[Cite as *McClenaghan v. Ohio Dept. of Commerce*, 2005-Ohio-1284.]

IN THE COURT OF CLAIMS OF OHIO

ROBERT MCCLENAGHAN	:	
Plaintiff	:	CASE NO. 2003-10571 Judge Fred J. Shoemaker
v.	:	DECISION
OHIO DEPARTMENT OF COMMERCE	:	
Defendant	:	

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{¶ 1} Plaintiff brings this action for disability discrimination against defendant, the Ohio Department of Commerce (ODC), as a result of the termination of plaintiff's employment in violation of R.C. Chapter 4112 and Ohio's public policy. Defendant denies liability. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} Plaintiff worked for ODC for 20 years and held a variety of positions. During the period that included the events at issue, plaintiff held the position of a Maintenance Repair Worker 1 (MRW1) with the State Fire Marshal Division.

{¶ 3} Although plaintiff testified that he has cerebral palsy and problems with his vision, his allegations of disability discrimination focus solely on an injury to his back.

{¶ 4} Plaintiff injured his back in 1995 while he was stacking pallets. According to findings from an MRI, plaintiff had suffered two herniated disks in his back. (Plaintiff's Exhibit 20.) Plaintiff re-injured his back while working in 1997. However, after the original injury in 1995, plaintiff received numerous temporary work restrictions from his treating physician, which continued through 2001. Then, on June 22, 2001, plaintiff's doctor

ordered the following permanent work restrictions: no twisting, no weed eating, no shoveling, no stooping or bending, and no lifting greater than 50 pounds. (Plaintiff's Exhibit 1 and Defendant's Exhibit C.)

{¶ 5} At the time that plaintiff received permanent work restrictions, his job title was that of a MRW1. The position description for a MRW1 identifies 80 percent of the job duties as follows: "unskilled & semi-skilled minor repair or replacement on doors, windows, walls, steps, floors & assists skilled maintenance workers; performs unskilled & semi-skilled minor electrical repair ***; repairs minor plumbing equipment ***; maintains grounds (e.g., mows grass, trims hedges, trees, removes snow & ice); assists with repairs and maintenance of equipment as needed; sweeps floors and cleans carpets." The other 20 percent of the job duties included "duties as assigned; performs laundry duties (e.g., wash, dry & fold bed linens) at the Ohio Fire Academy." (Plaintiff's Exhibit 5A and Defendant's Exhibit A.)

{¶ 6} The position description also included a list of ten minimum acceptable characteristics needed to become a MRW1. For example, the characteristics include knowledge of basic plumbing repair, skill in the operation of lawn equipment, and an ability to lift 10 to 100 pounds. (Plaintiff's Exhibit 5A and Defendant's Exhibit A.)

{¶ 7} Kathryn Clear, an administrative officer and the facilities manager of the maintenance department, testified about the various duties plaintiff was required to perform under his title and the physical abilities needed to accomplish such tasks. She explained that plaintiff performed the laundry duties for the dormitories, which consisted of collecting, cleaning, and distributing the bed linens from men's and women's dorms. The women's dorm held four beds; men's dorm, 35-40. Plaintiff also was

assigned to clean carpets using a self-propelled commercial cleaner. When cleaning the carpets, plaintiff was required to move pieces of furniture which, according to Ms. Clear, weighed anywhere from 100 pounds to more than 150 pounds.

{¶ 8} Ms. Clear explained that plaintiff's daily activities included moving boxes into storage, transferring 50 pound boxes of copy paper from storage to the copiers located on two different floors, and handling daily deliveries of paper, pamphlets, and books that typically weighed over 50 pounds. If plaintiff had any additional time during the work day, he was required to maintain office cubicles, clean the heating and air conditioning filters, check smoke alarms, and engage in light plumbing and electrical work.

{¶ 9} In the winter months plaintiff participated in snow removal, which involved maintaining trucks and tractors, attaching plows to vehicles, loading salt and calcium chloride into hoppers, and shoveling walkways. Ms. Clear testified that small blades for the vehicles weighed approximately 50 pounds and larger blades weighed almost 200 pounds. Additionally, the salt and calcium chloride came in bags weighing 50 and 100 pounds respectively. Ms. Clear testified that during the non-winter months, plaintiff would mow the lawn and engage in other basic yard work tasks.

{¶ 10} Ms. Clear explained that in 2001, the maintenance department had two full-time employees and one seasonal helper who were to maintain 50 acres of land and attendant five buildings. The maintenance department found it difficult to complete all of the work required due to the large area to be maintained and the small number of employees. If an MRW1 was not able to perform all of the work, the only other full-time employee in the maintenance department would be required to assume the duties. Ms. Clear

testified that it would be impossible for one person to finish all of the work.

{¶ 11} Plaintiff testified that his principle duty was to clean laundry from the dorms each day. From beginning to end, the laundry duties required him to collect two washcloths, two blankets, two towels, one fitted sheet, and one flat sheet from each student; wash and dry items that had been used; and restock student lockers with a clean set of towels and sheets. Plaintiff also cleaned carpet in two of the buildings, which involved moving aside any tables and chairs, and then using a self-propelled cleaner. Plaintiff testified that the individual pieces of furniture each weighed 50 pounds or less.

{¶ 12} Plaintiff also testified that he mowed the lawn in the spring, summer, and fall months, and that he performed general maintenance to the mowers, such as oil changes. During the winter, plaintiff contributed to outdoor maintenance by plowing and shoveling snow and putting down salt and calcium chloride. As with the lawn mowers, plaintiff serviced any vehicles used for snow plowing, which included the installation and disassembly of plow blades. Additionally, plaintiff admitted not only that the salt came in 50-pound bags and the calcium chloride in 100-pound bags but also that two people together would maneuver the 100-pound bags.

{¶ 13} Plaintiff explained that the rest of his workday was filled with miscellaneous tasks such as moving boxes and filing cabinets, shoveling dirt and other yard work, and helping with larger jobs that arose occasionally. Plaintiff explained that on one occasion he removed all the cubicles from an office space, laid new carpet, and then reconfigured all of the cubicles. When moving heavy objects, such as the boxes and filing cabinets, plaintiff

asserted that he would use a dolly to transport them from one place to another.

{¶ 14} Plaintiff presented his June 22, 2001, work restriction to Ms. Clear. She testified that because this work restriction was permanent in nature and also more restrictive than he had previously received, she consulted with the fire marshal and the assistant fire marshal, and that they made a joint decision to send the information to Human Resources (HR). Ms. Clear sent an e-mail to Blaine Brockman, the person in charge of HR, requesting that plaintiff have an independent medical assessment to evaluate whether he could perform the essential duties of a MRW1, considering his permanent work restrictions.

{¶ 15} Blaine Brockman sent a letter to plaintiff dated July 25, 2001, notifying him that he was required to submit to a medical exam by Dr. John Cunningham on August 17, 2001. The letter also explained that the "reason for this medical examination is to assess your ability to perform the essential duties of your job as Maintenance Repair Worker 1." (Plaintiff's Exhibit 3 and Defendant's Exhibit M.)

{¶ 16} Plaintiff submitted to the medical exam and Dr. Cunningham prepared a three-page evaluation dated August 17, 2001. This evaluation included the background information concerning plaintiff's lower back problems, the work restrictions written by Dr. Lowery, and additional information plaintiff produced during the assessment interview. Dr. Cunningham then provided extensive details regarding the physical examination that he had conducted. The last section of Dr. Cunningham's evaluation contained his opinion whether plaintiff was able to perform his essential job duties. (Plaintiff's Exhibit 4 and Defendant's Exhibit E.)

{¶ 17} Dr. Cunningham concluded in his evaluation that "this individual is not employable without manual task work restrictions

on a permanent basis. *** In my medical opinion, at this time, on the basis of today's evaluation, including my extensive history and physical examination of this individual, he is employable with no lifting, carrying, pushing, pulling, or otherwise moving objects greater than 50 pounds. He should not be asked to crawl in the course of his employment, and he should not be asked to bend, stoop, or kneel on more than an occasional basis in the course of his employment. In my medical opinion, these work restrictions are permanent." (Plaintiff's Exhibit 4 and Defendant's Exhibit E.)

{¶ 18} Jason Woodrow, a labor relations officer for ODC, signed a letter dated October 30, 2001, that was hand-delivered to plaintiff to notify him that an Involuntary Disability Separation (IDS) meeting was scheduled for November 2, 2001. The letter also informed plaintiff that the action was an "administrative separation with reinstatement rights set forth in Chapter 123:1-33-04 of the OAC." A copy of this chapter was attached. (Plaintiff's Exhibit 6 and Defendant's Exhibit F.)

{¶ 19} Mr. Woodrow testified that he has conducted six or seven IDS meetings and that it is his practice to review both a person's job description with that person's supervisor and any doctor's reports. He also explained that he has initiated four to five other IDS meetings in the past that never went forward because the person presented a second medical opinion. Mr. Woodrow testified that plaintiff's IDS meeting lasted only about five minutes because plaintiff stated that he agreed that he could not do his job and that plaintiff also did not offer a medical opinion contrary to those of Drs. Lowery and Cunningham.

{¶ 20} After the meeting, Mr. Woodrow sent a memorandum to Gary Suhadolnik, Director of ODC, concerning plaintiff's IDS meeting. Mr. Woodrow provided three sections: Doctor's Opinion, Employee's Position, and Conclusion and Recommendation.

(Plaintiff's Exhibit 7 and Defendant's Exhibit G.) Mr. Woodrow recommended that plaintiff be separated from his MRW1 position.

{¶ 21} On November 5, 2001, Director Suhadolnik had a letter hand-delivered to plaintiff notifying him of an immediate involuntary separation. (Plaintiff's Exhibit 8 and Defendant's Exhibit H.) Attached to the separation letter was an "order of *** Involuntary Disability Separation." (Plaintiff's Exhibit 8 and Defendant's Exhibit I.) The order states in bold letters at the bottom of the page "Important: See other side for Employer and Employee Instructions." While Plaintiff's Exhibit 8 and Defendant's Exhibit I are photocopies of an original, Defendant's Exhibit P is a blank order form consisting of four carbon-copy pages identical front and back. The back page of the order has instructions for the appointing authority and instructions to the employee. The employee instructions include information on how and when an employee should file a written appeal to the State Personnel Board of Review. Mr. Woodrow testified that plaintiff did not file an appeal with the Board of Review and did not request a reinstatement pursuant to Chapter 123:1-33-04 of the Ohio Administrative Code.

{¶ 22} Plaintiff also testified about what happened at the IDS meeting on November 2, 2001. According to plaintiff, he told Mr. Woodrow that he agreed with his work restrictions but never stated that he thought he could not perform his job duties. Additionally, plaintiff claimed that Mr. Woodrow attempted to "bait" plaintiff into getting angry during the meeting. Plaintiff then went on to explain that while he did receive his notice of involuntary separation, he was not aware that he could be reinstated or that he could have appealed the decision.

{¶ 23} As a threshold issue, the court finds that plaintiff did receive notice of his right to appeal the IDS order and that

the evidence supports the finding that plaintiff did not fully exhaust his administrative remedies when he failed to appeal to the State Personnel Board of Review. Although defendant raised the failure to exhaust administrative remedies as an affirmative defense, the Supreme Court of Ohio has found that, even though a person has not exhausted his administrative remedies, that person may institute an independent civil action for disability discrimination. See *Elek v. Huntington National Bank* (1991), 60 Ohio St.3d 135. Specifically, the court stated that "4112.99 is to be liberally construed to promote its object (elimination of discrimination) and protect those to whom it is addressed (victims of discrimination). *** As such, R.C. 4112.99 must be interpreted to afford victims of handicap discrimination the right to pursue a civil action." Id. at 137.

{¶ 24} R.C. 4112.02(A) makes it an unlawful discriminatory practice "[f]or any employer, because of the *** disability *** of any person, *** 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." R.C. 4112.02, part of the Ohio Civil Rights Act, is similar to the Americans with Disabilities Act (ADA) with respect to the definition of disability and requirements for employers. The Supreme Court of Ohio has held that cases and regulations interpreting the ADA can provide guidance in interpreting Ohio law. *Yamamoto v. Midwest Screw Products*, Lake App. No. 2000-L-200, 2002-Ohio-3362.

{¶ 25} To establish a prima facie case of disability discrimination pursuant to R.C. 4112.02, plaintiff must demonstrate "1) that he or she was disabled; 2) that an adverse employment action was taken by an employer, at least in part, because the individual was disabled; and, 3) that the person, though disabled,

can safely and substantially perform the essential functions of the job in question. *Yamamoto*, supra, citing *Hazlett v. Martin Chevrolet, Inc.* (1986), 25 Ohio St.3d 279, 281.

{¶ 26} At the outset, the court notes that there was evidence that plaintiff suffered from two herniated disks and that such condition impaired his ability to lift heavy objects, twist, bend, and stoop. However, that evidence is not dispositive as to whether plaintiff qualifies for a disability under the ADA. See *Toyota Motor Mfg. v. Williams* (2002), 534 U.S. 184, 195. ("Merely having an impairment does not make one disabled for purposes of the ADA.") See, also, *Dutcher v. Ingalls Shipbuilding* (5th Cir. 1995), 53 F.3d 723, 726. ("A physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA.") Rather, "[c]laimants also need to demonstrate that the impairment limits a major life activity." *Toyota Motor,* supra, at 195.

{¶ 27} Thus, under Ohio law, an individual has a "disability" if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." R.C. 4112.01(A)(13). The Code of Federal Regulations provides guidance for the meaning of the term "substantially limits." Pursuant to Section 1630.2(j), Title 29, C.F.R., the term "substantially limits" means: "(i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity." Further, "an individual must have an impairment that prevents or severely restricts 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*, supra, at 198.

{¶ 28} In the instant case, there was testimony by plaintiff that he has discomfort every day, that he is continuing treatment to include examinations every six months, medication, stretching, and that he is also abiding by the June 22, 2001, restrictions. However, the Tenth District Court of Appeals has found that a weight restriction of 30-40 pounds as the result of having a herniated disk does not constitute a substantial limitation on a major life activity. *Sadinsky v. EBCO Mfg. Co.* (1999), 134 Ohio App.3d 54. More recently, the Eleventh District Court of Appeals found that an appellant was not disabled because he was not substantially limited by a 20-pound weight restriction after he sustained a herniated disk. *Yamamoto*, supra.

{¶ 29} Additionally, federal courts have denied ADA claims filed by plaintiffs that involve similar factual circumstances. See, e.g., *Coker v. Tampa Port Authority* (M.D.Fla. 1997), 962 F.Supp. 1462 (plaintiff, who suffered from a lower back strain and could not lift more than 45 pounds was not disabled under the ADA; the court held that, "lifting restrictions do not constitute a substantial limitation on a major life activity"); *Kirkendall v. United Parcel Service, Inc.* (W.D.N.Y. 1997), 964 F.Supp. 106 (plaintiff, who suffered from degenerative disk disease and could not lift more than 30 pounds was not disabled under the ADA; the court held that the weight limitations did not substantially limit the plaintiff in any major life activity).

{¶ 30} Here, while there was evidence that plaintiff had an impairment that affected his ability to lift more than 50 pounds and twist, bend, or stoop, such evidence was not sufficient to demonstrate that he suffered from a disability as that term is defined in R.C. Chapter 4112.

{¶ 31} Plaintiff also contends that defendant failed to provide him with a reasonable accommodation. Specifically, plaintiff claims that he requested an accommodation in regard to his laundry duties such that all students at the Fire Academy would bring their laundry directly to the laundry room instead of having plaintiff collect those items himself. (Plaintiff's Exhibit 23.)

{¶ 32} A disabled employee who claims that he or she is otherwise qualified with a reasonable accommodation "bears the initial burden of proposing an accommodation and showing that accommodation is objectively reasonable." *Cassidy v. Detroit Edison Co.* (6th Cir. 1998), 138 F.3d 629, citing *Monette v. Electronic Data Systems, Corp.* (6th Cir. 1996), 90 F.3d 1173, 1183.

{¶ 33} Plaintiff testified that he had received the January 2001 revised ADA policy (Defendant's Exhibit J) and signed a receipt (Defendant's Exhibit K) acknowledging that fact. The ADA policy included a section explaining the procedure an employee should follow when requesting an accommodation. Although plaintiff contends that he submitted his request, the letter plaintiff submitted was titled "employee suggestion." (Plaintiff's Exhibit 23.) Additionally, this letter was submitted on February 27, 2001, almost four months before plaintiff's physician issued permanent work restrictions on June 22, 2001.

{¶ 34} The court finds that such evidence is not sufficient to demonstrate that plaintiff ever requested an accommodation from defendant. Where there is credible evidence that an employee knew or should have known the proper method for requesting an accommodation, but nonetheless failed to provide the employer with any necessary information, the employee is precluded from claiming that the employer violated R.C. Chapter 4112.

{¶ 35} In addition to his disability discrimination claim, plaintiff alleges that defendant violated the public policy of Ohio when his employment was terminated. The court finds that the public policy of Ohio regarding plaintiff's termination is codified in R.C. Chapter 4112. As discussed above, plaintiff failed to show that he suffered from a disability within the meaning of R.C. Chapter 4112. Accordingly, the court finds that there is no merit to plaintiff's public policy claim.

{¶ 36} For the foregoing reasons, the court finds that plaintiff has not proven any of his claims by a preponderance of the evidence and accordingly, judgment shall be rendered in favor of defendant.

IN THE COURT OF CLAIMS OF OHIO

ROBERT MCCLENAGHAN	:	
Plaintiff	:	CASE NO. 2003-10571 Judge Fred J. Shoemaker
v.	:	JUDGMENT ENTRY
OHIO DEPARTMENT OF COMMERCE	:	
Defendant	:	

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This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____

FRED J. SHOEMAKER
Judge

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