

[Cite as *Canady v. Rekau & Rekau, Inc.*, 2009-Ohio-4974.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Robert E. Canady, Jr.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-32
Rekau & Rekau, Inc. et al.,	:	(C.P.C. No. 07CV12-16776)
Defendants-Appellees.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on September 22, 2009

Robert E. Canady, Jr., pro se.

Frost Brown Todd LLC, and Robert D. Hudson, for appellees.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Robert E. Canady, Jr., appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Rekau & Rekau, Inc. ("Rekau"), Vince Ebner, and Marcellus Smith. For the following reasons, we affirm.

{¶2} Rekau operated two McDonald's restaurants in the Columbus area. On October 24, 2004, Rekau hired Canady to work as a general maintenance employee at one of the restaurants. Ebner and Smith, both managers for Rekau, supervised Canady.

{¶3} Generally, Canady worked the second shift (from 1:00 p.m. to 9:00 p.m.), while another general maintenance employee, Dago Llamas, worked the first shift (from 4:45 a.m. to 1:00 p.m.). When Canady reported for his shift, he often discovered that Llamas had not completed his job duties, requiring Canady to perform them. Canady complained to various managers about Llamas, and the managers invariably replied that they would speak to Llamas. However, in Canady's estimation, Llamas' performance never improved.

{¶4} Ebner conducted a performance evaluation of Canady in September 2005. Ebner indicated that Canady needed to improve his performance, particularly with regard to completing the landscaping. Overall, Ebner rated Canady's performance as "needs improvement," and based upon this rating, Rekau denied Canady a pay raise. Other Rekau employees, including Llamas, received a pay raise after their September 2005 performance reviews.

{¶5} In October 2005, Canady injured his back while he was throwing trash bags into the restaurant's dumpster. Canady visited Dr. Robert Taylor, who diagnosed Canady with a lumbosacral strain and sprain. Dr. Taylor completed a Bureau of Workers' Compensation ("Bureau") form entitled "Physician's Report of Workability," which stated that Canady could not work from October 11 through 13, 2005. The form also stated that Canady could return to work on October 13, 2005, but he had to follow certain restrictions on his activities until October 18, 2005. The restrictions that Dr. Taylor imposed precluded Canady from lifting or carrying anything, bending, twisting, turning, reaching below the knee, pushing, pulling, squatting, and kneeling. Canady gave the "Physician's

Report of Workability" to Ebner, who told Canady to stay home until he could perform his job duties. Canady returned to work, without any restriction, on October 25, 2005.

{¶6} Canady's back injury continued to cause him pain, so his physician excused him from work from January 31 to February 13, 2006. Canady returned to work, again without restriction, on February 14, 2006.

{¶7} In spring 2006, Canady was pulling the grill and fryer vats out for cleaning when he experienced sharp pain in his left shoulder. With his physician's approval, Canady was absent from his job for a week due to his shoulder injury. Canady returned to work without any restrictions on his activities.

{¶8} Although Canady's managers verbally reprimanded him from time to time, Canady only received significant discipline once. In July 2006, a manager docked 15 minutes from Canady's break time because he was playing chess while working. The manager also gave Canady a written warning.

{¶9} Soon thereafter, James Rekau, the owner and operator of Rekau, decided that the restaurant did not need two general maintenance employees to operate efficiently. James Rekau chose to eliminate Canady's position because he was the junior general maintenance employee and had performance issues. Rekau terminated Canady's employment on August 5, 2006.

{¶10} During the course of his employment with Rekau, Canady filed two workers' compensation claims. The Bureau allowed the October 2005 claim for the lumbosacral strain and sprain, but disallowed the June 2006 claim for the shoulder injury.

{¶11} On December 10, 2007, Canady, acting pro se, filed suit against defendants. In his complaint, Canady asserted claims for racial discrimination in violation

of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. 2000e et seq., and R.C. 4112.02(A); disability discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12101 et seq., and R.C. 4112.02(A); retaliation; wrongful discharge; and intentional infliction of emotional distress.

{¶12} After taking Canady's deposition, defendants moved for summary judgment. Pursuant to Loc.R. 21.01 of the Franklin County Court of Common Pleas, General Division, Canady had 14 days in which to file a response to defendants' motion for summary judgment. As defendants served their motion on Canady by regular mail on October 14, 2008, Canady had to respond on or before October 31, 2008.¹ Canady missed this deadline. On November 14, 2008, Canady filed a motion asking the trial court to extend the time for filing his response to November 20, 2008. The trial court granted Canady's motion. Despite having selected the new deadline, Canady missed it. Canady did not file his "Motion in Opposition" until November 24, 2008, making the response four days late.

{¶13} Aggrieved by Canady's delinquency, the trial court ruled that it would not consider Canady's memorandum contra when rendering its summary judgment decision. The trial court then reviewed Canady's claims and found that the record did not contain sufficient evidence to support them. Consequently, the trial court granted summary judgment in defendants' favor. The trial court subsequently reduced its decision to judgment.

{¶14} Canady now appeals and assigns the following errors:

¹ Civ.R. 6(E) provides an additional three days to respond to motion for summary judgment served by regular mail. Thus, Canady had a total of 17 days to file his memorandum contra to defendants' motion for summary judgment.

[1.] THE TRIAL [sic] ERRED TO THE PREJUDICE OF APPELLANT IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES FINDING THAT [sic] PLAINTIFF-APPELLANT FAILED TO TIMELY RESPOND TO THE DEFENDANTS-APPELLEES [sic] MOTION AND THAT APPELLANT PRESENTED NO EVIDENCE TO PROVE HIS CASE.

[2.] THE TRIAL COURT ERRED GRANTING SUMMARY JUDGMENT FINDING THAT APPELLANT FAILED TO PRESENT A PRIMA FACIE CASE OF DISCRIMINATION AND RETALIATION AGAINST THE APPELLEES.

{¶15} By his first assignment of error, Canady argues that the trial court erred in: (1) disregarding his late-filed memorandum contra, and (2) granting summary judgment when the evidentiary materials in the record established genuine issues of material fact as to all of his claims. As both the second argument and Canady's second assignment of error challenge the merits of the trial court's summary judgment decision, we will review them together. First, however, we will address the contention that this court should reverse the trial court because it refused to consider Canady's memorandum contra.

{¶16} Trial courts have inherent power to manage their own dockets and the progress of the proceedings before them. *State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 2007-Ohio-2882, ¶23; *Basha v. Ghalib*, 10th Dist. No. 07AP-963, 2008-Ohio-3999, ¶28. Given the discretion a trial court enjoys in managing the course of the litigation before the court, "it is not error [for a trial court] to rule on a summary judgment motion without considering memoranda and affidavits filed out-of-rule." *Prohazka v. Ohio State Univ. Bd. of Trustees*, 10th Dist. No. 03AP-616, 2004-Ohio-1601, ¶28, quoting *Ayers v. Demas* (Mar. 28, 1996), 10th Dist. No. 95APE10-1296. Thus, when a party files his memorandum contra after a court-imposed deadline has lapsed, the trial court may disregard the memorandum and attached evidentiary materials. *Union Sav. Bank v.*

Maga, 2d Dist. No. 20303, 2004-Ohio-3090, ¶21 ("We conclude that the trial court was not obligated to consider [the defendant's] response, with the affidavit attached, because it was not filed before the court-ordered deadline."); *Pingue v. Hyslop*, 10th Dist. No. 01AP-1000, 2002-Ohio-2879, ¶57 (finding no abuse of discretion in failing to consider the plaintiff's memorandum contra when the plaintiff filed it past the deadline set by the trial court).

{¶17} In the case at bar, Canady requested and received an extension of the deadline for filing his memorandum contra to November 20, 2008. As Canady filed his memorandum contra four days after that deadline expired, the trial court was well within its discretion to disregard it and the attached evidentiary materials. Accordingly, we overrule Canady's first assignment of error to the extent that it challenges the trial court's failure to consider Canady's memorandum contra.

{¶18} We now turn to Canady's argument that the trial court erred in granting summary judgment because genuine issues of material fact remain as to his claims. Appellate review of summary judgment motions is de novo. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶11, quoting *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that: (1) there is no genuine issue of material fact, (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 party against whom the

motion for summary judgment is made. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6.

{¶19} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

{¶20} As an initial matter, we will address Canady's claim that defendants violated 42 U.S.C. 1983 when they failed to provide him with a pre- or post-termination hearing. Defendants respond to this claim by pointing out that Canady never asserted a Section 1983 claim or any facts to support such a claim before the trial court. Under the notice pleading requirements of Civ.R. 8(A) and (E), a complaint need only allege those operative facts necessary to give fair notice of the nature of the action. *Johnson v. Ferguson-Ramos*, 10th Dist. No. 04AP-1180, 2005-Ohio-3280, ¶49; *Bridge v. Park Natl. Bank*, 10th Dist. No. 03AP-380, 2003-Ohio-6932, ¶5. Here, even under the most

generous reading, Canady's complaint does not allege facts giving rise to a Section 1983 claim. We conclude that the assertion of that claim on appeal does not provide a basis for reversal of the trial court's summary judgment decision.

{¶21} Canady next argues that the record contains evidence establishing that defendants discriminated against him because of his race. We disagree.

{¶22} Generally, Ohio courts look to federal case law interpreting Title VII to decide claims alleging a violation of R.C. 4112.02. *Plumbers & Steamfitters Jt. Apprenticeship Comm. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196. Therefore, in the absence of direct evidence of discriminatory intent, Ohio courts resolve both federal and state claims of disparate treatment racial discrimination using the evidentiary framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817. *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 584, 1996-Ohio-265; *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, ¶34.

{¶23} Under the *McDonnell Douglas* evidentiary framework, a plaintiff bears the initial burden of establishing a prima facie case of discrimination. In order to do so, the plaintiff must present evidence that: (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position in question, and (4) either he was replaced by someone outside the protected class or a non-protected similarly situated person was treated better. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Mitchell v. Toledo Hosp.* (C.A.6, 1992), 964 F.2d 577, 582-83 (discussing the fourth element). Once a plaintiff has established a prima facie case, the burden of production shifts to the employer to present evidence of some legitimate,

nondiscriminatory reason for its action. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. If the employer carries this burden, then the plaintiff must demonstrate that the reason the employer offered was not its true reason, but was a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253, 101 S.Ct. 1089, 1093.

{¶24} In the case at bar, no one disputes that Canady is African American, and thus, a member of a protected class. Moreover, no one disputes that Canady is qualified for employment as a general maintenance employee. Defendants, however, assert that not every action Canady complains about is an adverse employment action.

{¶25} Generally, an adverse employment action is a materially adverse change in the terms and conditions of the plaintiff's employment. *Michael v. Caterpillar Financial Servs. Corp.* (C.A.6, 2007), 496 F.3d 584, 593; *Samadder* at ¶38. Adverse employment actions include any " 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' " *Tepper v. Potter* (C.A.6, 2007), 505 F.3d 508, 515, quoting *Burlington Indus. v. Ellerth* (1998), 524 U.S. 742, 761, 118 S.Ct. 2257, 2268. Not everything that makes an employee unhappy or resentful is an actionable adverse action. *Primes v. Reno* (C.A.6, 1999), 190 F.3d 765, 767; *Samadder* at ¶38. Employment actions that result in mere inconvenience or an alteration of job responsibilities are not disruptive enough to constitute adverse employment actions. *Mitchell v. Vanderbilt Univ.* (C.A.6, 2004), 389 F.3d 177, 182; *Samadder* at ¶38.

{¶26} Here, we find that most of the actions Canady complains about are not significant enough to amount to adverse employment actions. Canady contends that he

suffered an adverse employment action when: (1) he did not get a new uniform, while Llamas did, (2) he was assigned particular duties—landscaping, pulling and cleaning the grill and fryer vats, and "decking" the floor—that Llamas did not perform, and (3) he was verbally reprimanded for poor performance and disciplined for playing chess while working. The receipt of used (instead of new) uniform shirts is, at most, an inconvenience. While the addition of other maintenance-related duties to Canady's regular duties made Canady unhappy, such a minor alteration of job responsibilities does not result in an adverse employment action. Finally, Ebner and Smith's verbal criticism of Canady's job performance is not an adverse employment action. *Weigold v. ABC Appliance Co.* (C.A.6, 2004), 105 Fed.Appx. 702, 708 ("[A]bsent evidence that it is 'anything more than mere criticism[],' a verbal reprimand does not [constitute an adverse employment action]."). Likewise, Canady's receipt of a written warning and loss of 15 minutes of break time are not serious enough sanctions to result in an adverse employment action. *Howard v. Bd. of Ed. of the Memphis City Schools* (C.A.6, 2003), 70 Fed.Appx. 272, 281 (holding that unless the discipline at issue is " 'accompanied [by] some other action, such as a demotion or salary reduction, it is not an adverse employment action' "); *Handshoe v. Mercy Med. Ctr.* (C.A.6, 2002), 34 Fed.Appx. 441, 446 (concluding that receiving counseling and a "write-up" did not constitute an adverse employment action); *Fernandez v. City of Pataskala* (Nov. 9, 2006), S.D.Ohio No. 2:05-CV-75 (concluding that the plaintiff was not subjected to an adverse employment action when he received a written reprimand and was docked one-half hour vacation time).

{¶27} Only two of defendants' allegedly discriminatory actions rise to the level of an adverse employment action. First, Rekau's decision to deny Canady a raise based

upon the results of his September 2005 performance evaluation qualifies as an adverse employment action. *Farrell v. Butler Univ.* (C.A.7, 2005), 421 F.3d 609, 614 ("[T]he denial of a raise qualifies as an adverse employment action."); *Valentine v. Westshore Primary Care Assoc.*, 8th Dist. No. 89999, 2008-Ohio-4450, ¶97 (holding that the plaintiff "clearly suffered an adverse employment action by not receiving an annual performance review and pay raise"). Evidence that Llamas, a similarly situated co-worker, received a raise satisfies the fourth and final element of the prima facie case. Nevertheless, Canady cannot prevail upon a racial discrimination claim based on the denial of a raise because he presented no evidence to prove that Rekau's legitimate, nondiscriminatory reason for its action was a pretext. Ebner testified that, as a matter of company policy, Rekau only awarded pay raises to employees if they received a satisfactory rating on their yearly performance review. Ebner further explained, "Mr. Canady did not receive a raise in 2005 because he received an overall needs improvement on his September 18, 2005 review." Ebner affidavit, at ¶9. Thus, defendants presented evidence establishing that the denial of a raise resulted from a poor rating on the performance review, not racial discrimination.

{¶28} Once an employer has articulated a legitimate, nondiscriminatory reason, the burden-shifting framework disappears, leaving the plaintiff with the ultimate burden of proving that the employer intentionally discriminated against him. *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 510-11, 113 S.Ct. 2742, 2749. A plaintiff satisfies this burden by presenting evidence from which a jury could conclude that the employer's proffered reason was false and that discrimination was the real reason for the adverse employment action. *Id.* at 509 U.S. at 515, 113 S.Ct. at 2752. Here, Canady's only effort to show pretext is a bald, self-serving statement that Rekau denied him a raise without reasoning

or justification. The record, however, belies Canady's statement. Rekau gave a reason—Canady's poor performance—that Canady had to prove false in order to show pretext. Canady cannot satisfy this burden by merely denying the existence of a legitimate, nondiscriminatory reason when, in fact, the record contains such a reason. Given the evidence in the record, reasonable minds could only conclude that Canady failed to show any pretext and that Rekau did not discriminate against Canady when it denied him a raise.

{¶29} Like the denial of a pay raise, Canady's termination also constitutes an adverse employment action. However, in his deposition, Canady abandoned any racial discrimination claim based upon the termination of his employment. Early in the deposition, Canady admitted:

A: * * * I don't feel that race, you know, was part of my discharge. That's why I didn't mention it [as a reason for discharge], because I don't feel like it played a part in my discharge.

Canady deposition, at 96. After questioning Canady about other matters, defendants' attorney explored the scope of Canady's racial discrimination claim in light of his earlier admission:

Q: You're accusing Mr. Rekau of discharging you because of your race?

A: Yeah. One of the reasons.

Q: Mr. Canady, how is it that you can maintain a claim alleging racial termination, and then testify under oath earlier today that you didn't believe Mr. Rekau terminated you because of your race?

A: Well, like I say, I don't believe that it [sic] was terminated because of my race, but I felt I was treated differently because of my race.

Q: During your employment?

A: During my employment.

Q: So to clarify, you're maintaining as far as your racial discrimination claim that you were treated differently during your employment because of your race, but you're not claiming that you were discharged because of your race?

A: Right. Exactly. Yes.

Canady deposition, at 134-35.

{¶30} In this testimony, Canady conceded that the only basis for his racial discrimination claim was the allegedly discriminatory treatment he suffered during his employment. As we concluded above, however, most of that treatment did not amount to adverse employment actions. The sole exception—the denial of a raise—did not result from intentional discrimination. Consequently, we conclude that Canady cannot prove his claim for racial discrimination, and thus, the trial court did not err in granting defendants summary judgment on that claim.

{¶31} Canady next argues that the record contains evidence establishing that defendants discriminated against him when they failed to make a reasonable accommodation for his back injury. We disagree.

{¶32} Both federal and Ohio law impose a duty on employers to make reasonable accommodations for their employees with disabilities. 42 U.S.C. 12112(b)(5)(A) (requiring employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee * * *"); Ohio Adm.Code 4112-5-08(E)(1) ("An employer must make reasonable accommodation to the disability of an employee or applicant * * *"). The

federal and Ohio definitions of what constitutes a disability are virtually identical.

According to 42 U.S.C. 12102(2):

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

R.C. 4112.01(A)(13) defines "disability" as:

[A] physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

Given the similarity between the ADA and Ohio disability discrimination law, Ohio courts look to regulations and cases interpreting the federal act when deciding cases including both federal and state disability discrimination claims. See *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 573, 1998-Ohio-410.

{¶33} When determining whether an individual is substantially limited in performing a major life activity, courts should examine: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. 29 C.F.R. 1630.2(j)(2)(i)-(iii). In order for an impairment to be substantially limiting, the impairment must "prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people's daily lives" and "[t]he impairment's impact must also be permanent or long term." *Toyota Motor Mfg.*,

Kentucky, Inc. v. Williams (2002), 534 U.S. 184, 198, 122 S.Ct. 681, 691.² Temporary impairments, with little or no long-term or permanent impact, are usually not disabilities. *Novak v. MetroHealth Med. Ctr.* (C.A.6, 2007), 503 F.3d 572, 582, quoting 29 C.F.R. Pt. 1630, App. sec. 1630.2(j). See also *Agnew v. Heat Treating Servs. of Am.* (Dec. 14, 2005), C.A.6 No. 04-2531 ("Temporary physical conditions, even those that may possibly recur, do not generally constitute substantial impairments."); *Mahon v. Crowell* (C.A.6, 2002), 295 F.3d 585, 590-91 ("[A]ny impairment that only moderately or intermittently prevents an individual from performing major life activities is not a substantially limitation under the [ADA]."). Thus, a back injury that only temporarily causes pain and limits a person's activities is not a substantially limiting physical impairment. *Agnew; Cunningham v. Steubenville Orthopedics and Sports Med., Inc.*, 175 Ohio App.3d 627, 2008-Ohio-1172, ¶92; *Yamamoto v. Midwest Screw Products*, 11th Dist. No. 2000-L-200, 2002-Ohio-3362, ¶¶26-29; *Maloney v. Barberton Citizens Hosp.* (1996), 109 Ohio App.3d 372, 376-77.

{¶34} In the case at bar, Canady failed to identify any major life activities that his back injury substantially limited. Reviewing the record for evidence of substantial limitation, we find that Canady's back injury prevented him from working for only a short time—one two-week period in October 2005 and a second two-week period in February 2006. At the end of each of these periods, Canady returned to work without any restrictions on his activities and performed all his job duties. Moreover, Canady admitted

² In the ADA Amendments Act of 2008, Pub.L.No. 110-325, sec. 2, 122 Stat. 3553, Congress rejected the standard for "substantially limits" articulated in *Williams*. The ADA Amendments Act, however, does not apply retroactively to govern conduct that occurred prior to January 1, 2009, the date the Act became effective. *Milholland v. Sumner Cty. Bd. of Ed.* (C.A.6, 2009), 569 F.3d 562, 565-67. Because all the allegedly discriminatory conduct at issue here occurred before January 1, 2009, we do not apply the Act to this case.

that, at the time of his September 2008 deposition, he could perform ordinary, everyday activities. Thus, rather than establishing the permanent or long-term impairment necessary for a disability, the evidence shows that Canady's back injury was only temporary. Because Canady's back injury fails to qualify as a "disability," we conclude that the trial court did not err in granting defendants summary judgment on Canady's disability discrimination claim.

{¶35} Canady next argues that the record contains evidence establishing that defendants discharged him for attending another Rekau employee's unemployment compensation benefit hearing. Canady's complaint asserted a generic claim for "retaliation" based upon three incidents: (1) he filed two workers' compensations claims, (2) he complained about Llamas' poor performance, and (3) he complained to McDonald's corporate office about defendants' treatment of him. Importantly, the complaint did not allege that defendants retaliated against Canady because of his attendance of an unemployment compensation benefit hearing. Without such an allegation, Canady deprived defendants of the "fair notice" necessary to state a claim for unemployment compensation retaliation. See *Johnson* at ¶49; *Bridge* at ¶5. Because Canady never stated a claim for unemployment compensation retaliation, Canady's argument regarding that "claim" cannot serve as a basis to reverse the underlying judgment.

{¶36} Canady also argues that the record contains evidence establishing that defendants retaliated against him for filing two workers' compensation claims. Pursuant to R.C. 4123.90:

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee

filed a claim * * * under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.

If an employer retaliates against an employee for filing a workers' compensation claim, then the employee may file an action against the employer. Id. However:

The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken.

Id.

{¶37} In the case at bar, defendants all testified that they did not receive any written notice claiming a violation of R.C. 4123.90 within 90 days of Canady's discharge. Canady does not dispute this testimony. Moreover, Canady does not dispute that he filed his retaliation action over 180 days after his discharge. R.C. 4123.90 thus precludes Canady from suing defendants for retaliation based upon his filing of two workers' compensation claims. Accordingly, we conclude that the trial court did not err in granting defendants summary judgment on the workers' compensation retaliation claim.

{¶38} Finally, Canady argues that the record contains evidence that defendants violated 42 U.S.C. 2000e-3, the Title VII anti-retaliation section. We disagree.

{¶39} In relevant part, 42 U.S.C. 2000e-3(a) prohibits an employer from retaliating against an employee because the employee has "opposed any practice made an unlawful employment practice by this subchapter." In general, the subchapter at issue makes it an "unlawful employment practice" to discriminate in any employment decision

because of an individual's race, color, religion, sex, or national origin. *McDonnell Douglas*, 411 U.S. at 796, 93 S.Ct. at 1821.

{¶40} In addition to governing Title VII discrimination claims, the *McDonnell Douglas* burden-shifting framework also applies to Title VII retaliation claims. *Martin v. Toledo Cardiology Consultants, Inc.* (C.A.6, 2008), 548 F.3d 405, 412. In order to establish a prima facie case of retaliation, a plaintiff must prove: (1) he engaged in activity protected by Title VII, (2) the defendant knew that the plaintiff engaged in the protected activity, (3) the defendant subsequently took an adverse employment action against the plaintiff, and (4) the protected activity and the adverse employment action were casually connected. *Id.*

{¶41} In the case at bar, Canady contends that Rekau discharged him because he complained about Llamas' poor performance and he complained to McDonald's corporate office about the treatment he received at Rekau. Canady's complaints, however, never included allegations that defendants discriminated against him on the basis of his race. If an employee merely complains generally about job conditions, without making any allegation of unlawful discriminatory conduct, he has not engaged in a protected activity. *Gerard v. Bd. of Regents* (C.A.11, 2009), 324 Fed.Appx. 818, 826 (holding that the plaintiff's complaint letter "did not constitute statutorily protected expression, because it laid out a list of grievances, but did not indicate that he was discriminated against based on his membership in a protected group"); *Garza v. Laredo Indep. School Dist.* (C.A.5, 2009), 309 Fed.Appx. 806, 810 (concluding that a teacher's general complaint about the school principal and manner in which the school functioned was not a protected activity because the teacher "did not once state that there were

issues of racial or national origin discrimination"); *Smith v. Internatl. Paper Co.* (C.A.8, 2008), 523 F.3d 845, 849-50 (holding that because the plaintiff's complaint about the verbal berating he received from his supervisor contained no reference to race, color, or national origin, it did not constitute protected conduct). "While no 'magic words' are required, the complaint must in some way allege unlawful discrimination * * *." *Broderick v. Donaldson* (C.A.D.C.2006), 437 F.3d 1226, 1232. See also *Fundukian v. United Blood Servs.* (C.A.9, 2001), 18 Fed.Appx. 572, 576 ("Generalized complaints about [the plaintiff's] job conditions * * * do not constitute protected opposition because they do not relate to conduct made unlawful by Title VII.").

{¶42} Because Canady's complaints did not contain any allegation of unlawful racial discrimination, he did not engage in a protected activity. Therefore, we conclude that the trial court did not err in granting summary judgment to defendants on Canady's Title VII retaliation claim.

{¶43} In sum, contrary to Canady's arguments, we do not find any evidence in the record that creates a genuine issue of material fact or precludes the entry of summary judgment in defendants' favor. Accordingly, we overrule Canady's first assignment of error to the extent that it challenges the merits of the trial court's summary judgment decision, and we overrule Canady's second assignment of error in its entirety.

{¶44} For the foregoing reasons, we overrule Canady's two assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
