



including Willo Thomas, Pam Chasteen, and Inder Sharma. From 1982 through 1992, plaintiff received generally satisfactory evaluations from Willo Thomas; however, some problem areas were noted. From April 1992 to April 1993, plaintiff reported to Pam Chasteen who rated plaintiff "below" expectation in four of seven performance categories. Plaintiff's next evaluation was written by Inder Sharma and covered the period from April 9, 1995, to April 9, 1996. Sharma had been plaintiff's supervisor for only a few months when he evaluated plaintiff's performance as "meets" expectation in all seven categories.

{¶ 4} Plaintiff asserts that her relationship with Sharma became problematic after an October 30, 1996, meeting with him, TPW Gwen Antoine, and staff nurse Lynn Veal. According to Sharma, the meeting was intended to welcome Antoine back to work from a leave of absence and to emphasize that she was required to follow the direction of any RN on her shift, including plaintiff and Veal. Sharma asked both plaintiff and Veal to write a statement to memorialize the meeting because Antoine had been offended when Sharma cautioned that the employees should not have any "delusions" about their working environment. In her November 1, 1996, statement, plaintiff expressed her belief that Sharma's use of the term delusions was "an honest mistake." (Defendant's Exhibit O.)

{¶ 5} On February 21, 1997, plaintiff wrote a letter of commendation for Antoine that plaintiff contends angered Sharma and caused him to retaliate against her by giving her poor performance evaluations and implementing corrective action. On February 25, 1997, Sharma outlined his performance expectations for plaintiff in a three-page memorandum. (Plaintiff's Exhibit 18.) In the memorandum, Sharma explained that plaintiff's annual performance evaluations would be "entirely based on the satisfactory achievement of these objectives" and that he would review the goals

with plaintiff in biweekly meetings. Sharma attached a copy of plaintiff's position description to the memorandum and forwarded a copy of the documents to Susan Kajfasz, defendant's Vice President of Nursing.

{¶ 6} In plaintiff's annual evaluation for the rating period April 9, 1996, to April 9, 1997, Sharma commented that plaintiff had failed to meet the expectations that were outlined in the February 25, 1997, memorandum and he rated her "below" expectation in every performance category. Sharma established goals for plaintiff in each of the seven categories and he notified plaintiff that she would receive a special evaluation in 60 days to reassess her progress. Plaintiff received a special evaluation on July 1, 1997, wherein she was both rated "below" expectation in all seven categories and notified that she would continue to receive special evaluations.

{¶ 7} From May 2, 1997, to October 2, 1998, plaintiff received a special evaluation every three months. During that period, plaintiff occasionally improved her rating in two or three of the seven categories to "meets" expectation; however, she was rated "below" expectation in all seven categories on both her annual evaluation for the period from April 9, 1997, to April 9, 1998, and her final special evaluation for the period ending October 2, 1998.

{¶ 8} In addition to the annual and special evaluations, plaintiff's "record of discipline" shows that she received several "corrective actions" that were initiated by Sharma as a result of what he perceived to be her deficient performance. (Defendant's Exhibit Q.) On February 18, 1997, plaintiff received an oral reprimand for "substandard levels" of performance and her failure to complete forms accurately. On May 20, 1997, plaintiff received a written reprimand for neglect of duty involving her failure to properly submit a unit report. On September 10, 1997, Sharma

suspended plaintiff for two days due to her failure to complete assignments. Plaintiff also received two five-day fines on April 2, 1998, and August 2, 1998, for "neglect of duty." Sharma's notes from the August 2, 1998, entry state that the action was a "last chance notice."

{¶ 9} Plaintiff filed grievances in response to Sharma's disciplinary actions through the Health Care and Social Service Union. On October 21, 1998, a mediation conference was held to address plaintiff's outstanding grievances concerning the corrective actions that had been taken. Upon the advice of her union representative, Alison Nedal, RN, plaintiff entered into a settlement agreement with defendant which dismissed all pending corrective actions against her in exchange for her agreement to accept a demotion to a staff nurse position on the second shift in unit 22E.

{¶ 10} On October 26, 1998, plaintiff began work on unit 22E under the supervision of Pam Chasteen, the Clinical Area Supervisor for the unit. On November 13, 1998, Chasteen directed plaintiff to conduct a test on a glucometer, a machine used in treating diabetics. Plaintiff testified that Chasteen became angry and threatened to document the incident when plaintiff was unable to perform the test. Plaintiff became distraught and did not return to work after the incident. On January 29, 1999, plaintiff filed a disability claim based upon a diagnosis of depression and her disability retirement became effective on June 1, 1999. (Defendant's Exhibit FFF.)<sup>1</sup>

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<sup>1</sup>At trial, defendant asserted that plaintiff's action should be dismissed because she failed to comply with the applicable statute of limitations. Defendant did not certify copies of records from state and federal courts and they were not admitted as evidence. Defendant was denied leave to substitute certified copies of the records at a later date, and the trial proceeded on the merits of plaintiff's claims.

{¶ 11} Plaintiff first asserts that she was constructively discharged in retaliation for her opposition to Sharma's conduct toward Antoine. However, plaintiff has the burden of proving a prima facie case of retaliatory discharge before defendant is required to present any evidence that the adverse action against plaintiff was taken for a legitimate, nondiscriminatory reason. See, e.g., *Neal v. Hamilton County* (1993), 87 Ohio App.3d 670; *Briner v. National City Bank* (Feb. 17, 1994), Cuyahoga App. No. 64610. Federal law provides the applicable analysis for reviewing claims of retaliation. *Chandler v. Empire Chem., Inc.* (1994), 99 Ohio App.3d 396, 402. In order for plaintiff to support her claim for retaliatory discharge, she must prove that: 1) she engaged in a protected activity under federal or Ohio law; 2) she was the subject of adverse employment action; and, 3) there was a causal link between her protected activity and the adverse action of her employer. *Cooper v. City of North Olmsted* (C.A.6, 1986), 795 F.2d 1265, 1272.

{¶ 12} Both R.C. 4112.02(I) and Section 2000e-3(a), Title 42, U.S.Code prohibit retaliatory discharges and provide that an employee may not be terminated because she has opposed unlawful employment discrimination. In order to invoke the protection of the "opposition clause," the employee need not prove the merits of the underlying discrimination complaint; however, she must show that she had a reasonable belief that her employer engaged in a discriminatory employment practice. *Aman v. Cort Furniture Rental Corp.* (C.A.3, 1996), 85 F.3d 1074. Plaintiff claims that she was terminated because she opposed Sharma's discriminatory actions against Antoine. Specifically, plaintiff asserts that she engaged in protected activity when she documented Sharma's allegedly discriminatory comments to Antoine and commended Antoine's work.

{¶ 13} Even if the court were to accept plaintiff's November 1, 1996, and February 21, 1997, letters as evidence that she opposed Sharma's actions, plaintiff has failed to demonstrate that she had a reasonable or good-faith belief that Sharma was engaging in any discriminatory practice. Plaintiff's opposition to Sharma's alleged discrimination was based upon Sharma's use of the term "delusions" during the October 30, 1996, meeting. However, Sharma directed plaintiff to write the November 1, 1996, letter that she characterizes as protected activity, and plaintiff wrote in that letter that she believed Sharma's use of the word delusions "was an honest mistake on his part" and that it reflected merely a "poor choice of words." The letter does not state that plaintiff believed Sharma's conduct toward Antoine was in any way discriminatory. Additionally, plaintiff's February 21, 1997, letter of commendation does not express any reasonable belief that Sharma engaged in a discriminatory employment practice. The court finds that plaintiff has not satisfied her burden of proving that her letters constitute a protected activity under either Ohio or federal law.

{¶ 14} However, the court finds that plaintiff did participate in protected activity after she began to receive poor evaluations from Sharma. On May 22, 1997, she wrote a letter to Belinda Duncan, defendant's EEO officer, wherein she claimed that Sharma had threatened her with a negative evaluation and progressive discipline because she "didn't support him on a certain issue involving a TPW." Although plaintiff participated in protected activity when she sent her letter to Duncan, she failed to establish the requisite causal connection between her letter and adverse employment action by defendant. Plaintiff's letter to Duncan was written after Sharma had rated plaintiff below expectation in all categories, had notified her that she would

receive special evaluations, and had commenced progressive discipline by giving her both oral and written reprimands for poor work performance. Furthermore, after her demotion, plaintiff was transferred from Sharma's unit and the incident that ultimately caused plaintiff to seek disability retirement did not involve Sharma. Therefore, the court finds that plaintiff cannot satisfy the third element of a prima facie case of discriminatory retaliation.

{¶ 15} Furthermore, even assuming that plaintiff had established her prima facie case of retaliation, the burden then shifts to defendant "to articulate a legitimate reason for its action." *Chandler*, supra, at 402. If that burden is met, the burden then shifts back to plaintiff "to show that the articulated reason was merely a pretext." *Id.* "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Center v. Hicks* (1993), 509 U.S. 502, 515.

{¶ 16} Although plaintiff asserts that Sharma retaliated against her for discriminatory reasons, the evidence submitted at trial documents that plaintiff had performed below expectation both before and after the time that she was being supervised by Sharma. In 1988 and 1989, Willo Thomas made comments on plaintiff's performance evaluations that specifically noted some difficulty with "paperwork," and timeliness with progress notes and "inservices." (Plaintiff's Exhibits 8 and 9.) In 1992, Thomas again commented that plaintiff's progress notes were deficient and plaintiff was rated "below" expectation in four of seven categories of performance. (Plaintiff's Exhibit 15.)

{¶ 17} The following year, plaintiff was evaluated by Pam Chasteen. For the period April 1992 to April 1993, Chasteen rated plaintiff "below" expectation in four of the seven categories of

performance. In addition to inadequate progress notes, Chasteen specifically commented that plaintiff "regularly forgets instructions" and "forgets changes in existing policies and new policies." (Plaintiff's Exhibit 16.) Chasteen's comments regarding plaintiff's serious deficiency with progress notes and her problems with work quality, quantity, and timeliness were similar to criticisms that were noted years later by Sharma. Although she did not agree with many of the critical comments in her performance evaluations, plaintiff testified that she had at times failed to comply with defendant's policies and procedures.

{¶ 18} As a general rule, this court will not substitute its judgment for that of the employer and will not second-guess the business judgments of employers regarding personnel decisions. See, e.g., *Watson v. Kent State University* (Aug. 8, 1994), Court of Claims No. 91-06627; *Dodson v. Wright State Univ.* (1997), 91 Ohio Misc.2d 57; *Washington v. Central State Univ.* (1998), 92 Ohio Misc.2d 26.

{¶ 19} In this case, the trial testimony established that there were numerous legitimate business reasons for taking corrective and disciplinary actions against plaintiff. The court finds that defendant's actions that resulted in progressive discipline and led to plaintiff's demotion were motivated by plaintiff's unsatisfactory work performance and that the same actions regarding her employment would have been taken regardless of her participation in any alleged protected activity. Therefore, the court concludes that plaintiff has not carried her burden of proving discriminatory retaliation by a preponderance of the evidence.

{¶ 20} Plaintiff's complaint also alleges a claim for intentional infliction of emotional distress. To prevail on a claim for intentional infliction of emotional distress, a plaintiff



must prove: "1) that the [defendant] either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; 2) that the [defendant's] conduct was so extreme and outrageous as to go 'beyond all possible bounds of decency' and was such that it can be considered as 'utterly intolerable in a civilized community'; 3) that the [defendant's] actions were the proximate cause of plaintiff's psychic injury; and 4) that the mental anguish suffered by plaintiff is serious and of a nature that 'no reasonable man could be expected to endure it.'" *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 34. (Citations omitted.) Plaintiff's claim for intentional infliction of emotional distress is predicated on her assertion that Sharma intentionally intimidated her by threatening to retaliate against her if she did not "support" him. Having found that Sharma had legitimate business reasons to use corrective actions and progressive discipline in supervising plaintiff, the court finds that Sharma's actions did not rise to the level of outrageous conduct that is utterly intolerable, or beyond all possible bounds of decency. See *Yeager v. Local Union 20 Teamsters* (1983), 6 Ohio St.3d 369.

{¶ 21} The factors needed to establish a claim for negligent hiring, retention, and supervision are: 1) the existence of an employment relationship; 2) the employee's incompetence; 3) the employer's actual or constructive knowledge of such incompetence; 4) the employer's act or omission causing plaintiff's injuries; and, 5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App.3d 715, 729, citing *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 739.

{¶ 22} Plaintiff alleges that Sharma's incompetence as a manager manifested itself in his harassing and retaliatory behavior



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JOSEPH T. CLARK  
Judge

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