[Cite as *Cioroch v. Ohio Dept. of Mental Retardation & Developmental Disabilities,* 2008-Ohio-5725.]

Court of Claims of Ohio

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SUZANNE CIOROCH

Plaintiff

v.

OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

Defendant

[Cite as *Cioroch v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, 2008-Ohio-5725.]

Case No. 2006-05641

Judge Joseph T. Clark

DECISION

{¶ 1} Plaintiff brought this action alleging disability discrimination. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} In 1998, plaintiff began her employment with defendant at the Northwest Ohio Development Center (NODC), a care facility for adults with developmental disabilities. As a general activity therapist (GAT), plaintiff's duties included accompanying developmentally disabled adults to places in the community such as restaurants, stores, and movie theaters. Plaintiff's employment was subject to a collective bargaining agreement (CBA).

{¶ 3} On July 1, 2003, plaintiff was promoted to a full-time GAT-1 position in Cottage 606, a residential unit that housed adult males who were profoundly mentally retarded. At times, plaintiff's duties included lifting patients from the floor and other tasks that required her to lift weight in excess of 50 pounds.

{¶ 4} In December 2003, plaintiff took a medical leave of absence for back surgery related to a congenital defect of her spine.[1] Plaintiff applied for and received short-term disability benefits. Although she anticipated returning to work two months after her surgery, by April 28, 2004, plaintiff's treating physician, Steven D. Ham, M.D., determined that her condition prevented her from working for at least 12 months. Dr. Ham also stated that in an eight-hour work day, plaintiff could occasionally lift up to 10 pounds and that she "probably needs to change work." (Defendant's Exhibit C.)

{¶ 5} On May 11, 2004, the Department of Administrative Services (DAS) approved plaintiff's application for supplemental disability benefits through June 30, 2004. However, DAS notified plaintiff that because her physician had determined that her condition would last longer than 12 months, she was required to apply for disability retirement through the Public Employees' Retirement System. DAS further informed plaintiff that she had until July 30, 2004, to request an appeal of its decision. On July 30, 2004, plaintiff filed a notice of appeal wherein she stated that she did not want to submit to disability retirement.

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[1]Plaintiff was born with a spinal cord defect known as a "tethered cord" which is related to the condition of spina bifida. On December 16, 2003, plaintiff had surgery to release the tethered spinal cord and to correct some spinal stenosis.

{¶ 6} In August 2004, plaintiff requested defendant's policy on reasonable accommodations. On August 30, 2004, Jeff Wilson, defendant's diversity manager, sent plaintiff a letter requesting that she provide medical documentation for him to evaluate her request for accommodation. Wilson asked plaintiff to have her medical provider review a position description that Wilson had included with the letter and to complete an attached questionnaire and return the paperwork to him by September 30, 2004. Included in the paperwork was a medical release for plaintiff to sign and then submit to her medical provider.

{¶ 7} On September 27, 2004, plaintiff sent Wilson a letter stating that she had found a discrepancy in the position description that he had sent her when she compared it to a position description that she had obtained in January 2004. According to plaintiff, the January position description set forth a 50-100 pound lifting requirement, whereas that requirement had been crossed out on the August position description. On October 4, 2004, Wilson sent plaintiff a letter explaining that the position description to give to her doctor was the "corrected" one without a lifting requirement. On November 3, 2004, a hearing was held on plaintiff's appeal.

{¶ 8} On November 8, 2004, defendant's human resources department received a letter from plaintiff wherein she made a request for a "new position that I am qualified for." (Plaintiff's Exhibit 18.) Plaintiff also returned the questionnaire that Dr. Ham had completed, although she had redacted the release and waiver language.[2] Dr. Ham opined that plaintiff's condition significantly restricted her physical stamina, stability, and leg strength, and that it prohibited any prolonged physical work. Dr. Ham further stated that plaintiff would be unable to restrain or lift patients. Dr. Ham concluded that he had no specific recommendation for an accommodation that could be made to enable plaintiff to perform the essential functions of her job.

{¶ 9} On November 12, 2004, a hearing officer recommended that the decision of the Office of Benefits Administration requiring plaintiff to file for disability retirement benefits be upheld.

{¶ 10} In a letter dated November 18, 2004, Wilson informed plaintiff that because her medical provider had made no specific recommendation for an accommodation, Wilson could not find enough medical information to identify any reasonable accommodation that would allow her to perform the essential functions of her job. Wilson added that defendant could not grant plaintiff a reasonable accommodation of a different position because that would eliminate the necessity for her to perform the essential functions of her current position and it would place her in a different classification under the CBA. Wilson suggested that if plaintiff desired employment in a different classification she should go through the hiring process.

{¶ 11} Also on November 18, 2004, Wilson sent plaintiff another questionnaire with the medical release and waiver language and requested that her medical provider return it to his office no later than December 17, 2004.

{¶ 12} Plaintiff wrote a letter dated November 22, 2004, to Dr. Ham asking him to be more specific on a recommendation for an accommodation. Plaintiff requested in the letter that the questionnaire be returned to her. On December 1, 2004, plaintiff's application for disability retirement benefits was approved.

{¶ 13} Plaintiff asserts that defendant discriminated against her on the basis of her disability when it refused to grant her a reasonable accommodation. Plaintiff further asserts that defendant failed to participate in an "interactive dialogue" regarding her accommodation request after her claim for disability retirement was approved. In addition, plaintiff claims that DAS' decision to force her to apply for disability retirement was contrary to the policy as set forth in the CBA.

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[2]Plaintiff had redacted the following language: "I have enclosed a written release and waiver with this letter and I ask that you provide the Ohio Department of Mental Retardation and Developmental

{¶ 14} At the close of plaintiff's case, defendant moved the court for dismissal of plaintiff's claims pursuant to Civ.R. 41(B)(2).[3] The court declined to render any judgment until the close of all the evidence.

{¶ 15} Sandra Hull Ferguson, plaintiff's supervisor, testified that plaintiff informed her that she wanted to return to work but that she was concerned about whether she could perform some of her job duties. Ferguson testified that plaintiff suggested an accommodation of solely performing the paperwork part of her job. However, according to Ferguson, only 10 to 15 percent of a GAT's job duties consisted of paperwork. Ferguson testified that even though the 50-100 pound lifting requirement had been eliminated from the position description, 85 to 90 percent of a GAT's job duties included lifting more than 15 pounds many times per day in activities such as assisting residents to walk and lifting wheelchairs and walkers. Ferguson noted that GATs were required to perform repetitive stooping and bending on a daily basis. Plaintiff conceded that after her surgery, she could no longer perform the duties of a GAT-1.

{¶ 16} Marjorie Cook testified that she was a personnel officer at NODC where her duties included hiring, drafting position descriptions and facilitating the bidding process. According to Cook, when plaintiff expressed interest in an account clerk position, Cook told plaintiff that she could bid on the position but that she would not be selected until she had submitted a "return to work slip." Although plaintiff testified that she was told that she was not eligible to apply for any vacant position while she was receiving disability benefits, she conceded that the CBA required her to be able to start a new position on the date that it was to be filled and to submit an application and a return to work slip to be considered for any position. Plaintiff testified that she did not

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Disabilities with information about my care." (See Defendant's Exhibits H and J.)

[3]Defendant asserted that plaintiff's claims were barred by the statute of limitations, that the court lacked jurisdiction over plaintiff's claims, and that plaintiff failed to prove a prima facie case of disability discrimination.

think that she needed a return to work slip because her physician had stated that she could do sedentary work.

{¶ 17} Jeff Wilson testified that in 2004 he was defendant's diversity manager and that his job duties included investigating discrimination complaints and responding to requests for reasonable accommodations. Wilson stated that a reasonable accommodation could be a new position, but that the CBA prohibited a union member from filling a vacant position in place of another union member who was entitled to promotion. Wilson testified that plaintiff's physician never returned the necessary information that the release and waiver would have provided. Wilson did state that he had access to plaintiff's disability file, but that the disability file did not help him determine an accommodation. Plaintiff explained that she redacted the release and waiver provision of the questionnaire because she thought that defendant had all of her relevant medical records from the disability file.

{¶ 18} Steven Hansen testified that he was defendant's deputy director of human resources. According to Hansen, DAS requires employees to file for disability retirement when they will be on disability leave for more than one year. Hansen stated that employees on disability retirement may return to work if they recover from the disability within five years of the date of separation. To seek reinstatement, employees must provide medical documentation stating that they could return to their previous job. Hansen stated that the CBA provides that short-term disability benefits are available for up to 24 months if a physician states that an employee's condition is temporary and is improving, however, that was not the case with plaintiff.

{¶ 19} Plaintiff argues that she should not have been forced to apply for disability retirement because the CBA provided that she could receive temporary disability benefits for a period of up to 24 months. However, plaintiff presented the same argument before a hearing officer on November 3, 2004. To the extent that plaintiff is either claiming that defendant violated a provision of the CBA or that she disagrees with

the decision of the hearing officer, this court does not have jurisdiction. Pursuant to R.C. 4117.09(B)(1), suits for violations of a collective bargaining agreement must be brought in the common pleas courts. *Moore v. Youngstown State University* (1989), 63 Ohio App.3d 238, 241-2. In addition, "the right to dispute the validity of an administrative decision is only conferred by statute and, if such a statutory right exists, the party aggrieved by the administrative decision can only seek an appeal via the method articulated in the statute." *George v. Ohio Dept. of Human Services*, Franklin App. No. 04AP-351, 2005-Ohio-2292, ¶32. (Citations omitted.)

{¶ 20} The court now turns to plaintiff's claim of disability discrimination. R.C. 4112.02 provides in relevant part:

{¶ 21} "It shall be an unlawful discriminatory practice:

{¶ 22} "(A) For any employer, because of the * * * disability * * * of any person, to discharge without just cause, 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."

{¶ 23} To establish a prima facie case of disability discrimination pursuant to R.C. 4112.02, plaintiff must demonstrate: 1) that she was disabled; 2) that defendant took an adverse employment action against her, at least in part, because she was disabled; and 3) that she, though disabled, can safely and substantially perform the essential functions of the job in question. *Yamamoto v. Midwest Screw Products*, Lake App. No. 2000-L-200, 2002-Ohio-3362, citing *Hazlett v. Martin Chevrolet, Inc.* (1986), 25 Ohio St.3d 279, 281.

{¶ 24} "Once the plaintiff establishes a prima facie case of handicap[4] discrimination, the burden then shifts to the employer to set forth some legitimate, nondiscriminatory reason for the action taken. * * * [I]f the employer establishes a

[4]"The term 'disability' was previously referred to as 'handicap' under former R.C. 4112.01(A)(13)." *Ferguson v. Lear Corp.*, 155 Ohio App.3d 677, 2003-Ohio-7261.

nondiscriminatory reason for the action taken, then the employee or prospective employee must demonstrate that the employer's stated reason was a pretext for impermissible discrimination." *Hood v. Diamond Prods.*, 74 Ohio St.3d 298, 302, 1996-Ohio-259, citing *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 197-198.

{¶ 25} Ohio courts often look to the federal Americans with Disabilities Act (ADA), which is similar to the Ohio disability discrimination law, for assistance in interpretation of Ohio law. See *City of Columbus Civ. Serv. Comm'n v. McGlone*, 82 Ohio St.3d 569, 573, 1998-Ohio-410.

{¶ 26} Under Ohio law, an individual has a "disability" if he or she has "a physical or mental impairment that substantially limits one or more major life activities" of such individual. R.C. 4112.01(A)(13). 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) [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 CFR 1630.2(j). 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." See *Toyota Motor Mfg. Ky. v. Williams* (2002), 534 U.S. 184, 198. Factors to consider whether an individual is substantially limited in a major life activity include "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 CFR 1630.2(j)(2).

{¶ 27} Dr. Ham opined that plaintiff's condition after surgery significantly restricted her physical stamina, stability, and leg strength, and that it prohibited any

prolonged physical work. However, such evidence is not dispositive as to whether plaintiff suffers from a disability under the ADA. "Merely having an impairment does not make one disabled for purposes of the ADA." *Toyota Motor Mfg. Ky.,* supra, at 195. Rather, "[c]laimants also need to demonstrate that the impairment limits a major life activity." Id.

{¶ 28} Plaintiff asserts that she suffered from a disability because she was forced to take disability retirement. However, the criteria used to determine eligibility for disability retirement is not the same criteria used to determine whether a person is disabled as defined under R.C. 4112.01(A)(13). Plaintiff failed to identify a major life activity that was substantially limited by her condition. Indeed, "Section 1630.2(j)(3)(i), Title 29 CFR provides that, regarding the major life activity of working, '[t]he term substantially limits 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.'" *Hart v. The Columbus Dispatch/Dispatch Printing Co.*, Franklin App. No. 02-AP-506, 2002-Ohio-6963, ¶27. Plaintiff testified that she was capable of performing work that did not require lifting over ten pounds. The court finds that plaintiff has not proven that she was "disabled" as that term is defined under R.C. 4112.01(A)(13).

{¶ 29} However, even if the court were to find that plaintiff's condition qualified as a disability under the statute, and even if the court were also to find that disability retirement in plaintiff's situation was an adverse employment action, the court finds that plaintiff has failed to prove that despite her disability she could safely and substantially perform the essential functions of the job in question. Plaintiff conceded that after her surgery, she could no longer perform the duties of a GAT-1.

{¶ 30} Moreover, even if plaintiff had proven a prima facie case of disability discrimination, the court finds that plaintiff did not prove that defendant failed to

reasonably accommodate her. In regard to the duty of an employer to accommodate an employee, "[f]ederal courts have recognized that the duty of an employer to make a reasonable accommodation also mandates that the employer interact with an employee in a good faith effort to seek a reasonable accommodation." *Shaver v. Wolske & Blue* (2000), 138 Ohio App.3d 653, 664. In order to show that an employer failed to participate in the interactive process, a disabled employee must demonstrate that "'1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.'" Id., quoting *Taylor v. Phoenixville School Dist.* (C.A.3, 1999), 184 F.3d 296, 319-320.

{¶ 31} It has been held that, in order for the interactive process "to work, '[b]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.'" *Jensen v. Wells Fargo Bank* (2000), 85 Cal. App.4th 245, 261, quoting *Barnett v. U.S. Air, Inc.* (9th Cir. 2000), 228 F.3d 1105, 1114-1115. Further, "[w]hen a claim is brought for failure to reasonably accommodate the claimant's disability, the trial court's ultimate obligation is to 'isolate the cause of the breakdown * * * and then assign responsibility' so that '[l]iability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown.' * * *." *Jensen,* supra, at 261, quoting *Beck v. Univ. of Wis. Bd. of Regents* (7th Cir. 1996), 75 F.3d 1130, 1135-1137.

{¶ 32} The court finds that plaintiff's suggestion of simply performing the paperwork part of her job was not an objectively reasonable accommodation. Ferguson testified credibly that paperwork was only 10-15 percent of a GAT's job. The court further finds that plaintiff's suggestion of a different position was not objectively reasonable because of the CBA. Moreover, plaintiff failed to comply with the

requirements of submitting a return to work slip or an application for another position. In addition, plaintiff's redaction of the medical release and waiver prevented defendant from obtaining information necessary to formulate any accommodation. Lastly, plaintiff's own treating physician had no recommendation for an accommodation.

{¶ 33} Based upon the foregoing, the court finds that plaintiff has failed to demonstrate that defendant did not make a good faith effort to assist her in seeking an accommodation or that she could have been reasonably accommodated but for defendant's lack of good faith. Accordingly, the court finds that plaintiff has failed to prove any of her claims by a preponderance of the evidence and, accordingly, judgment shall be rendered in favor of defendant. In light of the foregoing, defendant's motion to dismiss plaintiff's claims pursuant to Civ.R. 41(B)(2) is DENIED as moot.

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OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

Defendant

Case No. 2006-05641

Judge Joseph T. Clark

JUDGMENT ENTRY

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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.

_____
JOSEPH T. CLARK
Judge

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HTS/cmd
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