UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

L. BETH SUTHERLAND, Plaintiff, v. CITY OF CINCINNATI, et al., Defendants.	:	NO. 1:12-CV-00205 **OPINION & ORDER**

This matter is before the Court on Defendants' Motion for Summary Judgment (doc. 41), Plaintiff's Response (doc. 52), and Defendants' Reply (doc. 64). For the reasons indicated herein, the Court GRANTS Defendants' motion and DISMISSES this matter from the docket.

I. BACKGROUND

Plaintiff L. Beth Sutherland ("Sutherland") began working with Defendant the City of Cincinnati in 1997 as a legal technician in the City's law department (doc. 52). The law department consists of several sections that with the exception of real estate, are headed by attorneys (Id.). Plaintiff's work, as a non-attorney, was in supporting the Solicitor, later in doing title work and some property-management duties (Id.). Plaintiff's position was that of an unclassified at-will employee that served the City Solicitor (Id.).

There is no dispute that throughout Plaintiff's employment her work was good, and she received commendable evaluations (Id.). According to Defendant, however, Plaintiff had a pattern of poor

attendance (doc. 41). The City indicates it granted large amounts of leave to Plaintiff, and individual Defendants Real Estate Section Head Tom Klumb and former Interim City Solicitor Pat King were among those who donated paid vacation hours to Plaintiff through the City's leave program (doc. 41).

Plaintiff indicates in the fall of 2005 she became very ill (doc. 52). The City allowed her a flexible work schedule as well as permitted her to work from home during her periodic illness (Id.). By 2009, Plaintiff was improving, though she had been diagnosed with common variable immunodeficiency ("CVID"), a condition that makes it difficult for her to fight off infections (Id.). In an effort to help her manage her condition, the City provided Plaintiff an enclosed office with an air purifier after Plaintiff requested them (doc. 41).

After Defendant John Curp became City Solicitor in August 2008, he soon promoted Plaintiff to real estate specialist, which meant she worked on the City's acquisition of property for right-of-way and eminent domain (doc. 41). Solicitor Curp also informed Plaintiff that she would no longer be allowed to work from home or work reduced hours (doc. 52).

In the summer of 2009, Curp was told he had to reduce the law department's budget (doc. 41). Curp indicates he was forced by City Council's directive to make cuts to personnel, and to re-focus the department to its core functions (Id.). Curp further indicates he was forced to consider cuts of unclassified employees like

Plaintiff as opposed to those union employees covered by the collective bargaining agreement (Id.). Plaintiff was initially informed that in lieu of layoff she was being re-assigned to a position at waterworks, although she only spent a day or two there before she returned to the law department (doc. 52). An emergency ordinance had restored funding temporarily, but Council later reinstated cuts forcing job eliminations (doc. 41).

Faced with budget cuts, Curp indicates that he and his leadership team conducted a review of skills, performance and qualifications of employees, with names redacted so as to focus on job-related skills (doc. 41). Curp's team agreed on the employees whose skill sets were most vital to the division, primarily those with appraisal and relocation experience (Id.). Ultimately, in December 2009, four real estate employees, including Plaintiff, were let go (Id.). According to Defendants, each of the four had less skills than those retained, and none of the four were appraisers (Id.). Those retained were ages 52, 53, 59, and 59 (Id.). According to Plaintiff she had better performance evaluations than all but one of the employees considered for layoff (doc. 52).

Plaintiff secured new work with RA Consultants, doing much of the same work she did for the City, consulting with the Metropolitan Sewer District, waterworks and the department of transportation and engineering (Id.). In her new position she earns nearly five-times her former salary with the City (Id.). Plaintiff nonetheless indicates she has suffered damages in the loss of her

former health insurance plan, pension, and disability insurance (doc. 52). Plaintiff brings suit against the City and the three individual Defendants, Curp, Klumb, and King, over her termination (doc. 1). In her Complaint Plaintiff contends her employment was terminated for her disability, her CVID, and her age, 46 at time of lay-off (Id.). She further alleges conspiracy, invasion of privacy and emotional distress, intentional and negligent (Id.). Defendants have moved for summary judgment, contending Plaintiff was let go due to budget cuts and not for any discriminatory reason (doc. 41). Plaintiff has responded such that this matter is ripe for the Court's consideration.

II. STANDARD

A grant of summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; see also, e.g., Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir.1993); Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs., 979 F.2d 1131, 1133 (6th Cir.1992)(per curiam). In reviewing the instant motion, "this Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Patton v. Bearden, 8 F.3d 343, 346 (6th Cir. 1993), quoting in part

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)(internal quotation marks omitted).

The process of moving for and evaluating a motion for summary judgment and the respective burdens it imposes upon the movant and the non-movant are well settled. First, "a party seeking summary judgment. . . bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact[.]" Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); see also LaPointe, 8 F.3d at 378; Guarino v. Brookfield Township Trustees, 980 F.2d 399, 405 (6th Cir. 1992); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The movant may do so by merely identifying that the non-moving party lacks evidence to support an essential element of its case. See Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A., 12 F.3d 1382, 1389 (6th Cir. 1993).

Faced with such a motion, the non-movant, after completion of sufficient discovery, must submit evidence in support of any material element of a claim or defense at issue in the motion on which it would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. See Celotex, 477 U.S. 317; Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). As the "requirement [of the Rule] is that there be no genuine issue of material fact," an "alleged factual dispute between the parties" as to some ancillary matter

"will not defeat an otherwise properly supported motion for summary judgment." Anderson, 477 U.S. at 247-48 (emphasis added); see generally Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1310 (6th Cir. 1989). Furthermore, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson, 477 U.S. at 252; see also Gregory v. Hunt, 24 F.3d 781, 784 (6th Cir. 1994). Accordingly, the non-movant must present "significant probative evidence" demonstrating that "there is [more than] some metaphysical doubt as to the material facts" to survive summary judgment and proceed to trial on the merits. Moore v. Philip Morris Cos., Inc., 8 F.3d 335, 339-40 (6th Cir. 1993); see also Celotex, 477 U.S. at 324; Guarino, 980 F.2d at 405.

Although the non-movant need not cite specific page numbers of the record in support of his claims or defenses, "the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies." Guarino, 980 F.2d at 405, quoting Inter-Royal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989)(internal quotation marks omitted). In contrast, mere conclusory allegations are patently insufficient to defeat a motion for summary judgment. See McDonald v. Union Camp Corp., 898 F .2d 1155, 1162 (6th Cir. 1990). The Court must view all submitted evidence, facts, and reasonable inferences in a light most favorable

to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); United States v. Diebold, Inc., 369 U.S. 654 (1962). Furthermore, the district court may not weigh evidence or assess the credibility of witnesses in deciding the motion. See Adams v. Metiva, 31 F.3d 375, 378 (6th Cir. 1994).

Ultimately, the movant bears the burden of demonstrating that no material facts are in dispute. See Matsushita, 475 U.S. at 587. The fact that the non-moving party fails to respond to the motion does not lessen the burden on either the moving party or the Court to demonstrate that summary judgment is appropriate. See Guarino, 980 F.2d at 410; Carver v. Bunch, 946 F.2d 451, 454-55 (6th Cir. 1991).

III. DISCUSSION

Defendants move for summary judgment on each of Plaintiff's claims, contending there is no dispute as to any material fact, such that they are entitled to judgment as a matter of law (doc. 41). Defendants further contend the individual Defendants cannot be sued under the ADA or ADEA, that Plaintiff has not raised a triable inference she was terminated due to disability or age, and Plaintiff cannot show that Defendant Curp's action in a workforce reduction was pretext (Id.). Defendants also attack Plaintiff's claims for conspiracy, invasion of privacy, defamation, and infliction of emotional distress, both negligent and intentional (Id.). The Court will analyze each claim seriatim.

A. Plaintiff' Age Discrimination Claim

Ohio and federal law prohibit discrimination on the basis of age in employment decisions. O.R.C. § 4112.02(A), Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a). Under these provisions, Plaintiff may assert a prima facie case through the presentation of either direct or indirect evidence. Allen v. Ethicon, Inc., 919 F. Supp. 1093, 1098 (S.D. Ohio 1996). Direct evidence "is evidence which if believed, would prove the existence of a fact . . . without any inferences or presumptions." Lautner v. American Tel. and Tel. Co., 1997 U.S. App. LEXIS 1267, No. 95-3756,(6th Cir. Jan. 22, 1997). The evidence proffered in this matter simply does not meet the legal test to constitute direct evidence of age discrimination.

Plaintiff can establish a circumstantial prima facie case of age discrimination by proffering evidence that 1) she was in the protected class, 2) she was qualified, 3) she suffered an adverse employment action, and 4) she was replaced by someone outside the protected class. McDonnell Douglas v. Green, 411 U.S. 792 (1973). Should Plaintiff succeed, the burden of proof shifts to Defendant to proffer a legitimate non-discriminatory reason for its termination decision. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

There is no genuine dispute that Plaintiff, at 46 years old, falls within the protected class; that she was qualified; and that her termination constitutes an adverse employment action.

Defendants focus on the fourth-prong, contending Plaintiff cannot show she was replaced by someone outside the protected class, and even if she could, its workforce reduction was not pretext. The Court agrees.

Defendants argue Plaintiff's age discrimination claim defies common sense because she was younger than everyone in the department who survived the workforce reduction (doc. 41). Plaintiff, citing O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996), contends that age discrimination claims are not necessarily precluded when replacements are also members of the protected class, so long as age was the reason for the employment action (doc. 52). Defendant replies that the replacement in O'Connor, though forty years old and in the protected class, was nonetheless sixteen years younger than the plaintiff (doc. 64). Here, Defendant contends Plaintiff was 46, and every single person who withstood the workforce reduction was in their fifties (Id.).

The record before the Court does not show that Plaintiff was replaced by someone younger than 40. Although Plaintiff contends later her position was advertised, Defendants respond that the positions they filled, after losses to attrition, were for individuals with qualifications Plaintiff does not have. Moreover, Defendants contend Plaintiff never re-applied. The Court concludes the circumstances here show Defendant is correct that Plaintiff fails to establish that she was replaced by someone outside the protected class, or that any new employees filled her specific role.

Out of an abundance of caution the Court further finds that Plaintiff has in no way shown that the workforce reduction cited by Defendant Curp is pretext. The Court sees no evidence that age was used in the decision-making concerning who would stay or who would go. In fact, the record shows Curp and his team conducted a nearly "blind" assessment of skills desired for a changing department. In the Court's view, a reasonable jury could not find that the process Curp instituted, with the goal to work within shifting budgetary constraints, was anything other than true. Plaintiffs desire that Curp should have retained her with a Memorandum of Understanding is simply a second-guessing of Curp's management. Her contention that it was economically unreasonable because she ended up working with a private contractor that bills the City more than she used to earn ignores the complicated budgeting realities of the City. In short, Plaintiff's theories fail to show her discharge was not in fact motivated by a workplace reduction.

The record shows Plaintiff obtained good evaluations, and even ultimately ended up doing the same sort of work after leaving the City. Even if her evaluations were better than some of those employees retained, she was subject to different evaluators, and in any event, Defendants show those retained had skills she did not have. The unfortunate reality, as Defendants indicate, is that in workforce reductions good employees are let go. Such reality in-and-of itself does not mean this 46-year-old Plaintiff suffered age

discrimination.

B. Plaintiff's Disability Claim

Plaintiff alleges Defendants discriminated in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112, and Ohio Revised Code § 4112.02 by terminating her job because of "her need for reasonable accommodations" (doc. 1). The Sixth Circuit has held Ohio disability discrimination claims employ the same analysis as ADA claims. Kleiber v. Honda of Am. Mfg., 485 F.3d 862, 872 (6th Cir. 2007).

The Court sees no failure to accommodate claim alleged in this matter, in that Plaintiff clearly functioned within the parameters of her employment, and in that Defendants provided her with an air filter and private office. There is simply no record showing the required interactive process or a basis for such a claim. Plaintiff's disability claim, rather, is grounded in the theory that she was let go because of her disability.

In Jones v. Potter, 488 F.3d 397, 403-06 (6th Cir. Ohio 2007), the Sixth Circuit held that in order to make a claim for disability discrimination, a Plaintiff must show: (1) that she is disabled; (2) that she is otherwise qualified to perform the job requirements with or without reasonable accommodation; (3) that she suffered an adverse employment action; (4) that her employer knew or had reason to know of her disability; and (5) that, following the adverse employment action, either she was replaced by a non-disabled person or her position remained open (or in the alternative) she was

treated differently than similarly-situated employees. Id.

Defendants first contend that Plaintiff has not shown that she qualifies as disabled due to her CVID, but then assuming that she does, contends for the same reasons articulated above with regard to age that she was not replaced by a non-protected person. Defendants again contend if Plaintiff is found to meet a prima facie case, she still cannot show their proffered legitimate justification, a workforce reduction, is pretext.

The Court finds Defendants' position well-taken. Plaintiff has not shown that her CVID had any relationship to her termination. Moreover, for the precise reasons articulated with regard to her age claim, Plaintiff has not shown she was replaced by any one who was not disabled, and even if she had been, she has not shown the workforce reduction to be pretext.

The record further shows the City made efforts to accommodate Plaintiff's CVID. No one else of Plaintiff's comparable rank had a private office. Defendants granted that for her condition. Two of the individual defendants actually donated their personal leave time to Plaintiff as she managed her condition. No reasonable jury would find a viable disability discrimination claim here.

C. Plaintiff's Conspiracy Claim under 42 U.S.C. §1985(3)

Plaintiff brings a claim for conspiracy to interfere with civil rights against Defendants Curp, Klumb, and King (doc. 1). To establish a claim under Section 1985(3) Plaintiff must prove 1) a conspiracy involving two or more persons, 2) for the purpose of

depriving Plaintiff of equal protection of laws, 3) an act in furtherance of the conspiracy, 4) which causes injury or deprivation of a right, 5) and that the conspiracy was motivated by class-based animus. Johnson v. Hills and Dales General Hosp., 40 F.3d 837, 839 (6th Cir. 1994). Defendants contend Plaintiff's claim for conspiracy fails due to lack of support with material facts, that it is untimely, and that it is barred by the intra-corporate conspiracy doctrine (doc. 41). Plaintiff responds that Klumb told her Curp directed him to eliminate persons with disabilities[1], and that King provided a "thin file of information" about Plaintiff (doc. 52). Defendants reply Plaintiff proffers no authority showing her claim is not barred by the two-year statute of limitations, citing Browing v. Pendleton, 869 F.2d 989, 992 (6th Cir. 1989)(O.R.C. §2305.10 applies to Section 1983 actions in Ohio) (Id.).

The Court neither finds Plaintiff was deprived of equal protection of law nor that she was the target of class-based animus, and therefore her conspiracy claim, even if timely, fails. The record shows, as noted above, that Defendant Curp conducted an evaluation of skills within the context of workforce reduction such that Plaintiff's termination was lawful. The objective evidence

[1]Plaintiff's Response mischaracterizes the record. Plaintiff's deposition indicates she met Klumb for drinks after work. According to Plaintiff, Klumb told her Curp handed Klumb a paper with three names of employees to let go. The Response indicates "Klumb had consumed many alcoholic beverages at the time and conveniently does not recall his admission." The Court notes although the Response cites to Plaintiff's deposition, 159-162, there is nothing in the record showing either that Klumb made any admission or that he was inebriated.

does not support that persons with disabilities were targeted: two out of the four retained in the department had received time off or modified schedules for health issues. All four retained had stronger skill-sets, greater relocation and appraisal experience, and good performance. No reasonable jury could find Defendants conspired to deprive Plaintiff of her employment based on animus to her CVID particularly or to a class of disabled persons generally.

D. Plaintiff's Invasion of Privacy and Defamation Claims

Plaintiff complains that Defendant King disclosed private health information to a co-worker (doc. 1). However, it appears that in her deposition Plaintiff grounds her claim in a meeting between Brenda Brown, a supervisor, and Brenda Dixon, ADA coordinator, that she is unsure ever took place, and she is unsure of anything said (doc. 41). Moreover, the record shows that Plaintiff shared about her CVID condition with co-workers, and even solicited leave time for the condition (doc. 64). A reasonable jury could not find Plaintiff suffered an invasion of privacy, which requires 1) a clearly private fact, 2) public disclosure of the private fact, and 3) evidence the issue made public is one that would be highly offensive and objectionable to a reasonable person. Greenwood v. Taft, Stettinius & Hollister, 105 Ohio App. 3d 295, 303 (Ohio Ct. App. 1995). Plaintiff made her CVID public, and she alleges nothing specific about her condition that was disclosed which would be objectionable.

Plaintiff also claims she was defamed by Klumb and Curp who characterized her as an "underachiever" (doc. 52). Defendants

respond any defamation claim is barred by Ohio's one-year statute of limitations, and in any event, it fails on the merits. The Court agrees. A review of the record shows no evidence that Plaintiff's reputation was damaged by such alleged statement so that she incurred damages. Plaintiff has not been injured in her trade or occupation, Heidel v. Amburgey, No. CA2002-09-092, 2003 WL 21373164, *3-5 (Ohio Ct. App. 2003), indeed the record shows she still works in real estate and now earns a much higher salary.

E. Plaintiff's Emotional Distress Claims

The record shows no physical injury or felonious assault as required under Ohio law to support an employment-context claim for negligent infliction of emotional distress. Griswold v. Fresenius USA, 964 F. Supp. 1166, 1172 (N.D. Ohio 1997). Nor does the record show Defendants acted in an extreme and outrageous manner as to go "beyond all possible bounds of decency," Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America, 6 Ohio St. 3d 369, 453 N.E.2d 666 (Ohio 1983), Franks v. Village of Bolivar, et al., No 5:11CV701, 2013 U.S. Dist. LEXIS 133567 (N.D. Ohio, September 18, 2013), as required for a claim of intentional infliction of emotional distress. Defendants are entitled to judgment as a matter of law on these claims.

IV. CONCLUSION

Having reviewed this matter, the Court finds Defendants' Motion for Summary Judgment well-taken. The record shows Defendants engaged in a workforce reduction that in no way targeted Plaintiff for other than objective skill-based reasons. The Court

finds correct Defendants' position that Plaintiff cannot show pretext in her theories that the layoffs were not economically reasonable, not adequately documented, that she should have been retained through a Memorandum of Understanding, that the City offered changing rationales for her layoff, and that numerous others were hired into the department who were outside the protected class. The Court finds no basis for age or disability claims, for a conspiracy claim, for defamation, invasion of privacy, or emotional distress claims. Accordingly the Court GRANTS Defendants' Motion for Summary Judgment (doc. 41), and DISMISSES this matter from the Court's docket.

SO ORDERED.

Dated: April 29, 2014

s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge