

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

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| GINA L. WATSON, | : | APPEAL NO. C-190644 |
| Plaintiff-Appellant, | : | TRIAL NO. A-1801920 |
| vs. | : | <i>JUDGMENT ENTRY.</i> |
| OHIO MEDICAL TRANSPORT, LLC, | : | |
| Defendant-Appellee. | : | |

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiff-appellant Gina L. Watson appeals the judgment of the Hamilton County Court of Common Pleas, which granted summary judgment to defendant-appellee Ohio Medical Transport, LLC, (“OMT”). We affirm.

OMT is a private ambulance service that hired Watson to work as a paramedic on August 16, 2017. Less than a month later, Watson was reported to a supervisor by coworkers who alleged that Watson was texting while driving and driving erratically. She was given a written warning on September 14, 2017, that stated the next offense would result in her termination. Two weeks later, Watson was reported to a supervisor by a coworker who alleged Watson had “clipped” the mirror of a vehicle in an adjoining lane and was verbally abusive toward her coworkers. Watson was placed on unpaid leave

pending a company investigation into her conduct. She was terminated on October 24, 2017.

In April 2018, Watson sued OMT for wrongful termination based upon her age, gender, and color. She alleged employment discrimination in violation of the Ohio Revised Code, Title VII of the Civil Rights Act of 1964 (“Title VII”), the Age Discrimination in Employment Act of 1967 (“ADEA”), and 42 U.S.C. 1981, 1983, and 1985. Her complaint did not include an affidavit, evidence, or documents. Discovery proceeded and Watson was deposed. OMT moved for summary judgment, attaching the affidavit of Eva Richardson, an “HR generalist” who worked for the company. Watson filed a response in opposition to summary judgment, which included a copy of her separation notice and a copy of the written warning she received from OMT. Her response did not include an affidavit. The trial court granted summary judgment for OMT. Watson now appeals the trial court’s judgment, asserting five assignments of error.

We review the trial court’s ruling on a motion for summary judgment de novo. *See Wal-Mart Realty Co. v. Tri-Cty. Commons Assoc., LLC*, 1st Dist. Hamilton No. C-160747, 2017-Ohio-9280, ¶ 5. “Summary judgment is appropriate if (1) no genuine issue of material fact exists for trial, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his or her favor.” *Id.*, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

In her first assignment of error, Watson argues that the trial court erred in granting summary judgment for OMT on her claims brought under Title VII and the ADEA. In designating the procedure for challenging prohibited employment

discrimination under Title VII and the ADEA, Congress gave initial enforcement responsibility to the Equal Employment Opportunity Commission (“EEOC”). *See Younis v. Pinnacle Airlines, Inc.*, 610 F.3d 359, 361 (6th Cir.2010); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008). Thus, an employee alleging employment discrimination in violation of either or both statutes “must first file an administrative charge with the EEOC within a certain time after the alleged wrongful act or acts.” *Younis* at 361. In Ohio, an employee must file a charge with the EEOC “within three hundred days after the alleged unlawful employment practice occurred.” 42 U.S.C. 2000e-5(e)(1). It is undisputed that Watson did not file a charge with the EEOC and, as the alleged unlawful employment practice occurred more than 300 days ago, she cannot proceed with claims under Title VII or the ADEA. Accordingly, we must overrule Watson’s first assignment of error.

In her second assignment of error, Watson argues that the trial court erred in treating her Title VII claim of discrimination based upon her color as one based upon her race. (In its judgment, the trial court indicated that “[f]or the purposes of [Watson’s Title VII] claims, race and color, while technically different, will be treated the same.”) In light of our resolution of her first assignment of error, involving her Title VII claim, we overrule as moot Watson’s second assignment of error.

In her third and fifth assignments of error, Watson generally argues that the trial court erred in granting OMT’s motion for summary judgment. In order to avoid redundancy, we address these assignments together. Watson’s remaining claims for employment discrimination are based on Ohio law and 42 U.S.C. 1981 (“Section 1981”), 42 U.S.C. 1983 (“Section 1983”), and 42 U.S.C. 1985 (“Section 1985”). Employment discrimination claims brought under the Ohio Revised Code are analyzed using the

framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The plaintiff bears the burden to present a prima facie case of discrimination, which can be established in one of two ways. See *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, 837 N.E.2d 1169, ¶ 25; *Brown v. Dover Corp.*, 1st Dist. Hamilton No. C-060123, 2007-Ohio-2128, ¶ 15-16. First, the plaintiff may present direct evidence of discrimination. See *Mauzy v. Kelly Servs.*, 75 Ohio St.3d 578, 587, 664 N.E.2d 1272 (1996). Or, a plaintiff may establish a prima facie case of discrimination by showing (1) that he is a member of a racial minority or protected class; (2) that he was qualified for the position; (3) that he suffered an adverse employment action or that his employment was terminated; and (4) that similarly-situated nonprotected employees were treated differently. See *Stallworth v. Wal-Mart Stores E., L.P.*, 2016-Ohio-2620, 50 N.E.3d 27, ¶ 26 (1st Dist.). With respect to the latter element, “a plaintiff need not demonstrate an exact correlation with the similarly-situated employee. It is sufficient to show that each had the same supervisor, had been subjected to the same standards, and had engaged in the same conduct without differentiating or mitigating circumstances.” *Id.* at ¶ 27.

OMT stipulated that Watson met the first three elements because she is a 65-year-old woman of color who was a qualified paramedic that was terminated. Watson also alleged that OMT’s company policies were not equally applied to her, including the investigation into her conduct. However, her complaint failed to allege or identify any nonprotected employee that was treated differently. Watson also did not put forth any evidence regarding any other similarly-situated employee who was terminated or to whom the company policies were applied differently. Without allegations or evidence supporting the fourth element, a court can grant summary judgment to the defendant. See *Greene v. Cincinnati*, 1st Dist. Hamilton No. C-070830, 2008-Ohio-4908, ¶ 19-20.

Employment-discrimination claims brought under Section 1981 are analyzed under the same framework as discussed above. The plaintiff must establish a prima facie case of discrimination. *See Noble v. Brinker International, Inc.*, 391 F.3d 715, 720 (6th Cir.2004). Accordingly, Watson's claim for discrimination based on Section 1981 fails for the same reason: she did not meet her burden in establishing the fourth element of a prima facie case of discrimination.

To successfully bring a Section 1983 employment-discrimination claim, one must show that "the conduct complained of was committed by a person acting under color of state law and * * * [the] conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Denver v. Casbeer*, 1st Dist. Hamilton No. C-050106, 2005-Ohio-5860, ¶ 10. Thus, for a Section 1983 claim to survive, there must have been a federal constitutional violation committed by a state actor. The evidence in this case establishes that OMT is a private ambulance service and not a state actor. While an exception exists called the public-function exception, under which a private actor can be held accountable when it exercises "powers traditionally exclusively reserved to the State," *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), Watson made no argument to support this exception, nor is there any evidence in the record to support the idea that OMT's action can be "fairly attributed to the state." *See Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir.2000). Therefore, Watson's Section 1983 claim fails as a matter of law.

Section 1985 provides a civil remedy for individuals injured by conspiracies to deprive them of their right to equal protection under the law. *See Greene v. Cincinnati*, 1st Dist. Hamilton No. C-070830, 2008-Ohio-4908, ¶ 25, citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). "The plaintiff must prove the

existence of a conspiracy that is aimed at interfering with any right or privilege of a United States citizen and that is motivated by a racial or other discriminatory animus.” *Id.* Watson could not have prevailed on this claim because she failed to present any evidence of a conspiracy.

In light of the preceding determinations, we overrule Watson’s third and fifth assignments of error.

In her fourth assignment of error, Watson argues that the trial court erred in relying upon the affidavit attached to OMT’s motion for summary judgment. In support of its summary-judgment motion, OMT attached the affidavit of Eva Richardson, a human resources generalist employed by OMT, as “Exhibit A.” Under Civ.R. 56(E), “supporting * * * affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.” Additionally, “sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.” Civ.R. 56(E). In Richardson’s affidavit, she only offered her job title without further description or mention of any documents inspected to obtain personal knowledge. Watson argued in her response in opposition to summary judgment that Richardson was not employed by OMT while Watson was employed. Watson did not support her assertions with any evidence, such as an affidavit. We find this assignment of error to be moot in light of our determination that Watson did not plead the fourth element of her *prima facie* case for discrimination, and therefore we do not address its merits.

The judgment of the trial court is affirmed.

A certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

OHIO FIRST DISTRICT COURT OF APPEALS

MOCK, P.J., ZAYAS and WINKLER, JJ.

To the clerk:

Enter upon the journal of the court on September 23, 2020
per order of the court _____.
Presiding Judge