**[Cite as *Pattison v. W.W. Grainger, Inc.*, 2010-Ohio-2484.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 93648**

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**WALLY PATTISON**

PLAINTIFF-APPELLANT

vs.

**W.W. GRAINGER, INC., ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:**
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-500620

**BEFORE:** Blackmon, J., Kilbane, P.J., and Sweeney, J.

**RELEASED:** June 3, 2010

**JOURNALIZED:**

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PATRICIA ANN BLACKMON, J.:

**{¶ 1}** Appellant Wally Pattison appeals the trial court's decision granting summary judgment in favor of W.W. Grainger, Inc., et al. ("Grainger"), on his statutory claim of age discrimination. Pattison assigns the following error for our review:

> **"The trial court erred in granting Appellees' motion for summary judgment with respect to Appellant's age discrimination claim."**

**{¶ 2}** Having reviewed the record and pertinent law, we reverse the trial court's decision. The apposite facts follow.

**{¶ 3}** Grainger is a national distributor of maintenance, repair, and operating supplies to commercial, industrial, contractor, and institutional markets in North America. Grainger's sales efforts are supported by over 13,000 sales people across the country.

**{¶ 4}** Upon graduating from college in 1975, Pattison began working for Pattison Supply Company, which was founded by his grandfather in 1898. In 1990, Grainger purchased Pattison Supply Company. At the time of Grainger's acquisition, Pattison was employed as an outside sales representative.

**{¶ 5}** On January 7, 2003, Grainger terminated Pattison for allegedly failing to meet sales goals. At the time of his termination, Pattison was 51 years old, held the position of Territory Manager ("TM"), sold business

supplies, and serviced approximately 2400 accounts in the Greater Cleveland area.

**{¶ 6}** On May 6, 2003, Pattison filed a complaint against Sam DiMeo ("DiMeo") and his former employer, Grainger, alleging age discrimination, in violation of R.C. 4112.02(A), and wrongful termination, based upon a violation of public policy.

**{¶ 7}** In the complaint, Pattison specifically alleged that around May 2001, DiMeo assumed the position of District Sales Manager and became his immediate supervisor. Pattison alleged that shortly after DiMeo became his supervisor, DiMeo took numerous adverse employment actions against him, including giving performance warnings for not meeting sales goals when similarly situated younger employees, under the age of 40, were not meeting sales goals, but were not being given performance warnings.

**{¶ 8}** Pattison alleged that DiMeo took potentially significant accounts away from him and gave them to his younger counterparts. Pattison also alleged that DiMeo terminated him despite a significant rise in his performance numbers shortly before his termination. Pattison further alleged that similarly situated younger employees with worse performance numbers were not terminated.

**{¶ 9}** After the termination, Grainger replaced Pattison with new hires John Wanhainen and Lisa Marie Dukes. Some of Pattison's accounts were

transferred to John Hoptry, who began working for Grainger four months prior to Pattison's termination. At the time of Pattison's termination, Wanhainen was age 40, Dukes age 30, and Hoptry age 38.

**{¶ 10}** Pattison finally alleged that Grainger also terminated or caused to resign numerous sales representatives in the Cleveland district, who were all over 40 years of age.

**{¶ 11}** On May 14, 2004, Grainger filed a motion for summary judgment arguing that Pattison was terminated solely for failing to meet legitimate business goals for five consecutive years. On June 21, 2005, the trial court granted Grainger's motion for summary judgment.

**{¶ 12}** Pattison timely appealed the trial court's decision. On appeal, we found that Grainger's motion for summary judgment had addressed only the first count of Pattison's complaint, ignoring his public-policy claim, and that the trial court's summary judgment had likewise failed to resolve that claim. Consequently, we dismissed the appeal for lack of a final, appealable order. *Pattison v. W.W. Grainger*, Cuyahoga App. No. 86698, 2006-Ohio-1845, ¶1.

**{¶ 13}** On June 29, 2006, Pattison voluntarily dismissed the public policy claim pursuant to Civ.R. 41(A)(1)(a) to perfect a final appealable order. On July 10, 2006, the trial court issued a journal entry stating that this claim was dismissed.

**{¶ 14}** On August 9, 2006, Pattison filed a second notice of appeal, which was more than 30 days from the filing of the voluntary dismissal, but less than 30 days from the trial court's journal entry referring to the notice of the dismissal. We concluded that Pattison's voluntary dismissal of the public policy claim created a final appealable order on the age discrimination claim, but that the dismissal became effective upon filing, not memorialization by the court. As such, we found Pattison's second appeal untimely, and dismissed it for lack of jurisdiction. *Pattison v. W.W. Grainger*, Cuyahoga App. No. 88556, 2007-Ohio-3081.

**{¶ 15}** On July 17, 2007, Pattison filed a notice of certified conflict to the Ohio Supreme Court regarding whether a final order had been created when he voluntarily dismissed the outstanding public policy claim against Grainger, pursuant to Civ.R. 41(A). On October 16, 2008, the Ohio Supreme Court held that pursuant to Civ.R. 41(A), a plaintiff may not dismiss one of multiple claims, and remanded the case. *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, 897 N.E.2d 126.

**{¶ 16}** On June 2, 2009, we sua sponte dismissed the appeal for lack of a final appealable order, pursuant to the Ohio Supreme Court's decision that Pattisson's public policy claim had not been dismissed. On July 7, 2009, Pattison filed a notice of voluntary dismissal with prejudice of his public policy claim.

**{¶ 17}** On July 21, 2009, Pattison refiled the appeal of the trial court's original decision granting summary judgment in Grainger's favor on his age discrimination claim.

**Summary Judgment**

**{¶ 18}** In the sole assigned error, Pattison argues the trial court erred in granting summary judgment on his age discrimination claim. We agree.

**{¶ 19}** We review an appeal from summary judgment under a de novo standard of review. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 746 N.E.2d 618, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 699 N.E.2d 534. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. Id. at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion that is adverse to the non-moving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

**{¶ 20}** The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact. Id. at 293.

**Age Discrimination**

**{¶ 21}** R.C. 4112.02 provides, in relevant part:

> **"It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment. * * *"**

**{¶ 22}** Pursuant to *Mauzy v. Kelly Svcs., Inc.*,75 Ohio St.3d 578, 582, 1996-Ohio-265, 664 N.E.2d 1272, Ohio courts may rely on federal anti-discrimination case law when interpreting and deciding claims brought under R.C. 4112.02 and R.C. 4112.14.

**{¶ 23}** Under both federal and Ohio standards, a plaintiff may establish a prima facie case of discrimination through either direct or indirect evidence. Absent direct evidence, indirect evidence may be used to raise an inference of direct and circumstanced discriminatory intent where a plaintiff establishes that

he: 1) was a member of a statutorily protected class; 2) was subject to adverse employment action; 3) was qualified for the position; and 4) that comparable, non-protected persons were treated more favorably than plaintiff. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817; *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 575 N.E.2d 439.

**{¶ 24}** In *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, the Supreme Court of Ohio modified the fourth prong of this test, by replacing it with "a requirement that the favored employee be substantially younger than the protected" individual. Id. at ¶19. The Supreme Court of Ohio declined to define "substantially younger." Id. at ¶22. Instead, the court noted that "[t]he term 'substantially younger' as applied to age discrimination in employment cases defies an absolute definition and is best determined after considering the particular circumstances of each case." Id. at ¶23.

**{¶ 25}** Once a plaintiff succeeds in establishing a prima facie case of discrimination, the burden shifts to the employer to rebut the presumption of discrimination by articulating some legitimate, nondiscriminatory reason for its adverse action. Then, assuming the employer presents such reasons, the burden shifts back to plaintiff to show that the purported reasons were a pretext for invidious discrimination. To succeed in sustaining the ultimate burden of proving intentional discrimination, a plaintiff may establish a pretext either directly, by showing that the employer was more likely motivated by a discriminatory

reason, or indirectly, by showing that the employer's proffered reason is unworthy of credence. *Sarach-Kozlowska v. Univ. of Cincinnati College of Med.*, Ct. of Cl. Case No. 2001-07505, 2004-Ohio-1926, citing *Fragante v. City & Cty. of Honolulu* (C.A. 9, 1989), 888 F.2d 591, 595, citing *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253, 67 L.Ed.2d 207, 101 S.Ct. 1089.

**{¶ 26}** In the instant case, it is uncontroverted that Pattison was a member of a protected class, given that he was age 50 when Grainger discharged him in January 2003, after 27 years of service. It is also uncontroverted that Pattison was replaced by substantially younger employees. After terminating Pattison, Grainger replaced him with new hires John Wanhainen, age 40, and Lisa Marie Dukes, age 30. In addition, Grainger transferred some of Pattison's accounts to John Hoptry, age 38, who began working for Grainger four months prior to Pattison's termination.

**{¶ 27}** In granting summary judgment in favor of Grainger, the trial court found that Pattison was not qualified for the position because he failed to meet company's sales goals for five consecutive years. We note that Pattison's alleged failure to meet sales goals was Grainger's stated reason for terminating Pattison.

**{¶ 28}** However, "[w]hen assessing whether a plaintiff has met his employer's legitimate expectations at the prima facie stage, * * * a court must examine the plaintiff's evidence independent of the nondiscriminatory reason

'produced' by the defense as its reason for terminating plaintiff." See *Cline v. Catholic Diocese of Toledo* (6th Cir., 2000), 206 F.3d 651, 657. Here, the trial court judged Pattison's qualifications by using Grainger's discharge justification as evidence that Pattison was not qualified.

**{¶ 29}** Our review of the record reveals that after graduating from college in 1975, Pattison began his employment with the family-owned business that was later acquired by Grainger. In total, Pattison spent 27 years with Grainger and its predecessor companies. Pattison moved up through the ranks to become a Territory Manager and held that position for 12 years before being terminated.

**{¶ 30}** In addition, prior to his termination, Pattison generated $3.5 million dollars in revenue and was responsible for 2400 accounts. The record reveals that several of Pattison's customers spoke highly of his qualification, efficiency, and dependability. Several of these customers indicated that they were disappointed with Pattison's replacement, and at least two indicated that they have purchased significantly less from Grainger since Pattison's termination. One former customer stopped purchasing from Grainger after Pattison was terminated.

**{¶ 31}** When viewed independently of Grainger's proffered reason, Pattison offers sufficient evidence for a reasonable jury to find that he was

qualified for his position. As such, Pattison established a prima facie case of age discrimination.

**{¶ 32}** As previously stated, if an appellant makes a prima facie case for age discrimination, then "the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse employment action." *Wexler v. White's Fine Furniture, Inc.* (C.A.6, 2003), 317 F.3d 564, 574. See, also, *Kline v. Tennessee Valley Auth.* (C.A.6, 1997), 128 F.3d 337.

**{¶ 33}** To raise a genuine issue of fact as to pretext and defeat a summary judgment motion under this position, Pattison must show one of the following: "(1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate the action, or (3) that the proffered reason was insufficient to motivate the action." *Nelson v. Gen. Elec. Co.* (6th Cir., 2001), 2 Fed. App. 425, 430; *Tinker v. Sears, Roebuck & Co.* (6th Cir., 1997), 127 F.3d 519, 522; *Manzer v. Diamond Shamrock Chems. Co.* (6th Cir., 1994), 29 F.3d 1078, 1084.

**{¶ 34}** Under the first and third methods of showing pretext, the fact finder may infer discrimination from the circumstances. See *Kline v. Tenn. Valley Auth.* (6th Cir., 1997), 128 F.3d 337, 346. When a plaintiff proves that the defendant's proffered reasons either have no basis in fact or are insufficient to motivate discharge, a permissive inference of discrimination arises. *Manzer*, 29 F.3d at 1084. Under the second method, Pattison may

not rely exclusively on his prima facie evidence, but instead must introduce some further evidence of discrimination. See *Reeves v. Sanderson Plumbing Prods., Inc.* (2000), 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (allowing the fact finder to consider the plaintiff's prima facie evidence when evaluating if the defendant's proffered reason was a pretext); *Kline*, 128 F.3d at 346, noting that "when the reasons offered by the defendant did not actually motivate the discharge," the plaintiff must introduce "additional evidence of discrimination"; *Manzer*, 29 F.3d at 1084, noting that the plaintiff "may not simply rely on his prima facie evidence."

**{¶ 35}** Under any of the three methods used to show pretext, Pattison offered sufficient evidence to permit a reasonable fact finder to conclude that age discrimination motivated Grainger's decision to fire Pattison.

**{¶ 36}** A review of the record indicates that 13 TM's worked in the Cleveland district under DiMeo's direct supervision and each was given yearly sales objectives, which were defined as V% goals. The V% goals were created from the TM's previous year's performance.

**{¶ 37}** The record indicates that in 2002, Pattison's last full year, only one out of the 13 TM's met his V% goals. The individual, Vince Gambino, was hired in December 2001, therefore did not have any 2001 performance numbers from which the V% goals could be created. (Sales Chart, Cleveland TM's, 1998-2002). DiMeo testified that the Cleveland district routinely failed

to meet sales goals, that the district was below goal for the three years prior to Pattison's termination, and that they were below goal for five out of the previous seven years.

**{¶ 38}** Despite the subpar performance of the entire Cleveland district, the record also indicates that Pattison's sales numbers consistently ranked in the mid-range of the 13 TM's, which means he was performing better than half of the other TM's. In addition, the record indicates that at least five substantially younger TM's whose sales numbers were below Pattison's were not terminated. Scott Puhalsky, age 31 at the time of Pattison's termination, testified that he was below goal for half the time under consideration, but was never threatened or reprimanded. (Puhalksy depo. 9-10.)

**{¶ 39}** Brian Waldron, six years younger than Pattison, was promoted in 2002, despite his 2001 sales numbers being four percentage points lower than Pattison's. Similarly, TM's Doug Cisan and Marty Jamieson had lower sales numbers than Pattison in 2001 and 2002, but sustained no adverse actions. (Sales Chart, Cleveland TM's, 1998-2002). TM Kae Kaul, age 38 at the time of Pattison's termination, had cumulative V% figures between 1999 and 2001 that were -21.7 versus Pattison's at -6.33. (Sales Chart, Cleveland TM's, 1998-2002).

**{¶ 40}** The record further reveals that when significantly younger TM's were failing to meet sales goals, they were neither disciplined nor terminated.

Instead, Grainger would transfer them to non-sales positions. For example, Grainger transferred Waldron, Kaul, and Gar Glover to other positions within the company, yet never afforded Pattison the same opportunity. Given that Grainger transferred or promoted significantly younger TM's, who were not meeting sales goals, while terminating Pattison, who was by no means the least productive, raises an inference that Grainger's stated reason for terminating Pattison was pretextual.

**{¶ 41}** We find that Pattison offers evidence showing that Grainger's proffered reason for firing him was false. Grainger claimed that it fired Pattison because of his poor performance; however, Grainger's dissimilar treatment of significantly younger employees, whose performance figures were lower than Pattison's belies its assertion.

**{¶ 42}** Not only does Pattison offer evidence showing that Grainger's reason for terminating him was false, he also offers evidence that the falsity masked discriminatory animus. The record indicates that DiMeo admitted that Grainger had no written or verbal policy about the number of years a TM could fail to meet goals before being terminated. In his deposition, DiMeo testified as follows:

> **"Q. Is there some number, magic number, of how many quarters or years an employee has to miss goals before you will terminate them?**
>
> **There is no magic number." DiMeo depo. 33-34.**

**{¶ 43}** With no clear written or verbal policy, Grainger could arbitrarily and subjectively take adverse employment actions against an employee and attempt to justify its decision, after the fact, by citing poor performance when litigation arises.

**{¶ 44}** Still, Grainger contends that Pattison was the only TM who failed to meet his V% goal for five consecutive years. However, Pattison directs us to DiMeo's action of taking away his largest accounts and transferring them to other TM's, effectively set him up for failure so they could fire him.

**{¶ 45}** The record indicates that in the early part of 2002, DiMeo reassigned four of Pattison's largest accounts, namely Cleveland Plain Dealer, Horsborg & Scott, American Greetings, and KM&M. In granting summary judgment in favor of Grainger, the trial court concluded that Pattison failed to demonstrate how his overall performance would have changed had he continued to service these accounts.

**{¶ 46}** However, the impact of the reassignment, when viewed in its totality tells a different story. The record indicates that in 2002, Pattison serviced approximately 2400 accounts and generated $3.5 million in revenues. This amounts to an average revenue stream of $1,458 per account. The record further indicates that prior to the reassignment, Pattison generated approximately $113,000 from these four accounts. This figure

appears minuscule when compared to the $3.5 million Pattison generated in his last year of employment with Grainger.

**{¶ 47}** However, Pattison's average revenue stream from these four reassigned accounts amount to $28, 250 per account as opposed to an average of $1,458 for the other accounts. Thus, Pattison was generating approximately 20 times more revenue from these four accounts than from the other accounts.

**{¶ 48}** Consequently, at minimum, a genuine issue of material fact exists as to whether DiMeo created the situation for Pattison to underperform, given the size of the accounts that were taken away. We conclude reasonable minds could differ as to Grainger's real reasons for terminating Pattison's employment. Accordingly, we sustain the sole assigned error.

**{¶ 49}** Judgment reversed and cause remanded to the trial court for further proceedings in accordance with the law and consistent with this opinion.

It is, therefore, considered that said appellant recover from said appellees his costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR