[Cite as *Miller v. Ohio Dept. of Ins.*, 2009-Ohio-5313.]

Court of Claims of Ohio
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TERRANCE MILLER

Plaintiff

v.

OHIO DEPARTMENT OF INSURANCE

Defendant
Case No. 2006-07805

Judge Joseph T. Clark

DECISION

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

{¶ 2} Plaintiff, an African-American, began his employment with defendant in 1990. In 1992, plaintiff was promoted to fiscal specialist II, a bargaining unit position. Plaintiff was diagnosed with narcolepsy in 1997 and with sleep apnea in 2004. Prior to 2004, plaintiff had received positive employment evaluations and had not received formal discipline. In mid-2004, Curtis McGuire became plaintiff's supervisor.

{¶ 3} At times, because of his medical conditions, plaintiff would arrive late to work or fall asleep at his desk. Plaintiff was prescribed a stimulant known as Provigil. However, Provigil caused him to suffer severe headaches. He was then prescribed another medication for his headaches, but that medication made him drowsy, which exacerbated his conditions of narcolepsy and sleep apnea. Plaintiff used intermittent sick leave under the Family and Medical Leave Act (FMLA) because of his medical

conditions. Plaintiff's "leave balances" became critically low and he began to ask for leave without pay for his absences. Pursuant to defendant's policies, when an employee's accrued sick leave falls below 24 hours, a physician's verification is required to obtain sick leave. According to McGuire, plaintiff did not follow established procedures for filling out leave requests after repeated reminders. Over time, the relationship between plaintiff and McGuire deteriorated.

{¶ 4} In May 2005, McGuire disciplined plaintiff for not attending a meeting with the human resources department to instruct him on how to use FMLA leave correctly. On September 2, 2005, McGuire issued plaintiff a written reprimand for failure to follow the proper call-in procedures on June 6 and 8, August 23, 30, and 31, 2005.

{¶ 5} On September 28, 2005, plaintiff and McGuire had a verbal altercation at work wherein plaintiff alleged that McGuire called him "boy" two times and then called him "nigger." McGuire denied that he had made such statements. Jerry Mapes, director of human resources, conducted an investigation of plaintiff's allegations during which he interviewed employees who may have witnessed the altercation. However, as a result of the investigation, plaintiff's version of events could not be substantiated.

{¶ 6} On the day of the altercation, plaintiff sent an e-mail to another supervisor to notify him that he was leaving for the day because he was so upset. Plaintiff left work at approximately 8:00 a.m., after having arrived at 7:00 a.m. that day. Plaintiff did not return to work until the following day at approximately 11:00 a.m. Plaintiff received formal discipline for leaving work without permission, in addition to not having sufficient accrued leave to cover the absence.

{¶ 7} On October 17, 2005, McGuire obtained approval from his supervisor to move plaintiff's desk from the file room to a cubicle approximately ten feet away from his office. According to McGuire, plaintiff was the only full-time employee that he supervised whose desk was located in the file room. McGuire testified that he wanted to move plaintiff closer to him so that communication would improve. Plaintiff opposed the relocation, and communication between him and McGuire did not improve.

{¶ 8} On November 8, 2005, McGuire reported that plaintiff was asleep at his desk. On November 22, 2005, plaintiff was notified that a pre-disciplinary conference was scheduled for December 5, 2005, to address plaintiff's violation of work rule #42,

"an employee shall not sleep on duty." On December 14, 2005, plaintiff was notified of another pre-disciplinary conference to address his failure to submit physician verification for absences on December 1 and 6, 2005. On December 15, 2005, plaintiff began an authorized one-month leave of absence without pay, with the stated reason to allow plaintiff to meet with his doctors so that they could calibrate his medications in an effort to eliminate his tardiness and absences.

{¶ 9} On January 25, 2006, plaintiff was issued a written reprimand for falling asleep at his desk on November 8, 2005. On February 10, 2006, plaintiff filed a grievance wherein he sought a new supervisor. On February 22, 2006, plaintiff sent an e-mail to Mapes, wherein he inquired about the procedure to obtain an Independent Medical Examination (IME). Mapes arranged for plaintiff to undergo two IMEs. Plaintiff was first examined by Scott Lewis Donaldson, Ph.D., a psychologist, and then by David Lang, M.D. Dr. Donaldson stated in his report that plaintiff's "capacity to perform his job duties is questionable," and, "[a]s a means of eliminating Mr. Miller's occupational difficulties, a transfer to another department may be beneficial." (Plaintiff's Exhibit 24.) Dr. Lang opined that plaintiff "will be unlikely to complete his work duties, or any other work duties potentially." In addition, Dr. Lang stated: "Returning Mr. Miller intermittently back into the work place and his failure to be able to complete his job duties just causes further contention between himself and his co-workers." (Defendant's Exhibit AA, Page 13.)

{¶ 10} On February 28, 2006, a pre-disciplinary conference was held to discuss plaintiff's absence on February 8, 2006, when plaintiff had no paid leave balances of any type. Plaintiff then went on leave for an extended period of time. On May 22, 2006, plaintiff was issued a written reprimand for being absent without leave on February 8, 2006.

{¶ 11} On June 8, 2006, plaintiff received a letter from Mapes, informing him that defendant had scheduled an involuntary disability separation hearing because of the findings in Dr. Lang's report. The hearing was scheduled for July 16, 2006, but was postponed until July 27, 2006, at plaintiff's request so that he could obtain a physician to rebut Dr. Lang's opinions.

{¶ 12} Plaintiff asked his treating physician, Dr. Sanyika, to write a report in opposition to Dr. Lang's report. However, Dr. Sanyika declined to draft a report on plaintiff's behalf. Plaintiff attended the hearing and argued that he was able to perform his duties; however, an involuntary disability separation was issued effective August 11, 2006.

{¶ 13} Plaintiff alleges that defendant disciplined him and commenced disability separation proceedings because of his race and disability, and in retaliation for both filing a grievance about McGuire and complaining about the September 28, 2005 incident.

ANALYTICAL FRAMEWORK

{¶ 14} R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the *race*, * * *, *disability*, age, or ancestry 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." (Emphasis added.)

{¶ 15} In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196.

{¶ 16} A plaintiff may establish a prima facie case of discrimination either by direct evidence or by the indirect method established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. Under *McDonnell Douglas*, the plaintiff first has "the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' * * * Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Comm.*

Affairs v. Burdine (1981), 450 U.S. 248, 252-253, quoting *McDonnell Douglas*, at 802, 804. The prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters* (1978), 438 U.S. 567, 577. "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine*, supra, at 248.

I. Racial Discrimination

A. Direct Evidence

{¶ 17} Plaintiff alleges that the September 28, 2005 incident during which McGuire allegedly called him "boy" and "nigger" constitutes direct evidence of discrimination. "Direct evidence of discrimination occurs when either the decision-maker or an employee who influenced the decision-maker made discriminatory comments related to the employment action in question." *Chitwood v. Dunbar Armored, Inc*. (S.D. Ohio 2003), 267 F. Supp.2d 751, 754. Further, "'direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Johnson v. Kroger Co.* (6th Cir. 2003), 319 F.3d 858, 865, quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.* (6th Cir. 1999), 176 F.3d 921, 926. "Consistent with this definition, direct evidence of discrimination does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." Id. citing *Nguyen v. City of Cleveland* (6th Cir. 2000), 229 F.3d 559, 563.

{¶ 18} According to plaintiff, the incident began when McGuire said "good morning" to him in the hallway. Plaintiff put his hand up to acknowledge McGuire without talking to him. Then McGuire said "Hey boy." Plaintiff replied, "What did you say?" McGuire said "Hey boy" again. Plaintiff then responded, "Don't you ever call me out of my name. My name is Terrance." McGuire then said, "You need to go back to your desk, nigger. Your time would be better spent there." Plaintiff went to his desk and e-mailed Bill Rossbach, McGuire's supervisor, to inform him that he was leaving for

the day. Plaintiff testified that the only time that McGuire had made any statements to him that were based on race was the one incident on September 28, 2005.

{¶ 19} According to McGuire, he and plaintiff were walking toward each other in the hallway. McGuire said, "Good morning, Terrance." Plaintiff raised up his hand as if to acknowledge McGuire. McGuire then said something like "How are you today?" Plaintiff did not respond. Then McGuire muttered, "Oh boy!" out of frustration when he was halfway down the stairwell. McGuire denied calling plaintiff "boy" or "nigger."

{¶ 20} Jerry Mapes testified that he was the head of the human resources department, where his duties included labor relations and payroll. Mapes stated that he and Tynesia Dorsey conducted an investigation regarding the September 28, 2005 incident. Mapes stated that they interviewed four employees and that, after the investigation, they could not substantiate plaintiff's allegations.

{¶ 21} After reviewing the evidence, the court finds that plaintiff has not proven, by a preponderance of the evidence, that McGuire made any discriminatory statements.

Having found that plaintiff's case of racial discrimination based on direct evidence has failed, the court shall analyze plaintiff's indirect evidence of racial discrimination.

B. Indirect evidence

{¶ 22} In order to establish a prima facie case of racial discrimination based upon disparate treatment, plaintiff must demonstrate that: 1) he is a member of a protected class; 2) that he suffered an adverse employment action; 3) that he was qualified for the position; and 4) either that he was replaced by someone outside the protected class or that a comparable, non-protected person was treated more favorably. *Mowery v. City of Columbus,* Franklin App. No. 05AP-266, 2006-Ohio-1153, ¶43; see also *McDonnell Douglas,* supra; *Mitchell v. Toledo Hosp*. (C.A.6, 1992), 964 F.2d 577, 582.

{¶ 23} It is undisputed that plaintiff was a member of a protected class. The court further finds that at the time he was disciplined for the September 28, 2005 incident, plaintiff was qualified for the position. And, limiting the analysis to the discipline imposed for the September 28, 2005 incident, the court finds that plaintiff suffered an "adverse employment action." However, the court finds that plaintiff has failed to prove that a comparable, non-protected person was treated more favorably. Plaintiff did not

provide any evidence that a comparable, non-protected person left work without authorization and without adequate leave time but was not disciplined.

{¶ 24} To the extent that plaintiff alleges that he was discriminated against based upon his race because he received discipline for sleeping at his desk on November 8, 2005, plaintiff did testify that two other employees had been found sleeping at their desks and were not disciplined.

{¶ 25} In order to establish a prima facie case of discrimination based upon treatment of comparables, a plaintiff must show that the other persons referenced were comparable in all respects. *Mitchell v. Toledo Hosp.* (C.A.6, 1992), 964 F.2d 577, 582. A "plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly-situated'; rather, * * * the plaintiff and the employee with whom the plaintiff seeks to compare [himself] * * * must be similar in 'all of the relevant aspects.' The individuals with whom the plaintiff seeks to compare * * * [his] treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Clark v. City of Dublin,* Franklin App. No. 01AP-458, 2002-Ohio-1440. (Citations omitted.)

{¶ 26} Plaintiff testified that two other employees had fallen asleep at their desks at some point during his employment with defendant but that they were not disciplined. However, plaintiff did not present sufficient evidence regarding those employees' attendance records or accrued leave balances to show that they were similarly-situated. In addition, McGuire testified that he did not supervise either of those employees. Based upon the evidence presented at trial, the court concludes that plaintiff failed to demonstrate that there were any similarly-situated, comparable employees.

{¶ 27} Accordingly, the court finds that plaintiff has failed to prove by a preponderance of the evidence a prima facie case of racial discrimination, either by direct or by indirect evidence.

II. DISABILITY DISCRIMINATION

{¶ 28} 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) Significantly 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. v. Williams* (2002), 534 U.S. 184, 198.

{¶ 29} 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 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. "Once the plaintiff establishes a prima facie case of handicap 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 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.,* supra.

{¶ 30} On June 8, 2006, plaintiff received a letter from Mapes notifying him that defendant was commencing an involuntary disability separation process based upon Dr. Lang's report that plaintiff could no longer perform his job duties due to his sleep apnea and narcolepsy. Plaintiff was given the opportunity to rebut Dr. Lang's findings. Plaintiff attended the hearing but offered no rebuttal evidence. The court finds that plaintiff has

failed to prove that, though disabled, he could safely and substantially perform the essential functions of the job in question. Therefore, the court finds that plaintiff has failed to prove a prima facie case of disability discrimination by a preponderance of the evidence.

III. RETALIATION

{¶ 31} Plaintiff further claims that he was disciplined in retaliation both for complaining about the racial epithets that McGuire allegedly made on September 28, 2005, and for filing a grievance about McGuire in February 2006.

{¶ 32} R.C. 4112.02(I) provides that it is unlawful "[f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code."

{¶ 33} In order to establish a prima facie case of retaliation, pursuant to R.C. 4112.02(I), a plaintiff is required to prove that: "'(1) plaintiff engaged in a protected activity; (2) the employer knew of plaintiff's participation in the protected activity; (3) the employer engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action.'" *Motley v. Ohio Civil Rights Commission*, Franklin App. No. 07AP-923, 2008-Ohio-2306, ¶11 quoting *Zacchaeus v. Mt. Carmel Health Sys*., Franklin App. No. 01AP-683, 2002-Ohio-444. (Additional citations omitted.) The first element of a prima facie case of retaliation is that plaintiff must have engaged in a "protected activity." Generally, "[a]nyone who participates in bringing a claim of unlawful discriminatory practice is engaging in a protected activity." *HLS Bonding v. Ohio Civ. Rights Comm'n*., Franklin App. No. 07AP-1071, 2008-Ohio- 4107, ¶21, citing *Thatcher v. Goodwill Industries of Akron* (1997), 117 Ohio App.3d 525, 535.

{¶ 34} Although plaintiff filed a grievance wherein he requested a new supervisor, plaintiff did not state in his grievance that he was claiming an unlawful discriminatory practice. Plaintiff simply stated that he wanted a new supervisor. The court finds that the filing of plaintiff's grievance does not rise to the level of a protected activity. Even assuming, arguendo, that the filing of plaintiff's grievance or his complaints about the

September 28, 2005 incident were protected activities, the court finds that plaintiff has failed to prove any causal link between such protected activities and the adverse action. To determine whether a causal connection exists, courts have considered the amount of time between the protected activity and the adverse employment action. An employee must show that "the alleged retaliatory action followed [the employee's] participation in the protected activity sufficiently close in time to warrant an inference of retaliatory motivation." *Neal v. Hamilton County* (1993), 87 Ohio App.3d 670, 678. Plaintiff's complaints about the September 28, 2005 incident occurred in September 2005. Plaintiff's grievance was filed in February 2006. Plaintiff's involuntary disability separation occurred in August 2006. The court finds that the lengthy amount of time that passed between the alleged protected conduct and plaintiff's disability separation precludes the inference of a retaliatory motive on the part of defendant. See *Reeves v. Digital Equipment Corp.* (N.D. Ohio, 1989), 710 F.Supp. 675, 677, ("as a matter of law, three months is too long to support an inference of retaliation"). Furthermore, even if plaintiff were to prove a prima facie case of retaliation, the court finds that defendant has brought forth a legitimate, nondiscriminatory reason for the disability separation. Specifically, defendant's independent medical examiner opined that plaintiff's disabilities of sleep apnea and narcolepsy prevented him from performing the essential duties of his job. Plaintiff has brought forth no credible evidence to demonstrate that the employer's stated reason for the disability separation was a pretext for discrimination.

{¶ 35} For the foregoing reasons, the court finds that plaintiff has failed to prove any of his claims by a preponderance of the evidence and, accordingly, judgment shall be rendered in favor of defendant.

Plaintiff

v.

OHIO DEPARTMENT OF INSURANCE

Defendant
Case No. 2006-07805

Judge Joseph T. Clark

JUDGMENT ENTRY

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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