IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PEGGY J. BARNUM,

Plaintiff,

v.

OHIO STATE UNIVERSITY MEDICAL CENTER, *et al.*

Defendants.

Case No. 2:12-cv-930

Judge Peter C. Economus

MEMORANDUM OPINION AND ORDER

Plaintiff Peggy J. Barnum brought this action against Defendants The Ohio State University Medical Center ("OSUMC"); E. Gordon Gee, in his official capacity as President of the Ohio State University ("OSU"); Steven G. Gabbe, in his official capacity as Chief Executive Officer of OSUMC; Ronald Harter, in his individual capacity and official capacity as Chair of the Anesthesia Department of OSUMC; Stephen Pariser, in his individual capacity and official capacity as Chair of the Peer Review Committee of the Ohio State University ("Peer Review Committee"); and John and Jane Does Number One through Ten ("Does"), in their individual capacities and official capacities as members of the Peer Review Committee. Barnum alleges that Defendants retaliated against her for voicing concerns regarding OSUMC's privacy practices, discriminated against her based on disability or perceived disability, and denied her due process and equal protection by placing her on leave and by eventually reinstating her under less favorable conditions of employment.

The factual background of this case is set forth in the Court's Opinion and Order dated November 8, 2013 (doc. 31, the "2013 Order"), in which the Court granted in part and denied in part a motion to dismiss filed by Defendant OSUMC.

In an Opinion and Order dated August 5, 2014 (doc. 55, the "2014 Order"), the Court granted in part and denied in part a motion to dismiss, or for qualified immunity, filed by Defendants Gee and Gabbe, in their official capacities; and Harter and Pariser, in their individual and official capacities (the "Individual Defendants"). The 2014 Order dismissed several claims and denied the Individual Defendants' motion for qualified immunity without prejudice to filing a renewed motion.

Following the dismissal of several claims in the 2013 and 2014 Orders, the following claims remain pending:

i. First Amendment retaliation claims against Defendants Harter, Pariser, and Does in their individual capacities; as well as any claims for injunctive relief against OSUMC and the individual defendants in their official capacities;

ii. Due process claims for deprivation of property interest in employment against Defendants Harter, Pariser, and Does in their individual capacities; as well as claims for injunctive relief against OSUMC;

iii. Rehabilitation Act claim against OSUMC; and

iv. Americans with Disabilities Act claim for injunctive relief against OSUMC.

This case is now before the Court on cross motions for summary judgment. Barnum seeks summary judgment on her claim under the Rehabilitation Act (doc. 64), and Defendants seek summary judgment on all remaining claims (doc. 65).

I. Standard of Review

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view the evidence and draw all reasonable inferences in favor of the non-moving party, *Matsushito Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), but "need not make assumptions that strain credulity," *Grecewicz v. Henry Ford Macomb Hosp.*

Corp., 683 F.3d 316, 323 (6th Cir. 2012). Any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Muhammad v. Close*, 379 F.3d 413, 416 (6th Cir. 2004).

The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Where the record completely contradicts the movant's version of the facts so that no reasonable jury could believe it, the district court should not adopt the movant's version of the facts. *Scott v. Harris*, 550 U.S. 372, 380–81 (2007). Deposition testimony "alone is sufficient to create a jury question . . . ." *Harris v. J.B. Robinson Jewelers*, 627 F.3d 235, 238 (6th Cir. 2010).

II. First Amendment Retaliation

Defendants seek summary judgment on Barnum's First Amendment retaliation claims against Defendants Harter, Pariser, and Does in their individual capacities; as well as any claims for injunctive relief against OSUMC and the individual defendants in their official capacities.

A. Allegations of Retaliation

Barnum alleges in her complaint:

> Defendants and their employees, all state actors acting under the color of law by virtue of how they invoked or applied the OSU policies, conspired and acted in concert to defame, stigmatize, and disadvantage Peggy J. Barnum in her employment relationship to punish and retaliate against her for alleging various privacy violations of federal law and regulations. Such conduct by Defendants constituted First Amendment retaliation and violated Peggy J. Barnum's rights under the First and Fourteenth Amendments to the U.S. Constitution, and gives rise to a claim for relief, including money damages against Defendants Harter, Pariser, and John and Jane Does No. 1-10 under 42 U.S.C. 1983.

(2d Am. Compl. ¶ 33.)

More specifically, Barnum alleges that she "first voiced concerns about confidentiality of her medical records on October 7, 2011." (Doc. 77-1 at 18 (citing 2d Am. Compl. ¶ 10).) During the October 7, 2011 phone call with Drs. Harter and Pariser, Barnum "voiced concern that her husband might see the treatment records or bills" if she reported to the OSUMC emergency department. (2d Am. Compl. ¶ 10.) Barnum stated during her deposition that, during this phone call, she asked whether she "[had] to go to OSU's emergency room," and "[Drs. Harter and Pariser] said [she] was welcome to go anywhere else." (Barnum Dep. 73 (Doc. 66-1).) Barnum asserts that, following this conversation, OSUMC retaliated by "plac[ing] her on leave for over one year." (Doc. 77-1 at 18 (citing 2d Am. Compl. ¶ 10).) Barnum alleges that, in retaliation for her expressions of concern during the October 7, 2011 phone conversation, Defendants "placed her on leave for over one year." (Doc. 77-1 at 17 (citing 2d Am. Compl. ¶ 10).)

Barnum also asserts that OSUMC retaliated after she filed an administrative complaint alleging privacy violations. Barnum's allegations and the evidence are inconsistent on this matter. In the Second Amended Complaint, Barnum alleges that she "filed a complaint with the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR)" on April 18, 2012. (2d. Am. Compl. ¶ 27.) In her response brief opposing Defendants' motion, Barnum asserts that she "filed the complaint with the HHS OCR on or about February 1, 2012**."** (Doc. 77-1 at 11, 16.) The evidence shows that Barnum filed two complaints, roughly accounting for the different dates alleged. First, on February 1, 2012, Barnum filed an internal complaint with OSUMC, which investigated her allegations and issued a case report on March 27, 2012, finding that no "discrimination, HIPAA violation(s) or policy violation(s)" occurred, and that, "based on Ms. Barnum's action in the workplace[,] . . . [OSUMC] followed the appropriate defined process for credentialed medical staff that has been established for such cases." (Doc. 66-2 at 79–81.)

Second, Barnum filed a Charge of Discrimination with the Ohio Civil Rights Commission; this complaint was signed on April 7, 2012 and stamped as received on April 11, 2012. (Doc. 66-2 at 72–73.) The Court considers each complaint separately in the context of Barnum's allegations of retaliation. Barnum alleges that, in retaliation for her administrative complaint(s), Defendants (i) converted her leave to unpaid (doc. 77-1 at 17); (ii) "moved her return to work pathway from a minor mental health issue to a major mental health issue" (doc. 77-1 at 18 (citing Thomas Dep. 64–74)); and (iii) "failed to promptly process her return to work examination based on [the allegedly] false pretense[] [that] . . . OSU need[ed] [a] release from Masterson" (doc. 77-1 at 18 (citing Pariser Dep. Vol. 1, 92–96)).

B. Timeline

Defendants argue that the timeline of events does not support Barnum's allegations of retaliation. (Doc. 65 at 18.) The following summarizes the timeline of relevant events.

In **September to early October of 2011**, over a period of two to four weeks, several of Barnum's coworkers expressed concern about Barnum. In response, Dr. Arbona, an anesthesiologist at OSU East, called Dr. Harter and reported that Barnum may have "suicidal intention." (Arbona Dep. 43–83.) Barnum testified that she thought that her coworkers' concern for her would have been "sincere and genuine." (Barnum Dep. 105.)

On **October 7, 2011**, Drs. Harter and Pariser requested that Barnum report to the OSUMC emergency department ("ED") to be evaluated for suicide risk. Barnum told Drs. Harter and Pariser that she was concerned that her husband may see treatment records. She was told that, although she was welcome to go elsewhere, her information would be more likely to cross her husband's desk if she went to a different hospital. She went to the OSUMC ED. (Barnum

Dep. 73–74.) While Barnum was at the OSUMC ED, Dr. Pariser emailed Barnum stating that he would schedule a meeting with the LIPHC. (Barnum Dep. 75–76.)

On **October 9, 2011**, Dr. Harter placed Barnum on "sick time" leave for one to two weeks, pending an evaluation. (Harter Dep. 45–46 (doc. 69).)

On **October 11, 2011**, in an email, Dr. Harter scheduled the LIPHC meeting for October 25, 2011 and told Barnum that the LIPHC wanted her to see a psychiatrist. (Barnum Dep. 107, ex. 11.)

On **October 25, 2011**, Barnum met with the LIPHC committee, which recommended that Barnum remain off work until she secured a fitness for duty examination from a psychiatrist. Barnum testified that she initially resisted seeing a psychiatrist because she felt that the request amounted to "saying [she was] a nut job." She was also concerned that her husband would know any psychiatrist at OSUMC, and she did not want to see a psychiatrist outside OSUMC because she did not believe it would be covered by her health insurance policy. (Barnum Dep. 137–38.)

On **November 16, 2011**, Barnum saw a psychiatrist, Dr. Masterson.

On **November 22, 2011**, Barnum met with Dr. Thomas, who indicated that a "fit-to-return-to-work" report from a psychiatrist Barnum selects would be adequate, as long as that individual had talked to Dr. Harter. (Barnum Dep. 205.)

Barnum testified that, following her November 16, 2011 meeting with a psychiatrist, "[she] spent months and a total of 21 communications with [her] divorce attorney saying where is the report from Dr. Masterson." (Barnum Dep. 207.)

On **February 1, 2012**, Barnum filed an internal complaint with OSUMC human resources, including allegations of privacy violations.

On **February 22, 2012**, Barnum delivered to OSUMC a report by Dr. Masterson stating that Barnum was and always had been fit for duty. (2d. Am. Compl. ¶ 23.) Dr. Masterson had not spoken with Dr. Harter.

In **March of 2012**, OSU requested Barnum to sign a release permitting OSU personnel to confer with Dr. Masterson. Barnum objected and requested that OSU either submit written questions to Dr. Masterson or confer with Dr. Masterson in a conference call attended by Barnum's attorney.

In **April of 2012**, Barnum filed a Charge of Discrimination with the OCR.

On **June 21, 2012**, Barnum signed OSUMC's authorization form allowing OSUMC personnel to speak privately with Dr. Masterson.

On **July 10, 2012**, Drs. Thomas and Harter spoke with and provided background information to Dr. Masterson, who then issued an addendum to his report stating that his fitness-for-duty opinion had not changed.

On **July 31, 2012**, Barnum provided OSUMC with a second opinion from Dr. Spare, a psychiatrist, who opined that she was fit for duty.

On **August 22, 2012**, Barnum met with the LIPHC, which recommended her return to work. She was reinstated on **November 9, 2012**.

C. Analysis[1]

1. Placing Barnum on Leave

Barnum first alleges that OSUMC retaliated for her speech during the October 7, 2011

[1] Defendants and Barnum brief at length the issue of whether Barnum's speech was on a matter of public concern. However, in the 2013 Order, the Court determined that Barnum's speech was mixed, as it concerned alleged violations of HIPAA by OSUMC, and therefore protected as being on a matter of public concern. The Court finds that that the parties have not submitted additional evidence to change this conclusion.

phone call by "plac[ing] her on leave for over one year." (Doc. 77-1 at 18 (citing 2d Am. Compl. ¶ 10).) The focus of this allegation appears to be the initial action of placing Barnum on leave; later delays are addressed separately below.

The Court finds that there is no genuine dispute as to Defendants' actions immediately following the events of October 7, 2011. There is no evidence suggesting that Defendants placed Barnum on leave in retaliation for her statements on October 7, 2011. As Defendants point out, by the time Barnum expressed any concerns about her privacy, "the process had already begun to place her on leave, based on the good faith concerns of her colleagues," of which Barnum does not question the sincerity. (Doc. 65 at 18.)

No one disputes that the process of returning Barnum to work faced lengthy delays. Neither is there a genuine dispute, however, that the initial delays were caused by Barnum's hesitation to see a psychiatrist, which she considered a personal insult, and by the disorganization or miscommunication between Barnum, her attorney, and Barnum's chosen psychiatrist.

Defendants undisputedly started the process of placing Barnum on leave before she first expressed any privacy concerns, and the Court finds that there is no genuine question as to whether Barnum caused the initial delays. The Court therefore dismisses Barnum's claim that OSUMC retaliated for her October 7, 2011 speech by placing her on leave.

2. Converting Leave to Unpaid

As to the conversion of Barnum's leave to unpaid, it appears that "at some point while [Barnum] was off she exhausted her vacation and her sick leave, so . . . she had converted to administrative leave without pay." (Doc. 70-1 at 123.) Aside from the overall complaint that her return to work was inappropriately delayed, Barnum has made no specific argument that OSUMC should have placed her on paid leave following the exhaustion of accrued paid leave. Because this "conversion" to unpaid leave appears to be a matter of Barnum simply exhausting

her paid leave, and Barnum makes no arguments otherwise, the Court finds that there is no genuine issue of material fact as to whether this "conversion" constituted retaliation. The Court therefore dismisses Barnum's claim that OSUMC retaliated by converting her leave to unpaid.

3. Changing the Return to Work Pathway

Barnum complains that OSUMC inappropriately delayed her return to work by placing her on a more demanding "pathway" to returning to work, from Pathway 1 for a minor mental health issue to Pathway 2 for a major mental health issue. She cites only Dr. Thomas' deposition, in which he testified that Barnum "effectively went through some of the same steps as Pathway 2" due to the length of time she had been off work. He stated that "from a due diligence perspective [] we would put her back through the routine process for someone getting privileges, which is credentials committee." (Doc. 70-1 at 120.)

In her motion for summary judgment, Barnum argues that Dr. Thomas placed her on Pathway #2 "based on mistaken concerns about her mental health," an argument that is inconsistent with her allegation that she was moved to Pathway 2 in retaliation for protected speech. (Doc. 64-1 at 20 (citing Thomas Dep. at 66).) She makes no other arguments and points to no other evidence regarding the appropriate pathway or process for returning to work. Because the record contains no evidence that Barnum's return-to-work "pathway" was altered inappropriately, the Court concludes that there is no genuine issue of material fact as to whether Defendants retaliated by changing Barnum's "pathway," and therefore dismisses this claim.

4. Insisting on a Release

As stated above, a condition of Barnum's return to work was a fitness-for-duty report from a psychiatrist who had talked to OSUMC personnel (specifically Dr. Harter) for context. Barnum argues that OSUMC retaliated against her by demanding a release permitting OSUMC personnel to talk to Dr. Masterson, which Barnum asserts was unnecessary. Barnum testified that

she orally gave Dr. Masterson permission to speak with Dr. Harter, but Dr. Harter objected to such a conversation, saying he had to consult with OSU attorneys. (Barnum Dep. 338.)

Barnum makes no legal argument that a written release was unnecessary. To support her argument that it was unnecessary, and simply an excuse for OSUMC to drag out the process of returning her to work, Barnum points to Dr. Pariser's testimony that he "personally . . . would want to see a signed release" only due to the contentious tone and considerable hostility of the circumstances. (Doc. 71-1 at 94, 95–96.) Dr. Pariser testified:

> We wouldn't need a signed release as a peer review committee to talk with the forensic psychiatrist. But with the client being so contentious at this time – some would refer to her as paranoid. I'm not, but some did – it would be very respectful to see that the expert had a release signed before we proceeded, so as not to further aggravate the situation.

(Doc. 71-1 at 96.) Dr. Pariser's hesitation is supported by Barnum's testimony that she objected to Dr. Pariser talking to Dr. Masterson, based on Dr. Pariser having "proven himself to be a liar." (Barnum Dep. 246.)

Considering Barnum's stated objection to one OSUMC doctor talking to her psychiatrist, the Court finds that it is unreasonable to argue that another OSUMC doctor should have talked to her psychiatrist without a release. Because Barnum has made no legal argument that a written release was unnecessary, and because the evidence shows that she did object to at least one OSUMC doctor speaking with Dr. Masterson, the Court finds that no genuine issue of material fact exists as to whether OSUMC's insistence on a release constituted retaliation, and dismisses this claim.

5. Qualified Immunity

Defendants also assert that qualified immunity bars Barnum's retaliation claims against the individual defendants. Because Barnum has not shown a violation of a constitutionally

protected right, the Court need not further analyze the application of qualified immunity. *See Cass v. City of Dayton*, 770 F.3d 368, 374 (6th Cir. 2014) (citing *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001)); *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999); *Mattox v. City of Forest Park*, 183 F.3d 515, 520 (6th Cir. 1999) (before deciding whether qualified immunity applies, a court must first answer the threshold inquiry of whether the plaintiff sufficiently alleges violation of a protected right; where the plaintiff has failed to allege a constitutional violation, such failure is fatal to her case); *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").

Because the Court has found no genuine issue of material fact as to any of Barnum's First Amendment retaliation claims, and has found that Defendants are entitled to judgment as a matter of law, these claims are hereby **DISMISSED**.

III. Due Process

Defendants seek summary judgment on Barnum's due process claims for deprivation of property interest in employment against Defendants Harter, Pariser, and Does in their individual capacities; as well as claims for injunctive relief against OSUMC.

In the 2013 and 2014 Orders, the Court denied Defendants' motions to dismiss Barnum's claim that she was deprived of her property interest in her employment without due process based on the possibility that Barnum was employed as a classified civil servant under Ohio Revised Code § 124.11(A). The parties still dispute whether Barnum's position is classified. However, to state a due process claim as a classified civil servant, Barnum must "demonstrate[e] that the available state procedures were inadequate to compensate for the alleged

unconstitutional deprivation." *Collyer v. Darling*, 98 F.3d 211, 223 (6th Cir. 1996). As Defendants point out, if Barnum's position were classified, the available state procedure would be an appeal to the State Personnel Board of Review (SPBR). *See* Ohio Rev. Code § 124.34. Barnum did not pursue such an appeal (Barnum Dep. 328–29), and she makes no arguments regarding the adequacy of such an appeal.

Even assuming that Barnum is a classified civil servant, she has not alleged that the available state procedures were inadequate. Because she has presented neither arguments nor evidence that the available state procedures are inadequate, the Court finds that there is no genuine issue of material fact, and Defendants are entitled to judgment as a matter of law, as to this claim. Barnum's due process claims are hereby **DISMISSED**.[2]

IV. Rehabilitation Act and Americans with Disabilities Act

Barnum and Defendants have filed cross motions for summary judgment on Barnum's Rehabilitation Act claim against OSUMC, and Defendants seek summary judgment on Barnum's Americans with Disabilities Act ("ADA") claim for injunctive relief against OSUMC. In both of these claims, Barnum alleges that Defendants discriminated against her because they regarded her as disabled. Because the analysis is the same under either statute, *Mahon v. Crowell*, 295 F.3d 585, 589 (6th Cir. 2002), the Court considers the claims together.

To establish a prima facie case of disability discrimination, Barnum must show that (1) she is an individual with a disability; (2) she was otherwise qualified to perform a job's requirements, with or without reasonable accommodation; and (3) she was discriminated against solely because of the disability, and suffered an adverse employment action. *Spees v. James*

[2] Having found no constitutional violation, the Court need not further analyze the application of qualified immunity, for the same reasons explained above as to Barnum's First Amendment retaliation claims.

Marine, Inc., 617 F.3d 380, 395 (6th Cir. 2010) (citation omitted). As to the first element, "disability" means: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; . . . (B) a record of such an impairment; or . . . (C) being regarded as having such an impairment . . ." 42 U.S.C. § 12102(1).

Barnum alleges that Defendants discriminated against her because they regarded her as disabled. However, the Sixth Circuit has held that, following an employee's unusual behavior, an employer may require the employee to undergo a mental examination to determine fitness for duty. In *Sullivan v. River Valley School District*, the defendant school district asked the plaintiff teacher to "undergo mental and physical examinations to determine his fitness as a teacher following his allegedly exhibiting some unusual behavior." 197 F.3d 804, 810 (6th Cir. 1999). The Court held that:

> Given that an employer needs to be able to determine the cause of an employee's aberrant behavior, [evidence that the employer requested such examinations] is not enough to suggest that the employee is regarded as mentally disabled. As the district court ably explained, a defendant employer's perception that health problems are adversely affecting an employee's job performance is not tantamount to regarding that employee as disabled.

Id. The Sixth Circuit adopted the Eighth Circuit's reasoning that "requiring an employee to see a psychologist before returning to work does not run afoul of the ADA" because "[e]mployers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims under §§ 12112(a) and 12102(2)(C)." *Sullivan*, 197 F.3d at 811 (citations omitted).

Barnum does not address the Sixth Circuit's holding in *Sullivan*. Instead, she argues that Defendants either believed Barnum was disabled in that she was ill, suicidal, or so emotionally unstable that she could not care for herself (doc. 77-1 at 23); or that they "[knew] they were mistaken" regarding her disability and were instead relying on "stereotyped fears and

assumptions about [her] ability to take care of herself and to perform her job because of a perception that she was 'ill'" (*id.* at 24). Barnum presents no evidence, however, that Defendants' actions were based on "stereotyped fears"; in fact, Defendants' request for a psychiatric assessment was consistent with the recommendations of Barnum's counselor and her treating physician at the OSUMC ED. (Barnum Dep. ex. 25 (doc. 66-2 at 130–32); doc. 77-1 at 9.) *See Mahon v. Crowell*, 295 F.3d 585, 592 (6th Cir. 2002) (holding that an employer's altering of work requirements, in accordance with specific recommendations of employee's treating physician, did not constitute regarding the employee as disabled).

Barnum also argues that Defendants failed to undertake an individualized investigation as to whether Barnum's perceived disability substantially interfered with work, pointing to the absence of highly particularized details (specific dates and quotes) regarding her coworkers' expressions of concern. The Court finds that there is no genuine question as to whether OSUMC failed to undertake an individualized investigation of Barnum's ability to do her job. OSUMC undertook an investigation by, among other actions, requesting a psychiatric report from a psychiatrist who had been informed of the context: Barnum's actions and statements in the workplace. It is not particularly relevant that OSUMC does not have records of the specific dates and quotes of Barnum's coworkers' expressions of concern; Barnum does not question the sincerity of these concerns, and Defendants have disclosed the relevant details leading to their request for her to visit the ED.

In light of *Sullivan*, and particularly considering the recommendations of Barnum's counselor and ED physician, the Court finds that Defendants' insistence on a psychiatric examination is not evidence of discrimination. Barnum has a highly sensitive and important job—putting people to sleep for procedures—and it is undisputed that her coworkers were

genuinely concerned about her state of mind when she was put on leave. According to Barnum's counselor, Barnum "lack[ed] . . . insight as to the significance of her own statement, 'I am losing it at work everyday.'" Barnum has put forth no evidence that distinguishes this case from *Sullivan*.

The Court concludes that there is no genuine issue of material fact, and Defendants are entitled to judgment as a matter of law, as to Barnum's disability discrimination claims under the Rehabilitation Act and ADA. These claims are hereby **DISMISSED**.

V. Conclusion

For the reasons discussed above, the Court hereby **GRANTS** Defendants' motion (doc. 65), **DENIES** Plaintiff's motion (doc. 64), and **DISMISSES** this case.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE