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

DANNY MAYS,

Plaintiff,

v.

AMERICAN ELECTRIC POWER, et al.,

Defendants.

Case No. 2:08-cv-1124
Judge Sargus
Magistrate Judge Abel

Dockets.Justia.com

OPINION AND ORDER

This matter is presently before the Court on Defendants' Motion for Summary Judgment. (Docs. 17 & 22.). For the reasons that follow, the motion is **GRANTED**.

I.

Danny Mays ("Plaintiff") brings this action for alleged violations of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2617 *et seq.*, and Ohio's anti-discrimination statute, Ohio Rev. Code, § 4112.01 *et seq.*, against American Electric Power, Inc.("AEP"), and James Hill, his former supervisor.

Plaintiff is employed by Ohio Power Company ("Ohio Power"), a subsidiary of AEP. He was hired in May 2002 as a Line Mechanic B in the Lancaster, Ohio Service Center and was promoted to Line Mechanic A in July 2004. (Mays Dep. 24, 83; Liegl Aff. ¶ 5.) According to Plaintiff, despite being classified as either a Line Mechanic B or A, he also performed the duties of a Line Servicer, the highest position in the Line Mechanic progression of jobs, during his first several years working for Ohio Power. (Mays Dep. 49-50; Liegl Aff. ¶ 5.) Plaintiff has been a

member of the International Brotherhood of Electrical Workers ("IBEW") since he began his employ with Ohio Power. (Mays Dep. 74-75).

Part of the Line Servicer and Line Mechanics' duties include restoring power when there is an outage for any reason, including storms or accidents. (Mays Dep. 47-48.) Line Servicers work alone and are the "first responders" to incidents of power disruption, while Line Mechanics work in crews with other Line Mechanics. (Liegl Aff. ¶ 5.) Power restoration duties frequently require Line Servicers and Line Mechanics to work substantial amounts of overtime. While a Line Servicer is expected to work more overtime hours than a Line Mechanic, all four levels of Line Mechanic (A, B, C, and D) are expected to work the same amount of overtime hours. (Liegl Dep. 20; Hill Dep. 30-31.)

While the Line Mechanic A and Line Mechanic B job descriptions do not specifically mention an overtime requirement, Ohio Power's employee handbook and Plaintiff's applicable collective bargaining agreement mention an employee's overtime responsibility. (Steger Dep. Ex. N; Mays Dep. Ex. 12 at 16; Ex. 14 at 17.) Specifically, the employee handbook states that "it is frequently necessary for employees to work overtime," and "[e]very employee when hired accepts the responsibility to work overtime." (Mays Dep. Ex. 12 at 16.) The collective bargaining agreement between Ohio Power and the IBEW states that "[i]ndividual employees accept an obligation to perform overtime work when reasonably required by the Company. This includes an obligation to make themselves reasonably available for overtime assignments." (Mays Dep. Ex 14 at 17.)

As a subset of overtime hours worked, Line Mechanics are required to respond to "callouts," which occur when a Line Mechanic is called after hours to complete a job. (Hill Dep.

30-31; Mays Dep. 70.) Line Mechanics are expected to respond to a certain percentage of callouts. (Mays Dep. 69-72; Hill Dep. 30-31, 39.) The Athens Power District, where Plaintiff worked, maintained callout guidelines stating that "[i]f an employee's callout response rate drops into the 30 percent range, they should expect a discussion with their supervisor for coaching and to develop a corrective action plan." (Mays Dep. Ex. 15.) While Defendants maintain that this means that the callout expectation was at 40 percent, it was the understanding of Plaintiff that discipline would not occur unless an employee's percentage dropped below 30 percent. (*See* Mays Dep. 92.)

According to Plaintiff, the responsibilities for Line Servicers differed slightly from those of Line Mechanics in responding to incidents of power disruption. Line Servicers, as the first responders, were essentially always on duty during designated periods of time and would respond to incidents as they arose. (*See* Mays Dep. 69.) If a disruptive incident occurred after hours, the Line Servicer would evaluate the situation, fix the problem if possible, or, if necessary, request additional help from Line Mechanics. (*See* Mays Dep. 69-73.)

Plaintiff worked under the supervision of Charles Liegl, the Supervisor-Distribution Systems ("SDS"), for the first four years of his employment. (Mays Dep. 50; Liegl Aff. ¶¶ 2-3.) During this time, Plaintiff worked a considerable amount of overtime, including 678 hours in 2005, (Liegl Aff. Ex. 1), and 367 hours in 2006. (Mays Dep. Ex. 13.) Defendant Hill replaced Liegl as the SDS in June 2006. (Liegl Aff. ¶ 2.)

Plaintiff has been diagnosed with Irritable Bowel Syndrome ("IBS"). (Mays Dep. 20.) Liegl and Hill, as well as Mike Henderly, another supervisor, were aware of Plaintiff's condition. (Liegl Dep. 12; Henderly Aff. ¶ 2; Hill Dep. 16-17.) Plaintiff claims that he has long suffered

severe IBS and Crohn's disease-like symptoms that can render him incapacitated when he has a "flare up." (Mays Dep. 19-24; Mays Dep. Ex. 21.) According to Plaintiff, while he performed the responsibilities of a Line Servicer, Liegl and District Manager Tim Seyfang had no objection to his taking naps and breaking for meals during the workday, which helped him manage his condition. (*See* Mays Dep. 53-56.) When Hill replaced Liegl, the situation allegedly changed and Plaintiff was given less flexibility. (*See* Mays Dep. 54-55.)

In 2006, Plaintiff's callout percentage began to drop. After being verbally counseled twice, in January 2007, Plaintiff's Line Crew Supervisor, Timothy Daubenmire, issued Plaintiff a written warning for having a callout percentage of only 18.64% during the prior year. (Mays Dep. Ex. 16.) In May 2007, Plaintiff submitted an FMLA intermittent leave certification, stating that he suffered from IBS and may have occasional "flare ups" that cause him to miss work, but not placing any overtime restrictions on him. (Mays Dep. Ex. 21.) The certification was completed by Plaintiff's treating physician, Dr. Charles Keller, and stated that the likely duration of the intermittent leave was "lifetime" or "unknown at this time." (Mays Dep. Ex. 21.) Also in May 2007, Plaintiff's Line Crew Supervisor, Billy Watts, counseled Plaintiff on his overtime responsibilities, informing him that it was a requirement of the position. (Watts Aff. ¶ 5.) In June 2007, Ohio Power then had Plaintiff see Dr. Robert Hess, a gastroenterologist, for a second opinion as to Plaintiff's medical condition. (Mays Dep. Ex. 23.) Dr. Hess indicated that IBS would not prevent Plaintiff from working overtime and responding to callouts. (Mays Dep. Ex. 23.)

Plaintiff began taking FMLA leave and was absent for several periods during the latter half of 2007. Plaintiff took FMLA leave during the following time periods: August 6-10, 2007;

August 20-21, 2007; September 11-21, 2007; October 1-5, 2007; October 10-November 21, 2007; and November 27-28, 2007. (Mays Dep. Ex. 24.) During this period, Plaintiff broke up with his live-in girlfriend, and began seeing a psychiatrist, Dr. Max Haque. (Mays Dep. 154, 160-61.) In December 2007, Plaintiff's girlfriend died suddenly, creating additional stress in Plaintiff's life. (Mays Dep. 161, 180.) By the end of 2007, Plaintiff's callout rate was at 21% and he had worked a total of 129 hours of overtime for the year. (Hill Aff. ¶ 9, Jan. 8, 2010; Ex. 1.)

In January 2008, upon request from Ohio Power, Plaintiff submitted an FMLA certification for intermittent leave completed by Dr. Haque. (Mays Dep. Ex. 30.) The certification restricted Plaintiff's overtime hours and stated that he was only able to work 40 hours per week and not more, with a likely duration of "unknown, but at least 6 months." (Mays Dep. Ex. 30.) The stated medical conditions on the FMLA certification were panic disorder, agoraphobia, and post-traumatic stress disorder. (Mays Dep. Ex. 30.) However, Dr. Haque also indicated that stress contributed to Plaintiff's IBS symptoms. (Mays Dep. Ex. 30.)

According to Plaintiff, after he submitted the FMLA certification, Ohio Power continued to send him on callouts. (Mays Dep. 170). When Plaintiff refused these callout opportunities, Ohio Power began charging him for intermittent FMLA leave. For instance, on four different occasions in February 2008, Ohio Power charged FMLA time to Plaintiff for missed callout opportunities: February 1st (4.5 hours), February 5th (3.1 hours), February 6th (8 hours), and February 9th (5 hours). (Mays Dep. Ex. 34.) When Plaintiff missed callouts, the number of hours used by his replacement to complete the job assignment were charged to Plaintiff as FMLA leave. (Mays Dep. 187.) During this time, according to Plaintiff, Hill and Human Resources

Manager Gregory Steger advised Plaintiff that he would be without a job if his overtime restrictions were not lifted. (Mays Dep.170-71.)

Plaintiff's 12 weeks of FMLA leave was exhausted by February 9, 2008 as a result of the previous leave taken in 2007 coupled with the leave counted against him for missed callouts. (Mays Dep. Ex. 34) In early June 2008, Plaintiff had a meeting with Hill wherein Hill asked Plaintiff to submit medical documentation by the end of that month documenting his inability to work overtime. (Hill Aff. ¶ 12, Jan. 8, 2010.) According to Hill, at this meeting, he also told Plaintiff that Plaintiff's inability to work overtime would make it impossible for Plaintiff to continue in the Line Mechanic position because of the significant overtime requirements of the position. (Hill Aff. ¶ 12, Jan. 8, 2010.) In this regard, the collective bargaining agreement between Ohio Power and the IBEW provided that an employee could be "retrogressed" into a different, possibly lower paying position, if the employee became "incapacitated for his regular work." (Mays Dep. Ex. 14 at 36.)

Plaintiff responded that he had a doctor's appointment on June 27, 2007 and would provide documentation at that time. (Mays Dep. 197; Ex. 35.) By June 30, 2008, documentation had not been received from Plaintiff regarding his ability to work overtime, and he was informed that he would be retrogressed into a Meter Reader position as of July 1, 2008. (Hill Aff. ¶ 14, Jan. 8, 2010; Mays Dep. Ex. 35.) Plaintiff did provide medical documentation to Ohio Power on July 8, 2008, but the medical documentation indicated that he could only work occasional overtime "if absolutely needed." (Steger Dep. 59-61, Ex. R.)

In the months prior to his retrogression, Plaintiff applied for several job openings within AEP. (Mays Dep. Ex. 42.) These included positions of Distribution Projects Coordinator,

Region Contract Supervisor, and Distribution Dispatcher, each of which requiring post-secondary degrees, which Plaintiff does not possess. (Trad Aff. ¶ 3; McKimm Aff. ¶ 3; Winkler Aff. ¶ 3.) According to AEP, Plaintiff was also not selected for an interview for the position of Line Representative I in Chillicothe, Ohio because the hiring manager preferred candidates with some post-secondary education. (Payne Aff. ¶ 4.) Plaintiff was not selected for an interview for a Line Representative I position in Newark, Ohio because his resume did not indicate he had the requisite six years experience as a Line Mechanic with AEP or eight years equivalent experience. (Sterling Aff. ¶ 3.) However, Tracy Sterling, the individual who screened applications for the position in Newark, indicated that she did not notice that Plaintiff stated on his resume that he possessed nine years of "job knowledge." (Sterling Aff. ¶ 3.) Finally, Plaintiff was not selected for an interview for the position of Line Crew Supervisor in Athens, Ohio because of his low callout percentage, low overtime hours, and his overtime restriction. (Westfall Aff. ¶ 3.)

Plaintiff interviewed for two of the positions for which he applied. (Mays Dep. 222.) He interviewed for the Line Representative III position in Columbus, Ohio, but, according to AEP, ultimately was not selected for two reasons. First, he had a poor safety record. (Hoffman Aff. ¶ 3.) Second, during his interview, he stated that one of the reasons he was applying for the position was to "get away" from Hill. (Hoffman Aff. ¶ 3.) Gary Hoffman, who interviewed Plaintiff, claims that he was unaware of any of Plaintiff's medical restrictions when he made his decision not to select Plaintiff. (Hoffman Aff. ¶ 5.)

Plaintiff also interviewed for the Line Representative I position in Athens, Ohio. (Glass Aff. ¶ 2.) The interview was conducted by David Glass and three Line Representatives from other areas around the state. (Glass Aff. ¶ 2..) According to Glass, he was "turned off" by the

Plaintiff's "disheveled appearance" and Plaintiff's statements that he was interested in the position because he wanted to get away from his current supervisor, Hill. (Glass Aff. ¶ 4.) Glass was also concerned because Plaintiff stated that he could not ride in large trucks, because doing so would aggravate his health condition, and Line Representatives spend their days working out of their trucks. (Glass Aff. ¶ 5.) All four interviewers agreed that Plaintiff was not right for the position and another candidate was selected. (Glass Aff. ¶ 7-8.) Glass denied any prior knowledge of Plaintiff's medical conditions and claims that Plaintiff volunteered any health information that was discussed during the interview. (Glass Aff. ¶ 6, 8.)

Plaintiff continues to work for Ohio Power as a Meter Reader. (*See* Mays Dep. 171.) In his previous position, Plaintiff's rate of pay was $29.21 per hour; as a Meter Reader, Plaintiff's rate of pay is $14.58 per hour. (Mays Dep. 203.) Plaintiff brings this action claiming that his retrogression from Line Mechanic to Meter Reader was in violation of Ohio's anti-discrimination statute and the FMLA. Defendants now move for summary judgment.

II.

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388-89 (6th Cir. 1993). To avoid summary judgment, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the

material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *accord Moore v. Philip Morris Cos.*, 8 F.3d 335, 340 (6th Cir. 1993). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)(stating that the court must draw all reasonable inferences in favor of the nonmoving party and must refrain from making credibility determinations or weighing evidence). In responding to a motion for summary judgment, however, the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *see Celotex*, 477 U.S. at 324; *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994). Furthermore, the existence of a mere scintilla of evidence in support of the nonmoving party's position will not be sufficient; there must be evidence on which the jury reasonably could find for the nonmoving party. *Anderson*, 477 U.S. at 251; *see Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995); *see also Matsushita*, 475 U.S. at 587-88 (finding reliance upon mere allegations, conjecture, or implausible inferences to be insufficient to survive summary judgment).

III.

A.

Plaintiff brings claims pursuant to the Ohio anti-discrimination statute which provides in

part that: "[i]t shall be an unlawful discriminatory practice . . . [f]or any employer, because of the . . . disability . . . of any person . . . to refuse to hire, or otherwise 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." OHIO REV. CODE § 4112.02. The term "disability" is defined by the Ohio Revised Code 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.

Id. § 4112.01(A)(13). An employer must provide a reasonable accommodation to an employee or applicant with a disability unless doing so would create an undue hardship. OHIO ADMIN. CODE 4112-5-08(E)(1). "Reasonable accommodation" is defined as "a reasonable adjustment made to a job and/or the work environment that enables a qualified disabled person to safely and substantially perform the duties of that position." *Id.* 4112-5-02(A). Because of the similarity between the Ohio disability discrimination statute and the federal Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), Ohio courts look to regulations and cases interpreting the ADA for guidance in interpreting the Ohio statute. *City of Columbus Civil Serv. Comm'n v. McGlone*, 697 N.E.2d 204, 206-07 (Ohio 1998).

Here, Plaintiff specifically claims that AEP discriminated against him based on disability by failing to accommodate him, by retrogressing him to the lower-paying position of Meter Reader, and by not selecting him for certain positions for which he had applied. Plaintiff claims that his IBS and anxiety are physical and mental impairments that substantially limit his ability to work and walk. Plaintiff also claims that he is substantially limited in his ability to do house

chores.

The term "substantially limits" is not defined in the Ohio Revised Code or Ohio Administrative Code, but is defined by federal regulations to mean "unable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as 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 that same major life activity." 29 C.F.R. § 1630.2(j)(1).[1]

Plaintiff first claims that he is substantially limited as to his ability to do chores. Assuming that IBS is a physical impairment, the record does not include any evidence demonstrating that Plaintiff's anxiety limits his ability to do chores, Plaintiff testified during his deposition that on days when he is sick, he is unable to do yard work. (*See* Mays Dep. 19-24.) Plaintiff did not testify as to how often he is unable to do yard work. Thus, even assuming that yard work is a major life activity, Plaintiff has produced no evidence from which a jury could conclude that, compared to the average person, Plaintiff is "significantly restricted" as to the duration of time he can perform yard work.

For similar reasons, Plaintiff also has not produced sufficient evidence that his conditions substantially limit his ability to walk. Plaintiff testified that the substantial walking in his current

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[1] The Court does not consider what effect, if any, the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 ("ADAAA"), may have on Ohio disability discrimination law as the events that are the subject of this lawsuit occurred prior to the January 1, 2009 effective date of the ADAAA and the ADAAA does not apply retroactively. *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565 (6th Cir. 2009). Accordingly, the Court will apply law interpreting the ADA prior to the passage of the ADAAA to the facts of this case.

position of Meter Reader is making him tired because of his conditions. (*See* Mays Dep. 125.) Because Plaintiff walks a great deal in his position as a Meter Reader, the testimony does not suggest that the duration he is able to walk without tiring significantly departs from the capabilities of an average person.

Plaintiff next asserts that he is substantially limited as to his ability to work. The record reflects that Plaintiff is usually able to work the Line Mechanic job forty hours per week, but is unable to work overtime on a regular basis. With regard to the major life activity of working, federal regulations provide that substantially limited means

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3). The regulations also provide the following three factors to consider in determining if an individual is substantially limited as to his or her ability to work:

> [1] The geographical area to which the individual has reasonable access;
>
> [2] The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> [3] The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id.

Here Plaintiff has failed to provide evidence that he is significantly restricted in his ability

to perform a class of jobs or a broad range of jobs. To the contrary, Plaintiff is apparently able to successfully perform the job of Meter Reader. (*See* Mays Dep. 205.) In *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593 (6th Cir. 2002), the Sixth Circuit upheld a district court finding that the plaintiff was not substantially limited in his ability to work when the plaintiff had found a similar job to his previous employment and had worked continuously without taking time off because of his impairment. *Id.* at 598. Here, nothing in the record indicates that Plaintiff could not obtain work in jobs involving the same skill set as the Line Mechanic job, but that do not require substantial amounts of overtime. In this regard, Plaintiff has not provided evidence addressing the three factors identified above. Finally, the Sixth Circuit has expressly ruled that a person is not substantially limited as to his or her ability to work when he or she is able to work forty hours per week. *See, e.g., id.* at 598-99; *Lisner v. Dep't of Mental Health*, No. 99-3887, 2000 WL 1529809, at *3-*4 (6th Cir. Oct. 6, 2000)(holding that, under ADA and Ohio anti-discrimination statute, plaintiff was not substantially limited as to working where she conceded that she could work forty hours per week).

In the alternative, Plaintiff claims that he is disabled because AEP regarded him as being disabled. An individual can be disabled under the "regarded as" prong of the definition if "(1) [an employer] mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) [an employer] mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). At issue here is whether AEP mistakenly believed that Plaintiff's physical and mental impairments limited him as to the major life activity of working, which requires him to demonstrate that AEP "perceived him as unable to work in a broad class of

jobs or a broad range of jobs in various classes." *Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469, 480 (6th Cir. 2005).

As stated above, the only restriction in the record is Plaintiff's inability to work overtime. The question then becomes whether AEP equated Plaintiff's inability to work overtime as substantially limiting his ability to work. On this issue, Plaintiff has proffered no evidence. As stated above, AEP provided Plaintiff with a new job as a Meter Reader when it determined that he could not meet the requirements of the Line Mechanic position. The fact that he was provided a new job undercuts any argument that AEP did not believe he was capable of working. Furthermore, there is no evidence that AEP believed that his inability to work overtime precluded Plaintiff from a broad class of jobs for which he was qualified by virtue of the skills he possessed. Additionally, an inability to work overtime cannot be considered a substantial limitation on an individual's ability to work. *See, e.g., Ross v. Campbell Soup Co.*, 237 F.3d 701 (6th Cir. 2001)("It is not enough [] that the employer regarded that individual as somehow disabled; rather, the plaintiff must show that the employer regarded the individual as disabled within the meaning of the ADA." (quoting *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d Cir. 1998))).

For the above reasons, the record does not contain a genuine issue of material fact from which a jury could conclude that the Plaintiff is disabled, thereby entitling Defendants to summary judgment on claims under Ohio Revised Code § 4112.01 *et seq.*

B.

Plaintiff also asserts claims under the FMLA, which provides in part that employers must provide eligible employees with up to a total of twelve workweeks of leave annually if "a serious

health condition [] makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). Such leave may be taken intermittently. *Id.* § 2612(b)(1). Upon returning from FMLA leave, employees who are able to perform the essential functions of their position are entitled to be restored to their previous position or an equivalent position. *Id.* § 2614. However, if the employee is unable to perform the essential functions of his or her position upon returning from FMLA leave, the employer has no duty to restore him or her to the prior position. 29 C.F.R. § 825.216(c).

It is unlawful for employers to either interfere with the rights afforded employees by the FMLA or retaliate against employees for exercising their FMLA rights. 29 U.S.C. § 2615(a). Plaintiff claims both interference and retaliation. Defendants respond by asserting that Plaintiff is precluded from raising his retaliation claim and/or that Plaintiff has not produced sufficient evidence to support either claim.

1.

In order to prevail on his interference claim, Plaintiff must establish the following five elements:

> (1) [he] was an eligible employee, (2) the defendant was an employer as defined under the FMLA, (3) [he] was entitled to leave under the FMLA, (4) [he] gave the employer notice of [his] intention to take leave, and (5) the employer denied the employee FMLA benefits to which [he] was entitled.

Edgar v. JAC Products, Inc., 443 F.3d 501, 507 (6th Cir. 2006). Defendants assert that Plaintiff was never denied FMLA rights to which he was entitled. Plaintiff first claims that Hill denied him the right to temporarily work overtime. Second, he claims that AEP interfered with his FMLA rights in not selecting him for certain positions that he had applied for because of stated

concerns over his problems with stress, taking leave, and riding in trucks. Finally, Plaintiff claims that AEP incorrectly calculated the number of hours of FMLA he used, which resulted in his running out of FMLA leave prematurely. According to Plaintiff, when he ran out of FMLA leave, it allowed AEP to improperly retrogress him to the lower paying position.

As to Plaintiff's first theory, it is unclear how Hill denying plaintiff the right to work overtime implicates the FMLA at all. Furthermore, the testimony cited by Plaintiff (pages 170 through 171 of his deposition) suggests exactly the opposite situation—Hill asking Plaintiff to work overtime, but Plaintiff being unable to do so and using intermittent FMLA leave as a result. Similarly, for Plaintiff's second theory of interference, it is unclear how the FMLA would be implicated in AEP's concerns over Plaintiff's illness in deciding whether to hire him for a position or not. As the Court held in Part III.A. above, Plaintiff is not disabled under the Ohio anti-discrimination statute or ADA, and the FMLA itself provides no duty to employers to accommodate the medical conditions of potential employees. *See Tardie v. Rehab. Hosp. of R.I.*, 168 F.3d 538, 544 (1st Cir. 1999).

Plaintiff's third theory of FMLA interference seems to be that AEP impermissibly counted missed callout opportunities against Plaintiff's allotted FMLA leave. Plaintiff further asserts that AEP should not have determined the number of hours of leave charged to Plaintiff based on the number of hours Plaintiff's replacements worked to complete assignments missed by Plaintiff because of his medical conditions. Rather, he contends that, because he worked faster than other Line Mechanics, AEP should have estimated the amount of time it would have taken him to complete the jobs in question and charged him FMLA leave based on those estimates.

Regulations implementing the FMLA provide that "[i]f an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement." 29 C.F.R. § 825.205(c). AEP correctly charged missed overtime hours to Plaintiff's FMLA leave when Plaintiff's January 2008 FMLA certification specifically said that he would not be able to perform required overtime work. Furthermore, Plaintiff has cited no authority supporting his contention that AEP's adopted means of accounting for Plaintiff's missed callouts for FMLA purposes violates the FMLA or the regulations established pursuant thereto. As to Plaintiff's assertion that he was improperly retrogressed to the Meter Reader position, the record reflects that upon exhausting his annual FMLA leave, AEP moved him into a new position that did not require overtime work—a permissible act under the FMLA. *See, e.g., Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 785-86 (6th Cir. 1998)(holding that it was permissible to terminate an employee who was unable to return to work upon exhaustion of FMLA leave).

Plaintiff's citation to 29 C.F.R. § 825.204 for the proposition that he should have been reinstated to his current position is misplaced as that section relates to situations where employees using intermittent leave are transferred to temporary positions and only applies to cases where the employee is using leave "that is foreseeable based on planned medical treatment for the employee." 29 C.F.R. § 825.204(a). Here, the record does not reflect that Plaintiff's leave was foreseeable or was being used for medical treatment. Additionally, Plaintiff was not moved to a temporary job during his use of FMLA leave and was only retrogressed after his leave was exhausted.

2.

Turning to Plaintiff's retaliation claim, Defendants first contend that this claim is not properly before the Court because Plaintiff did not allege the claim in either his complaint or deposition. However, a careful reading of Plaintiff's complaint reveals that his allegations concerning the FMLA are sufficiently broad to have put Defendants on notice of a possible retaliation theory of recovery. *See Wysong v. Dow Chemical Co.*, 503 F.3d 441, 446 (6th Cir. 2007). For instance, the complaint contains a broad allegation that Defendants' actions violated the FMLA. The complaint also contains specific allegations that Plaintiff's supervisor had stated that if Plaintiff's physician did not lift Plaintiff's overtime restriction, Plaintiff would be downgraded to a lower paying position. (Compl. ¶¶ 12, 14.) A reasonable implication of these allegations is that Plaintiff suffered an adverse employment action in retaliation for his use of FMLA leave.

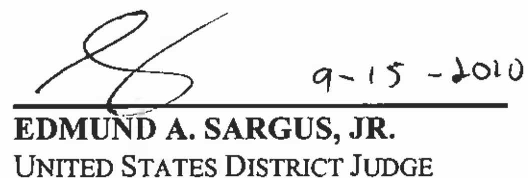
To make out a prima facie case of retaliation, the Plaintiff must demonstrate that "(1) [he] availed [himself] of a protected right under the FMLA . . . (2) [he] suffered an adverse employment action, and (3) that there was a causal connection between the exercise of [his] rights under the FMLA and the adverse employment action." *Edgar*, 443 F.3d at 508. If Plaintiff is able to make out his prima facie case, the burden then shifts to Defendants to articulate "a legitimate, nondiscriminatory rationale" for taking the adverse employment action. *Id.* While an employer's motive or intent is not relevant to claims of FMLA interference, motive is an "integral"component of retaliation claims. *Id.* at 507-08. Here, Plaintiff's claims must fail because he has not proffered evidence from which a reasonable jury could conclude that AEP retaliated against him for exercising his FMLA rights.

Plaintiff points to AEP's refusal to transfer him to the Line Representative I position in Athens, Ohio and his retrogression as adverse employment actions taken against him. However, there is no evidence that hiring manager David Glass was motivated by Plaintiff's use of FMLA leave when he decided not to hire him for the Line Representative I position or any evidence that Glass even knew that Plaintiff had been using FMLA leave. Similarly, Plaintiff has not produced evidence suggesting that AEP decision to retrogress him into the Meter Reader position was based on anything other than AEP's belief that he was unable to perform the essential functions of the Line Mechanic position upon exhausting his FMLA leave.

IV.

For the foregoing reasons, Defendant's Motion for Summary Judgment (Docs. 17 & 22) is **GRANTED**. The Clerk is directed to enter judgment in favor of Defendants and close this matter.

IT IS SO ORDERED.



DATED

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE