

[**37] We hold that Ercegovich established a prima facie case of age discrimination regarding his failure-to-transfer

⁵ In addition to the alleged statements by Gallagher, Hewitt, and Campbell, the plaintiff-appellant testified that when he told Paul Evert about Gallagher's discriminatory remarks, Evert simply replied "He's the boss." The district court concluded that Evert's alleged statement was too ambiguous and abstract to support an inference of age discrimination. J.A. at 23 (Dist. Ct. Order at 9). We agree. Evert's alleged response reveals little about the speaker's attitude toward older employees.

claim. We also hold that he produced sufficient evidence contradicting Goodyear's proffered legitimate reason to establish that there are genuine issues of fact concerning whether Ercegovich was denied transfer opportunities because of age discrimination. Therefore summary judgment on the refusal-to-transfer claim was inappropriate.

III. STATE CLAIMS

In addition to his discrimination claims under the ADEA, Ercegovich also brings suit under Ohio's age-discrimination laws. OHIO REV. CODE ANN. § 4101.17, *recodified as* § 4112.14 (Banks-Baldwin West 1994 & Supp. 1998). Under Ohio law, the elements and burden of proof in a state age-discrimination claim parallel the ADEA analysis. *See McLaurin v. Fischer*, 768 F.2d 98, 105 (6th Cir. 1985) (citing *Barker v. Scovill, Inc.*, 6 Ohio St. 3d 146, 451 N.E.2d 807, 808 (Ohio 1983)). We therefore apply the foregoing [*358] analysis to Ercegovich's state claims, and conclude that although the district court properly determined that the plaintiff failed to show that Goodyear's proffered [*38] reason for eliminating his position was a pretext for age discrimination, the district court erred in dismissing the

plaintiff's state claim that Goodyear applied a discriminatory transfer policy.

CONCLUSION

Because Ercegovich failed to produce sufficient evidence creating a genuine issue of fact as to whether Goodyear's explanation for its decision to eliminate his position is pretextual, we AFFIRM the district court's granting of summary judgment to the Goodyear on this claim. With respect to Ercegovich's allegation that Goodyear discriminated against him when it transferred younger employees affected by the reorganization but allegedly did not [***22] afford him the same opportunity, the district court erred in finding that Ercegovich failed to meet his prima facie burden. Because we hold that Ercegovich presented sufficient evidence from which a reasonable jury could infer that Goodyear chose not to reassign Ercegovich because of his age, we REVERSE the district court's granting of summary judgment to Goodyear on this claim. We REMAND for further proceedings consistent with this opinion.

In addition to introducing into evidence alleged discriminatory remarks by members of the Retail Sales Division's senior management, Ercegovich also offered the opinions of two Goodyear employees indicating that Goodyear discriminated against Ercegovich on the basis of age. According to Ercegovich, Ken Gable, a personnel manager, informed him that the probable reason for his poorer 1994 performance review relative to his earlier job appraisals was that Evert was setting him up. J.A. at 268 (Pl.'s Ex. 7). Ercegovich also testified that after his meeting with Morris and Lauritzen, at which time he was informed of his termination, Morris informed him that he would be within his rights to file charges against Goodyear. J.A. at 335 (Pl.'s Ex. 7) Ercegovich additionally relies on an anonymous letter received by Anita Fullum, Manager of EEO Practices, referring to Gallagher's statement that he did not want anyone working for him who was over fifty. J.A. at 656 (Fullum Dep.). The district court did not evaluate the admissibility or the evidentiary value of these statements since the district judge refused to consider the statements on the ground that only Evert decided to eliminate Ercegovich's position. On remand, the district court should reconsider the evidentiary value of these statements in light of our opinion and determine their admissibility if relied upon in further proceedings.

Thomas v. Columbia Sussex Corp.

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

January 6, 2011, Rendered

No. 10AP-93

Reporter

2011-Ohio-17; 2011 Ohio App. LEXIS 9; 2011 WL 96277

Charlotte L. Thomas, Plaintiff-Appellee, v. Columbia Sussex Corp., dba Courtyard by Marriott et al., Defendants-Appellants.

Subsequent History: Discretionary appeal not allowed by Thomas v. Columbia Sussex Corp., 128 Ohio St. 3d 1484, 2011 Ohio 2055, 946 N.E.2d 241, 2011 Ohio LEXIS 1168 (Ohio, May 4, 2011)

Prior History: **[**1]** APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 08CVH-01-233).

Disposition: Judgment affirmed.

Counsel: Law Offices of Russell A. Kelm, Russell A. Kelm and Joanne Detrick, for appellee.

Ogletree Deakins Nash Smoak & Stewart P.C., Thomas H. Barnard and Sara E. Hutchins, for appellants.

Judges: TYACK, J. BRYANT, J., dissents. SADLER, J., concurs separately.

Opinion by: TYACK

Opinion

(REGULAR CALENDAR)

DECISION

TYACK, J.

[*P1] Defendant-appellant, Columbia Sussex Corporation ("Columbia Sussex"), appeals from the final judgment of the Franklin County Court of Common Pleas and its order denying its motion for judgment notwithstanding the verdict or motion for new trial. For the reasons that follow, we affirm the judgment of the trial court.

[*P2] This is an age discrimination case brought by plaintiff-appellee, Charlotte L. Thomas ("Thomas"), under Ohio Revised Code Chapter 4112 against Columbia Sussex,

Mike Baker, and Stan Clayton. Thomas alleged that she had been terminated in 2007 from her position as sales director for the Courtyard by Marriott Hotel near Hilliard, Ohio, because of her age, 67, and that she was replaced by a younger, less experienced employee aged 42.

[*P3] According to the evidence admitted at trial, Thomas had been the **[**2]** director of sales at the Holiday Inn Columbus since 2004. As a result of her successful performance, she received annual bonuses during her tenure at the hotel.

[*P4] In the year ending in 2006, the hotel was completely renovated to become a Courtyard by Marriott. Thomas remained in her job throughout that process. After the hotel became a Courtyard by Marriott, Thomas continued in her position and successfully increased sales. As part of her job, she helped where needed. Among other duties, she filled in for the person in charge of banquets and catering, Diana Gutknecht, when that person was absent. Thomas was unaware of anyone performing her duties when she was not available.

[*P5] In 2007, Thomas' immediate supervisor, Mike Baker, was under a great deal of pressure from Stan Clayton, vice president of operations, over the operation of the hotel. Clayton informed Baker that he needed to cut costs to bring the Columbus Courtyard by Marriott in line with the Harrisburg, PA Courtyard by Marriott. In Harrisburg, one person handled the duties of both the director of sales and the banquet and catering manager.

[*P6] In August 2007, Baker had a conversation with Clayton about the sales and catering aspect **[**3]** of the hotel. Clayton asked if he had met Thomas before, and Baker said, "I think I told him [he had] at a couple of the Christmas parties. 'Cause he hadn't been at the property for a while." (Tr. 632.) Clayton and Baker talked some more, and Clayton asked, "is she that older woman?" (Tr. 633.) Baker said that "yes, she was an older woman." Id. Clayton did not ask any questions about Gutknecht other than her salary. Id.

[*P7] Prior to Thomas' termination, Baker pulled employee Patti Bible aside for a private conversation outside of the



building. Bible was the employee Baker had designated to be a witness at Thomas' termination. According to Bible, Baker told Bible "they had told him that he wasn't going to have to let Charlotte go, but now they're telling her -- him that he had to let her go," and "[w]hat I remember him telling me was that he had to let the old one go -- the oldest one go." (Tr. 384.)

[*P8] When Baker told Thomas that he had to let her go, Thomas offered to take a pay cut. Bible, who was present as a witness, testified that Baker said "it's not that, that I gotta let you go. It's you they want gone." (Tr. 388.)

[*P9] Thomas' job was then given to Gutknecht, age 42.

[*P10] The case was tried [**4] before a jury in August 2009 and resulted in jury verdicts in favor of Thomas and against Columbia Sussex and Clayton. The jury found that Baker,¹ who was Thomas' direct supervisor, was not liable for age discrimination. Thomas was awarded compensatory damages of \$ 140,164 and punitive damages of \$ 280,328 (reduced by the trial court from the jury award of \$ 300,000 in recognition of R.C. 2315.21). The trial court awarded attorney fees in the amount of \$ 140,164 on December 31, 2009.

[*P11] Columbia Sussex filed a motion for judgment notwithstanding the verdict or a new trial. The trial court appeared to deny both motions, and this appeal followed. On appeal, Columbia Sussex assigns the following as error:

1. The Trial Court committed reversible error when it admitted Patricia Bible's hearsay testimony that "they had told him that he had to get rid of somebody in * * * the sales office" and "what I remember [Baker] telling me was that he had to let the old one go -- the oldest one go."

2. The Trial Court erred in denying Appellants' Motion for Judgment Notwithstanding the Verdict after it refused to instruct the jury [**5] as to the proper legal elements in an age discrimination case, which ultimately allowed for the jury's verdict for Appellant on her age discrimination claim without support by sufficient evidence.

3. The Trial Court erred in denying Appellants' Motion for New Trial, after it refused to instruct the jury as to the proper legal elements in an age discrimination case, which caused an irregularity in the proceedings.

4. The Trial Court erred in denying Appellants' Motion for Judgment Notwithstanding the Verdict or For New Trial, because the jury's award of front pay to Appellant was not supported by sufficient evidence.

5. The Trial Court erred in denying Appellants' Motion for Judgment Notwithstanding the Verdict or For New Trial, because the jury's award of punitive damages to Appellant was not supported by sufficient evidence.

[*P12] As a threshold matter, the record is devoid of an order denying the motion for judgment notwithstanding the verdict and for a new trial. The motion was fully briefed, and the parties proceeded as if the motion had been denied. The only copy of the decision this court was able to view was an unsigned, and undated decision purportedly issued by the magistrate who presided [**6] over the trial. This was found attached to Columbia Sussex's supplemental appendix, but cannot serve as a substitute for a journalized entry on the court's docket.

[*P13] However, a nunc pro tunc order entered by the trial court on July 12, 2010, incorporates the post trial motions into the final judgment entry. Any motions still pending at the time of appeal are deemed overruled, and therefore we shall address the merits of the appeal. *Maust v. Palmer* (1994), 94 Ohio App.3d 764, 769, 641 N.E.2d 818; *Savage v. Cody-Zeigler, Inc.*, 4th Dist. No. 06CA5, 2006 Ohio 2760, P25.

[*P14] Civ.R. 50(A)(4) sets forth the standard for granting a motion for a directed verdict, and the same standard applies to a motion for judgment notwithstanding the verdict:

When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

[*P15] As for a new trial, Civ.R. 59(A) [**7] provides that:

A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

¹ Mike Baker represented himself at trial and is not a party to this appeal.

(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law;

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

(9) **[**8]** Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

[*P16] At the appellate level, when the basis of the motion involves a question of law, the de novo standard of review applies, and when the basis of the motion involves the determination of an issue left to the trial court's discretion, the abuse of discretion standard applies. *Dragway 42, L.L.C. v. Kokosing Construction Co. Inc.*, 9th Dist. No. 09CA0073, 2010 Ohio 4657, P32. Grant or denial of motion for new trial is committed to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. Civ.R. 59(A).

[*P17] In its first assignment of error, Columbia Sussex argues that direct evidence of age discrimination should have been excluded based on hearsay within hearsay or "double hearsay." Evid.R. 805 provides that: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Thomas argues that Baker's statement concerning "the old one" to Bible is not hearsay, as it is an admission of a party opponent. Evid.R. 801(D)(2)(d) **[**9]** provides in pertinent part:

(D) Statements which are not hearsay. A statement is not hearsay if:

(2) Admission by a party-opponent. The statement is offered against a party and is * * * (d) a statement by the party's agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship * * *.

[*P18] The trial court's discretion to admit or exclude evidence is broad "so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056. An appellate court reviewing the trial court's admission of evidence must limit its review to whether the lower court abused its discretion. *Id.* The term "abuse of discretion" connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140.

[*P19] We are not persuaded by Columbia Sussex's argument that the failure to identify the speaker was fatal to the admissibility of the statement. Baker's statement to Bible is not hearsay pursuant to Evid.R. 801(D)(2)(d) because he was an agent or employee of Columbia Sussex, and his statement concerned **[**10]** a matter within the scope of his agency and was made during the course of his relationship with the company. See *Holda v. Skilken Properties Co.* (Jan. 23, 1991), 5th Dist. No. CA-2768, 1991 Ohio App. LEXIS 517.

[*P20] Nevertheless, the original declarant who told Baker that he had to "let the old one go" is not specifically identified in the statement. A fair reading of the testimony allows for the reasonable inference that the statement is attributable to Clayton, a party opponent. See *Gallimore v. Children's Hosp. Med. Ctr.* (Feb. 26, 1992), 1st Dist. No. C-890808 (attribution by inference permissible when identity of declarant is otherwise supportable by reasonable inference).

[*P21] Baker, a reluctant witness, thought that he remembered telling Bible that Clayton told him to get rid of Thomas. He also admitted that he told Bible that he "was under advisement that it would be Charlotte [Thomas]" that would be terminated. (Tr. 673.) He knew Bible would realize that it was Clayton who directed him. (Tr. 657.) Baker further testified that Clayton had ordered him to get rid of one of the positions, and if Clayton had to come down to the hotel to do it, Baker would not like the result.

[*P22] We find that Baker's testimony sufficiently [**11] identifies Clayton as the original declarant. Clayton's statement is also an admission by a party opponent as defined in the Ohio Rules of Evidence as non-hearsay. Since both Baker and Clayton's statements fall within Evid.R. 801(D) as statements that are not hearsay, Columbia Sussex's argument with respect to Evid.R. 805 fails.

[*P23] The first assignment of error is overruled.

[*P24] In its second and third assignments of error, Columbia Sussex argues that the trial court failed to instruct the jury that a plaintiff must prove by a preponderance of the evidence that she was terminated because of her age. Columbia Sussex asked for an instruction that contained the language that age was the "but-for" cause for her termination.

[*P25] Our standard of review when it is claimed that improper jury instructions were given is to consider the jury charge as a whole, and determine whether the charge misled the jury in a manner affecting the complaining party's substantial rights. *Kokitka v. Ford Motor Company* (1995), 73 Ohio St.3d 89, 93, 1995 Ohio 84, 652 N.E.2d 671.

[*P26] Columbia Sussex relies upon *Gross v. FBL Financial Servs., Inc.* (2009), 129 S.Ct. 2343, 174 L. Ed. 2d 119, in support of its position that the court applied the wrong standard of proof for an age [**12] discrimination case. *Gross* was a case brought under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq. The Supreme Court of Ohio has stated that the federal case law interpreting the ADEA is instructive in interpreting Ohio's state statutes against age discrimination. *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 179, 2004 Ohio 723, P15, 803 N.E.2d 781.

[*P27] The issue before the court in *Gross* was whether a mixed-motive jury instruction is ever appropriate in an age discrimination case. In a mixed motive case the jury must decide if a plaintiff is entitled to damages if the treatment of the plaintiff was motivated by both a prohibited reason and a lawful reason. The burden shifts to the defendant to prove by a preponderance of evidence that it would have treated the plaintiff the same way even if the prohibited reason had played no role in the decision-making process. The court in *Gross* held that the burden of persuasion never shifts to the defendant in an alleged mixed motive case brought under the ADEA. *Gross* at 2352.

[*P28] This case, however, was not a mixed motive case. It was a straightforward discrimination case alleging disparate treatment in that Thomas contended [**13] that she was terminated because she was "the old one," and that

the reasons proffered by Columbia Sussex were pretexts. It is clear from the evidence and the testimony that Thomas was contending that, but for her age, she would not have been fired. Or put another way, she claimed that age actually played a role in Columbia Sussex's decision-making process and had a determinative influence on the outcome.

[*P29] The ADEA states that it shall be unlawful for an employer to discharge an individual "because of" such individual's age. Id. at 2350, quoting 29 U.S.C. § 623(a)(1). Ohio's statute also uses "because of" language. R.C. 4112.02(A). In *Gross*, the court did not depart from the standard of proof for age discrimination claims. Instead, it quoted with approval *Hazen Paper Co. v. Biggins* (1993), 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L. Ed. 2d 338, for the well-established standard that the plaintiff's age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." (Emphasis omitted.) Id.; See *Gross* at 2350. The court indicated that the phrase "because of" or "by reason of" requires at least a showing of "but for" causation. Id. The court in [**14] *Gross* further explained what "but for" cause means, observing that "but for" causation encompasses the terms "based on," "by reason of" and "because of." Id. at 2350. The court then indicated that an act is not regarded as a cause if the event would have occurred without it. Id. *Gross* then, stands for the proposition that "but for" causation is required in a disparate treatment case under the ADEA, and that standard is equivalent to the well-established standard articulated in *Hazen Paper*.

[*P30] Assuming that *Gross* applies to this case, Columbia Sussex argues that the trial court should have given the following jury instruction that was requested by counsel:

DEFENDANTS' PROPOSED JURY
INSTRUCTION NO. 11

Plaintiff may prove her age discrimination case by direct or circumstantial evidence, or both. No matter how Plaintiff chooses to prove her case, Plaintiff must prove by a greater weight of the evidence that age was the "but-for" cause for her termination i.e., that Defendants let Plaintiff go because of her age."

(R. 99 at 12.)

[*P31] Declining to give the requested instructions, the trial court instructed the jury in pertinent part as follows:

Now, plaintiff brings this action under Ohio civil rights [**15] laws that forbid discrimination in

employment because of age. * * * Under Ohio law, it is unlawful for an employer to discriminate against any employee because of that employee's age, when the employee is in the protected group of being over age 40.

Plaintiff claims that defendants discriminated against her by terminating her employment because of her age.

* * *

The employer claims that it acted for non-discriminatory reasons. In determining whether defendants discriminated against plaintiff on the basis of age, the question before you is not whether plaintiff was treated fairly or reasonably, but whether unlawful discrimination occurred. * * *

* * *

In order to prevail on her claims, plaintiff must prove by a greater weight of the evidence, in other words, a preponderance of the evidence, that the plaintiff's age was a determining factor for the unemployment - - for the employment action taken against her.

Now, a determining factor means that plaintiff's age made a difference in defendants' employment decisions regarding the terms of plaintiff's employment. There may be more than one reason for defendants' decisions. Plaintiff is not required to prove that her age was the only reason.

It [*16] is not a determining factor if the employee would have been treated the same and/or terminated regardless of her age. In other words, if plaintiff had been let go from her job without any consideration of her age, then a finding in favor of defendants should be made.

(Tr. 1155-57.)

[*P32] Taken as a whole, the instructions accurately stated the law, and adequately instructed the jury. The instructions made clear that the burden to prove discrimination based on age belonged to Thomas. The instructions informed the jury that they had to find that Columbia Sussex discriminated against Thomas *because of her age* and *on the basis of age*. The term "a determining factor" does not alter the burden of proof set forth in *Hazen Paper* that the plaintiff's age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome". Also, as discussed above, the terms

"because of" and "on the basis of" are equivalent to "but for" causation under *Gross*. Therefore, the trial court was not required to use the exact phrase requested by Columbia Sussex when the *Gross* opinion clearly states that the terms used by the trial court are of equivalent value.

[*P33] Alternatively, [*17] Columbia Sussex asserts that there was no evidence that age factored into the decision to terminate Thomas. Columbia Sussex argues that it is entitled to a new trial pursuant to Civ.R. 59(A)(6) or judgment notwithstanding the verdict because the verdict was against the manifest weight of the evidence and contradicted its finding that Baker did not discriminate on the basis of age.

[*P34] We must not reverse a decision as being against the manifest weight of the evidence if some competent, credible evidence supports it. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus.

[*P35] Here, we have direct evidence of age discrimination in Bible's testimony that Baker said that "they had told him that he wasn't going to have to let Charlotte go, but now they're telling her -- him that he had to let her go," and "what I remember him telling me was that he had to let the old one go --- the oldest one go." (Tr. 384.)

[*P36] At the time of her termination, Thomas was 67 years old, and she was replaced by an employee more than 20 years younger. Thomas had more experience in the hotel and hospitality business, she had more management experience, and she had more tenure with Columbia Sussex than [*18] the younger employee. Thomas had handled reporting for the banquet and catering manager, Gutknecht, and in fact, was performing that duty on the very evening she was terminated.

[*P37] Later, on September 29, 2007, Rebecca Starrett, age 30, was hired and was moved to assist Gutknecht with sales. Starret sat at Gutknecht's old desk, and Gutknecht sat at Thomas' former desk.

[*P38] Columbia Sussex directs us to testimony that supports the theory of the case it argued to the jury, but the jury was not required to accept their witnesses' testimony or their version of events as credible. In an age discrimination action brought under Ohio law, it was within the jury's province not to believe Columbia Sussex's proffered reason for Thomas' termination and, accordingly, the jury could infer from all the facts and circumstances that the employer's termination action was discriminatory

[*P39] There was competent, credible evidence to support the jury's verdict.

[*P40] The second and third assignments of error are overruled.

[*P41] In its fourth and fifth assignments of error, Columbia Sussex attacks the damages awarded to Thomas. Specifically, the jury awarded Thomas \$ 35,000 in front pay as part of its award. Columbia Sussex [*P19] argues that amount was against the manifest weight of the evidence. After her termination, Thomas found a comparable job at the same salary. Therefore, Columbia Sussex argues that there could be no reasonable certainty that Thomas deserved an award of front pay to make her whole. Columbia Sussex further argues that the jury's award of front pay was for a bonus that she was not eligible for because she was not employed at the hotel at the end of the year 2007.

[*P42] The jury rejected Thomas' contract claim that she was entitled to a bonus. However, the award of front pay is consistent with a finding that, had she not been discriminated against on the basis of age, she would have been entitled to receive a bonus consistent with past years that was based on performance. Therefore, the jury's award of front pay was supported by sufficient evidence.

[*P43] Columbia Sussex also attacks the award of punitive damages on the grounds that Thomas failed to establish by clear and convincing evidence that it acted with a conscious disregard of her rights.

[*P44] Punitive damages may only be awarded upon a finding of actual malice. Actual malice is defined as "(1) that state of mind under which a person's conduct is [*P20] characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus. Malice may be inferred from conduct. *Detling v. Chockley* (1982), 70 Ohio St.2d 134, 436 N.E.2d 208, overruled on other grounds, *Cabe v. Lunich* (1994), 70 Ohio St.3d 598, 1994 Ohio 4, 640 N.E.2d 159. A conscious disregard of the right not to be subject to age discrimination is sufficient to allow the award of punitive damages. *Atkinson v. International Technegroup, Inc.* (1995), 106 Ohio App.3d 349, 362-63, 666 N.E.2d 257.

[*P45] Clayton's statement to get rid of the old one demonstrates such conscious disregard. There was also evidence of a lack of training or awareness of age discrimination issues at the managerial and corporate level. Human resources was not involved in the termination process. In fact, the company never took any steps to ensure there was no age discrimination going on with respect to Thomas. The employee handbook referenced the "Age

Discrimination Act" not the ADEA or Ohio laws. Baker either never received any training in age discrimination or failed to recall any such training.

[*P46] The jury also [*P21] heard testimony from which they could have logically inferred that Columbia Sussex put forth pretextual explanations for its conduct. Columbia Sussex gave Thomas substantial year-end bonuses while she worked there, but at trial, her former manager testified that her performance was poor. Columbia Sussex advanced the explanation that it was Thomas' higher salary that motivated the decision. However, when Thomas begged to keep her job and offered to take a pay cut, Baker informed her that it was she they wanted gone.

[*P47] Thomas presented sufficient evidence to warrant an award of punitive damages as she proved that Columbia Sussex terminated her employment with a conscious disregard for her rights.

[*P48] The fourth and fifth assignments of error are overruled.

[*P49] Based on the foregoing, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, J., dissents.

SADLER, J., concurs separately.

Concur by: SADLER

Concur

SADLER, J., concurring separately.

[*P56] While I agree with the ultimate result of this appeal, I write separate to clarify a number of points. First, I disagree with the position of the dissent that we lack jurisdiction to review this matter. Nor do I believe it is necessary [*P22] for us to consider whether the post-trial motion for judgment notwithstanding the verdict or, alternatively, for a new trial can or should be deemed to have been implicitly overruled. Although the trial court's nunc pro tunc judgment entry filed on July 12, 2010 did not specifically refer to the motion for judgment notwithstanding the verdict or, alternatively, for a new trial, it did reference "rulings on the post-trial motions." In my view, this reference, combined with the court's entry of judgment in an amount consistent with the jury's award, shows that the trial court

did, in fact, overrule the motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

[*P57] With regard to the fourth assignment of error, I disagree with paragraph 43 of the lead opinion, which states that "appellee is entitled to receive a bonus consistent with past years that was based on performance." This is contrary to the directed verdict rendered in favor of appellant by the trial court which found that the award of bonuses were too speculative to be included in an award of front pay. However, notwithstanding the bonus issue, I agree the jury's award of front pay was supported by [**23] sufficient evidence.

[*P58] I concur with the remaining assignments of error, and thus, respectfully concur in the judgment.

Dissent by: BRYANT

Dissent

BRYANT, J., dissenting.

[*P50] Because this court lacks jurisdiction to consider the appeal of defendant-appellant, Columbia Sussex Corp., I dissent and would dismiss the appeal as premature.

[*P51] Following the jury verdict in favor of plaintiff-appellee, Charlotte Thomas, defendant filed timely motions for a new trial and judgment notwithstanding the verdict. The trial court referred the motions to the magistrate who, on the parties' agreement, had tried the underlying case. The record contains no signed decision from the magistrate, does not indicate a magistrate's decision was forwarded to the parties, and does not reflect the trial court adopted it. Accordingly, despite whatever the magistrate did in attempting to resolve the motions, the court did not comply with the procedure set forth in Civ.R. 53. Thus, to the extent the efforts of the magistrate are the basis for considering the motions resolved, they not only fall short of the requirements of Civ.R. 53 but also deprive the parties of the opportunity to object while nonetheless burdening them with the repercussions [**24] of failing to object.

[*P52] Even if we could assume the trial court de-referenced the motions to decide them itself, the record still presents

procedural problems. The entry does not purport to decide the motions, but instead, in speaking of its "rulings" on the post-trial motions, apparently refers to what the court believes were earlier rulings on the motions. Contrary to the court's entry, the record contains no such rulings.

[*P53] Finally, I disagree with the majority to the extent it deems the motions implicitly overruled. Generally, as to motions to strike, motions for continuance or other such motions, "a motion that is outstanding at the time judgment is entered is presumed to have been overruled." *Allied Erecting & Dismantling Company, Inc. v. Youngstown*, 7th Dist. No. 00 CA 225, 2003 Ohio 330, P12, citing *Solon v. Solon Baptist Temple, Inc.* (1982), 8 Ohio App.3d 347, 351-52, 8 Ohio B. 458, 457 N.E.2d 858. The general rule, however, does not apply to a pending motion filed under Civ.R. 50(B) or Civ.R. 59, as such motions affect the jurisdiction of the court on appeal.

[*P54] App.R. 4(B)(2) states that "[i]n a civil case * * * if a party files a timely motion for judgment under Civ.R. 50(B), a new trial under Civ.R. 59(B), [**25] vacating or modifying a judgment by an objection to a magistrate's decision under Civ.R. 53(D)(4)(e)(i) or (ii), * * * the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered." Where the record is devoid of a "dispositive judgment entry" concerning the motion for judgment notwithstanding the verdict or new trial, the motion "is still technically pending, and the appeal time has never begun to run. Therefore, th[e] court does not have jurisdiction to hear th[e] appeal as it is premature." *Broberg v. Hsu*, 11th Dist. No. 2005-T-0081, 2005 Ohio 5115, P10. Accordingly, such post-trial motions may not be deemed implicitly denied, because they potentially vacate a judgment, grant a new trial and determine the date from which the time for appeal begins to run. Similarly, in the absence of rulings in the record, a court's reference to its rulings on such motions is insufficient, leaving the parties to speculate about the date the time for appeal begins to run.

[*P55] Until the trial court rules on the motions, we lack jurisdiction to consider the appeal. *In re Estate of Olivito*, 7th Dist. No. 01 JE 20, 2002 Ohio 2790, P9. Because the [**26] trial court has not ruled on the motions, I would dismiss defendant's appeal for lack of jurisdiction.

Plt. Ex. #	Description
1.	Email from Drnek to Vartorella CC Banks RE Meet to Review Reorg Plan
2.	Banks Reorganizational Charts
2A.	Reorganizational Chart for Department of Student Life
3.	Email from Banks to McCafferty RE Hello
4.	Banks Revised Job Description for Director of Center for Student Involvement
5.	George Walker-James Drnek 1-1 Meeting
6.	Student Life Reorganization Chart by Vartorella
7.	CSU-Professional Staff Personnel Policies
8.	Chart RE Number of Registered Student Organizations at CSU
9.	CSU Department of Student Life Annual Reports for 2005-2010
10.	Department of Student Life Leadership Consultant Report
11.	Defendant's Responses to Plaintiff's First Set of Interrogatories – Liss
12.	Defendant's Response to Plaintiff's First Request for Production of Documents – Liss
13.	Defendant's Response to Plaintiff's Second Set of Interrogatories and Requests for Production of Documents – Liss
14.	Defendant's Responses to Plaintiff's First Set of Interrogatories - Russell



Plt. Ex. #	Description
15.	Defendant's Response to Plaintiff's First Request for Production of Documents - Russell
16.	Defendant's Response to Plaintiff's Second Set of Interrogatories and Requests for Production of Documents - Russell
17.	Termination Letters for Liss, Myers, Russell
18.	Rationale for Proposed Reduction in Work Force
19.	Intentionally Left Blank
20.	Intentionally Left Blank
21.	Intentionally Left Blank
22.	Consultant Agreement for Cauthen
23.	Performance Reviews – Russell
24.	Handwritten Notes on Organizational Structure
25.	Position Descriptions – Russell, Myers, Lenhart
26.	Professional Staff Job Descriptions
27.	Dept of Student Life Leadership Consultant Report
28.	Intentionally Left Blank
29.	Russell Hiring Paperwork
30.	Banks Greek Life Questionnaire

Plt. Ex. #	Description
31.	Liss Review of Myers at Banks' Request
32.	Email from Liss to Banks re Confidential Draft Memos
33.	Emails between Mearns and Drnek re Student Leadership & Involvement Consultant
34.	Email from Banks to Vartorella, Drnek re Consultant Visit
35.	Email from Banks to Drnek re Consultant Scope of Work
36.	Email from Banks to Drnek re Student Organizations
37.	Email from Banks to various re Consultant Visit
38.	Russell Responses to Greek Life Questionnaire
39.	Email from Banks to Drnek re Updated
40.	Email from Banks to Drnek fwd Email from Liss to Banks, Russell re Greek Life Information
41.	Email from Russell to all Greek Orgs re Request from Assoc. Dean Willie Banks
42.	Email/Memo? From Banks to Drnek re Recommendations for Reorganization within Student Life
43.	Emails between Liss, Russell, Drnek, Banks, Myers re Written Warnings of June 18, 2012 Retraction Request
44.	Email from Drnek to Vartorella, Banks re Student Life Update- Confidential
45.	Email from Banks to Drnek re Draft
46.	Intentionally Left Blank

Plt. Ex. #	Description
47.	Intentionally Left Blank
48.	Memo to Colleagues from Drnek re Reorganization
49.	Email from Banks to Liss, Drnek, Vartorella re CAS Assignment/Housing & Residential Life
50.	Coordinator of Greek Life & Commuter Programs Job Description
51.	Drnek Handwritten Notes re SGA
52.	Intentionally Left Blank
53.	Memo from Student Government Association to Drnek, Zhu re Concerns
54.	Email from Johnston to Drnek re Student Life Issue/Student Complaint
55.	Cauthen Resume
56.	2012 Liss Performance Review
57.	2011 Liss Performance Review
58.	2010 Liss Performance Review
59.	2010 Liss Performance Review
60.	2009 Liss Performance Review
61.	2009 Liss Performance Review
62.	2008 Liss Performance Review

Plt. Ex. #	Description
63.	2008 Liss Performance Review
64.	2003 Liss Supervisor of the Year Award
65.	Professional Staff Reclassification Request Forms
66.	Proposal for Leadership Consultant/Scope of Work
67.	Department of Student Life Reorganization Plan Draft
68.	Email from Drnek to Vartorella, Mutti, McCafferty, Banks re Student Life Organization 2012
69.	Intentionally Left Blank
70.	Director of Center for Student Involvement Job Description
71.	Various Student Organizations Job Descriptions
72.	Email from Drnek to Various w/Formal Reorganization Announcement
73.	Intentionally Left Blank
74.	Email from Liss to Banks, Russell, Myers re Greek Relationship Agreement/Draft
75.	Email from Drnek to Banks re Greek Life Changes
76.	Intentionally Left Blank
77.	Draft Reduction in Work Force- Student Life Reorganization
78.	Liss Resumes

Plt. Ex. #	Description
79.	Intentionally Left Blank
80.	Memo from Banks to Drnek re Recommendations for Reorganization within Student life
80A.	Memo from Banks to Drnek
81.	Salary Proposal
82.	Various Job Descriptions
83.	Intentionally Left Blank
84.	Intentionally Left Blank
85.	Professional Staff Performance Evaluation for Russell
86.	Professional Staff Performance Evaluation for Russell
87.	Professional Staff Performance Evaluation for Russell
88.	2008 Russell Performance Review
89.	2007-2008 Russell Performance Review
90.	Liss Responses to Student Organization Questionnaires
91.	Draft – Greek Life PIP
92.	Intentionally Left Blank
93.	Liss OrgSync Connect Conference Notes & Ideas

Plt. Ex. #	Description
94.	Intentionally Left Blank
95.	Email from Liss to Banks re Confidential/Revised Draft Memos
96.	Email from Liss to Meyers, Drnek re TKE Graffiti Party
97.	Liss List of Items for Review with Dr. Banks
98.	Termination Letter Liss
99.	Termination Letter Myers
100.	Termination Letter Russell
101.	Associate Dean of Student Life Proposed Organizational Structure Charts
102.	Memo to Students re Reorganization
103.	Handwritten Notes from Donna Whyte re Meeting with Banks re Discrimination
104.	Realignment of Duties in Student Life Reorganization
105.	Personal Data Worksheet – Catherine Lewis
106.	Personal Data Worksheet – Jamie Stoegbauer
107.	Personal Data Worksheet – Jill Courson
108.	Personal Data Worksheet – Melissa Wheeler
109.	Personal Data Worksheet- Robert Bergmann

Plt. Ex. #	Description
110.	Student Life Reorganization Chart
111.	Student Life Reorganization Salary Plan
112.	Personal Data Worksheet – Willie Banks
113.	Benefit Costs for Russell & Liss
114.	Position Description – Bergmann
115.	Position Description - Courson
116.	Position Description - Johnston
117.	Position Description - Lewis
118.	Position Description Liss
119.	Position Description Russell
120.	Email from Drnek to Vartorella, Banks re Student Life Update – Confidential
121.	Email from Banks to Drnek fwd email from Liss to Russell re First Written Warning Memo
122.	Emails between Banks, Agent, Drnek re Greek Life Changes
123.	Email from Banks to Drnek fwd email from Myers to Liss, Banks re Job Performance Concerns
124.	Email from Banks to various re Consultant Visit
125.	Proposal for Leadership Consultant/Scope of Work

Plt. Ex. #	Description
126.	Intentionally Left Blank
127.	Email from Banks to Drnek fwd email from Liss to Banks re CSI Update
128.	Email from Liss to Banks, Myers re Greek Recruitment & Fall Activities
129.	Intentionally Left Blank
130.	Email from Banks to Liss, Drnek re Recap of Meeting
131.	Email from Banks to Liss re Confidential Draft Memo
132.	Email from Banks to Drnek re Requested Materials
133.	Email from Banks to Drnek fwd email from Liss to Banks re Quick Update/Written Warning of June 18, 2012 Retraction Request
134.	Email from Banks to Drnek re Reorganization
135.	Email from Banks to Drnek fwd email from Liss to Banks, Drnek, Myers, Russell, Lenhart re Urban 13/Student Organizations Research
136.	Intentionally Left Blank
137.	Email from Banks to Drnek re bullet list
138.	Email from Banks to Bergmann re New Organizational Structure
139.	Email from Banks to Liss re Update/First Written Warning Memo
140.	Email from Banks to Liss re Draft Retraction/Written Warning of June 18, 2012 Retraction Request
141.	Email from Vartorella to Banks, Drnek, Mutti re Job Descriptions with Attachments

Plt. Ex. #	Description
142.	Intentionally Left Blank
143.	Intentionally Left Blank
144.	Intentionally Left Blank
145.	Email from Liss to Russell, Myers, Banks re Greek Relationship Agreement Draft
146.	Intentionally Left Blank
147.	Intentionally Left Blank
148.	Email from Bergmann to Banks re Items Needed
149.	Intentionally Left Blank
150.	Student Organization Officers Return Rates
151.	Email from Myers to Liss, Banks, Drnek re FY12 Student Organizations Report Summary
152.	Email from McCafferty to Drnek, Banks, Vartorella re Job Descriptions
153.	Memo from Student Government Association to Office of the President re Increasing Allocations for Student Activities
154.	Email from Drnek to Vartorella, Mutti, McCafferty, Banks re Student Life Reorganization
155.	Email from Drnek to Vartorella, Mutti, McCafferty, Banks re Materials Provided to Provost
156.	Email from Drnek to REDACTED re Greek Life Changes
157.	Email from Drnek to Vartorella, Banks re Info for Provost Walker

Plt. Ex. #	Description
158.	Email from Drnek to Banks re Reorg Info
159.	Email from Drnek to Napier, Banks re Confidential – Student Life Reorganization
160.	Email from Drnek to various re Student Life Reorganization
161.	Email from Drnek to Walker, Snell, Artbauer, Zhu, Banks re Student Life Reorganization Update
162.	Email from Drnek to Vartorella, Banks re Student Life Update – Confidential
163.	Viking Expeditions Contract
164.	Greek Organizations List
165.	Intentionally Left Blank
166.	Intentionally Left Blank
167.	Department of Student Life Reorganization Plan
168.	Intentionally Left Blank
169.	Intentionally Left Blank
170.	Keeling & Associates Proposal for Services
171.	Intentionally Left Blank
172.	Keeling & Associates Review of Student Programs and Services
173.	Email from Cannon to Smith re Homecoming Feedback

Plt. Ex. #	Description
174.	Memo from Gropitch to Smith re Homecoming Scheduling Problems
175.	Memo from Student Government Association to Smith re Homecoming Planning Process 2012
176.	Intentionally Left Blank
177.	Intentionally Left Blank
178.	Email from Liss to Myers, Russell, Banks, Drnek, Vartorella, Horsfall re Evaluation Update
179.	Intentionally Left Blank
180.	Banks 2012 Review
181.	Intentionally Left Blank
182.	Intentionally Left Blank
183.	Attachments to Ex 187
184.	Handwritten Notes on Meeting with Drnek, Banks, Vartorella
185.	Email from Drnek to himself w/Attachment 2011-2012 Annual Report Student Life
186.	Email from Drnek to Johns Hopkins re Application Materials for Vice Provost for Student Affairs
187.	Email from Drnek to Napier, Day, Banks re Confidential – Student Life Reorganization
188.	Intentionally Left Blank
189.	Intentionally Left Blank

Plt. Ex. #	Description
190.	Email from Banks to Drnek fwd email from Liss to Banks re Student Organizations & Greek Life Questionnaires/Inquiries
191.	New Student Affairs/Student Life Staff Responsibilities
192.	Intentionally Left Blank
193.	Intentionally Left Blank
194.	Intentionally Left Blank
195.	Email from Drnek to Vartorella, McCafferty, Mutti, Banks re Materials Provided to Provost
196.	Intentionally Left Blank
197.	Email from Banks to Liss BCC Drnek re Recap of Meeting
198.	Intentionally Left Blank
199.	Email string between Banks, Drnek and Vartorella re consultant visit
200.	Email from Drnek to Boise, Goodman at CSU Law re Student Org Coordinator Job Description
201.	Intentionally Left Blank
202.	Posting Preview Assistant Dean, Student Engagement
203.	EEO Summary re Position Assistant Dean, Student Engagement
204.	Posting info for Assistant Dean, Student Engagement
205.	Posting Info for Assistant Dean, Student Engagement

Plt. Ex. #	Description
206.	Posting Info for Assistant Dean, Student Engagement for top 5 candidates
207.	Application of Courson for Assistant Dean, Student Engagement
208.	Application of Steven Liss for Assistant Dean, Student Engagement
209.	Resume of Jill Courson
210.	Resume of Steven Liss
211.	EEO Summary, Coordinator, Commuter Affairs
212.	Posting Info for Coordinator, Commuter Affairs
213.	Posting info for Coordinator, Commuter Affairs
214.	Posting info for Coordinator, Commuter Affairs
215.	Posting Preview Job Description Coordinator, Commuter Affairs
216.	Liss Application for the position of Coordinator, Student Activities
217.	Resume of Steven Liss
218.	EEO Summary re Applicants for Coordinator, Student Activities
219.	EEO Summary re Applicants/Finalists for Coordinator, Student Activities
220.	Application of Steven Liss for position of Coordinator, Commuter Affairs & Student Center Programs
221.	Intentionally Left Blank

Plt. Ex. #	Description
222.	Posting Preview-Coordinator, Student Activities
223.	Intentionally Left Blank
224.	Email from Bergmann to Liss re Coordinator, Student Activities
225.	Email string between Banks, Bergmann, Johnston, re Interview Coordinator of Commuter Affairs for Wheeler and De-Armond
226.	Email string between Liss and Bergmann re Interview times for Coordinator, Student Activities Interview
227.	Intentionally Left Blank
228.	Email string between Bergmann to Search Committee for Coordinator, Student Activities
229.	Search Committee List of Applicants to Interview in Ranking Order
230.	Review Rating Form for Applicants for Coordinator, Student Activities Position
231.	Intentionally Left Blank
232.	Posting Preview, Assistant Dean, Student Engagement
233.	Hiring Proposal for Jill Courson
234.	Intentionally Left Blank
235.	EEO Summary re Applicants for Assistant Dean, Student Engagement Position
236.	Email string between Brown, Hinton-Hannah, Vartorella re Candidate Interviews for the position of Assistant Dean, Student Engagement
237.	Intentionally Left Blank

Plt. Ex. #	Description
238.	Intentionally Left Blank
239.	Posting Preview for Coordinator, Student Activities
240.	Intentionally Left Blank
241.	Hiring Proposal for Catherine Lewis
242.	CSU Application for Catherine Lewis for the position of Coordinator, Student Activities
243.	Cover Letter and Resume for Catherine Lewis
244.	EEO Summary re Applicants for Coordinator, Student Activities
245.	Professional Vacancy Check List for Coordinator, Commuter Affairs-New Hire Melissa Wheeler
246.	Post Preview Coordinator, Commuter Affairs
247.	EEO Review for Coordinator, Commuter Affairs
248.	Student Life Search Committee Lists
249.	Intentionally Left Blank
250.	Interview Notes for Steven Liss for the position of Coordinator, Student Activities
251.	Interview Notes for Steven Liss for the position of Coordinator, Student Activities
252.	Rankings for the position of Coordinator, Student Activities
253.	Intentionally Left Blank

Plt. Ex. #	Description
254.	Handwritten Interview Notes for Steven Liss for Coordinator, Student Activities Position
255.	Handwritten Notes Ranking Candidates for Assistant Dean, Student Engagement
256.	Review Ranking Form for the Assistant Dean, Student Engagement Position
257.	Review Ranking Form for the Assistant Dean, Student Engagement Position
258.	Email from Hinton-Hannah to Brown cc Vartorella List of top candidates they are going to interview
259.	Email from Hinton-Hannah to Brown candidates for interview
260.	Email string between Liss, Hinton-Hannah, bcc Drnek and Vartorella
261.	Intentionally Left Blank
262.	Documents regarding Cauthen including LinkedIn Profile
263.	Facebook pictures of Cauthen and Banks
264.	Intentionally Left Blank
265.	Cauthen Twitter Page
266.	Resume for Cauthen
267.	Intentionally Left Blank
268.	Chart for Student Life made by Banks
269.	Intentionally Left Blank

Plt. Ex. #	Description
270.	Student Media Specialist General Duties and Responsibilities by Banks
271.	Coordinator, Student Activities General Duties and Responsibilities by Banks
272.	Manager of Student Organization General Duties by Banks
273.	Intentionally Left Blank
274.	Intentionally Left Blank
275.	Draft Reduction in Force-Student Life Reorganization
276.	CSU Position description for Steve Liss, Director of Student Involvement
277.	Intentionally Left Blank
278.	Intentionally Left Blank
279.	Letter from Donna Whyte with CSU response to Liss complaint of age discrimination and retaliation
280.	Memorandum from Walker to Liss re Response to Step 2 Grievance by Liss
281.	Email from Liss to Mutti, Vartorella requesting a Step 3 to the Grievance Process
282.	Letter from CSU to Liss-Step3 Grievance Response
283.	Intentionally Left Blank
284.	Letter from Drnek to Liss-CSU response to Step 1 Grievance
285.	Intentionally Left Blank

Plt. Ex. #	Description
286.	Intentionally Left Blank
287.	Email from Liss to Vartorella re Assistance with Sensitive Matter
288.	Email from Russell to Liss CC Drnek, Banks, Vartorella re Written Warning of June 18, 2012 Retraction Request
289.	Intentionally Left Blank
290.	Intentionally Left Blank
291.	Email from Banks to Liss re Recap of Meeting
292.	Intentionally Left Blank
293.	Intentionally Left Blank
294.	Intentionally Left Blank
295.	Intentionally Left Blank
296.	Intentionally Left Blank
297.	Email string between Liss and Drnek re Reference Request
298.	Intentionally Left Blank
299.	Email from Drnek to Liss re Grievance Letter Decision
300.	Intentionally Left Blank
301.	Intentionally Left Blank

Plt. Ex. #	Description
302.	Various emails from people to Liss
303.	Emails from Lenhart and Emerick
304.	Email from Liss to Drnek re CONFIDENTIAL
305.	Email from Liss to Banks re Confidential Draft Memos
306.	The History of Greek Life at CSU as Experienced by Someone Who Has Been There from the Beginning by Russell
307.	Special Enrollment in Part B Medicare Form for Russell
308.	Intentionally Left Blank
309.	Letter from Stephanie McHenry Congratulating Russell for nomination to receive 2012 Distinguished Service Award
310.	Email string between Russell and Drnek, Vartorella re Hours and Issues
311.	Email from Russell to Wilson re Grievance re Discriminatory Issues
312.	Intentionally Left Blank
313.	Email from Wilson to Russell re end of employment
314.	Email from Russell to Vartorella cc Mutti and Wilson re Response to Termination Proposal
315.	Email string between Drnek and Russell re Smooth Transition
316.	Letter from Careworks to Russell re FMLA
317.	Letter from Careworks to Russell re FMLA

Plt. Ex. #	Description
318.	The achievement of CSU Greek Organizations in the past 5 years
319.	Newspaper Article re Major Restructuring in Dept of Student Life spurs confusion in student organization
320.	Newspaper Article Re Local Sororities concerned over their fate
321.	Newspaper Article re Student Life implements major changes
322.	Newspaper Article re CSU's Greek Life Rises from the Ashes
323.	Newspaper Article re SGA speaks out at press conference Al Bitar: SGA was not consulted about Student Life
324.	Newspaper Article re Voice of Students: Recent Layoffs in Student Life have caused students to speak out about the decision and what the future holds
325.	Newspaper Article re Restructuring in Student Life continues to raise questions – students reaction to the sudden termination of three key staff members
326.	Intentionally Left Blank
327.	Intentionally Left Blank
328.	Chart of Student Life before reorg done by Dr. Banks
329.	Chart of Student Life after reorg done by Dr. Banks
330.	Trial Subpoena for Banks for 9/2/14 Trial
331.	Trial Subpoena for Banks for 9/17/14 Trial
332.	Intentionally Left Blank

Plt. Ex. #	Description
333.	Intentionally Left Blank
334.	Intentionally Left Blank
335.	Letter from Ronald Berkman re Russell grievance and uphold Whyte decision
336.	Email from Russell to Sonali Wilson re Complaining of Discrimination
337.	Letter from Ronald Berkman re Liss grievance and uphold Whyte decision
338.	Cauthen Interview Notes w/CSU Staff Day One – WORD document w/Metadata
339.	Cauthen Interview Notes w/CSU Staff Day One – WORD document w/Metadata
340.	Cauthen Questions for Consideration – WORD document with Metadata
341.	Letter of Recommendation from Banks with WORD document with Metadata
342.	Professional Staff Job Description – Coordinator, Student Organizations – Job Code 32268B
343.	Professional Staff Job Description – Coordinator, Student Organizations – Job Code 32268B
344.	Professional Staff Job Description Template
345.	Cauthen Production
346.	Seating Chart for Student Life Department done by Dr. Drnek
347.	Organization Chart for Student Life done by Dr. Drnek
348.	Expert File from Dr. Burke for Liss

Plt. Ex. #	Description
349.	Expert File from Dr. Burke for Russell
350.	Liss Mitigation Document
351.	Resume of William Russell
352.	CSU Student Center Third Floor Seating Chart
353.	EEOC Charge of Discrimination and Amended EEOC Charge of Discrimination for Russell
354.	Notice of Right to Sue Russell
355.	W-2 Russell 2009-2012
356.	Notice of Right to Sue Liss
357.	EEOC Charge of Discrimination Liss
358.	W-2s 2009-2013 Liss and 2013 and 2014 Year End Paystubs for University of Akron and Lorain Community College
359.	Email from Russell to Vartorella RE Excuse William Russell from Work Oct. 8-12
360.	Layoff Letter to Russell Re extend employment to November 9, 2012
361.	Careworks Document for Russell