[Cite as *Price v. Carter Lumber Co.*, 2015-Ohio-1522.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

GERALD PRICE	C.A. No. 27289
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CARTER LUMBER COMPANY, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 2006 05 3098

DECISION AND JOURNAL ENTRY

Dated: April 22, 2015

CARR, Judge.

{¶1} Plaintiff-Appellant, Gerald Price, appeals from the judgment of the Summit County Court of Common Pleas, granting summary judgment in favor of Defendant-Appellee, Jim Collins. This Court affirms in part, reverses in part, and remands this matter for further proceedings.

I.

{¶2} This is the third time this matter has come before the Court. *See Price v. Carter Lumber Co.* ("*Price I*"), 9th Dist. Summit No. 24991, 2010-Ohio-4328; *Price v. Carter Lumber Co.* ("*Price II*"), 9th Dist. Summit No. 26243, 2012-Ohio-6109. "This matter arises out of allegations by Mr. Price that he was laid off and refused rehiring by his supervisor, [] Jim Collins, at Carter Lumber because of a disability arising out of medical issues." *Price II* at ¶ 2. Mr. Price initially brought claims against both Carter Lumber and Mr. Collins, but this Court

later determined that Mr. Price's claims against Carter Lumber were barred by claim preclusion.[1] *Price I* at ¶ 20. As such, only Mr. Price's claims against Mr. Collins are relevant to this appeal.

{¶3} Mr. Price brought suit against Mr. Collins for disability discrimination and intentional infliction of emotional distress. *Price I* at ¶ 22-25. Mr. Collins later filed a motion for summary judgment, arguing that Mr. Price's discrimination claim was barred by issue preclusion and his intentional infliction of emotional distress claim failed on the merits. The court granted Mr. Collins' motion because it found that both of Mr. Price's claims were barred by issue preclusion. On appeal, however, this Court determined that neither claim was barred by issue preclusion. *Price II* at ¶ 13-20. Because the trial court had not gone on to analyze "whether a genuine issue of material fact existed with regard to whether Mr. Price could make a prima facie case for his claims of disability discrimination and intentional infliction of emotional distress," we remanded the matter for the trial court to make that determination in the first instance. *Id.* at ¶ 22. On remand, the court once again entered summary judgment in favor of Mr. Collins on both of Mr. Price's claims.

{¶4} Mr. Price now appeals from the trial court's judgment and raises two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED IN GRANTING COLLINS' MOTION FOR SUMMARY JUDGMENT WHEN IT FOUND PRICE COULD NOT PERFORM THE ESSENTIAL FUNCTIONS OF HIS JOB, WITH OR WITHOUT ACCOMMODATION.

[1] Mr. Price also litigated claims against Carter Lumber in federal court.

{¶5} In his first assignment of error, Mr. Price argues that the trial court erred by entering summary judgment against him on his claim for disability discrimination. We agree.

{¶6} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶7} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶8} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated at trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶9} Mr. Price's claim of disability discrimination required him to prove "that Mr. Collins was an employer who discharged him without cause or refused to rehire him because of his disability." *Price II*, 2012-Ohio-6109, at ¶ 13, citing R.C. 4112.02(A). "It is not disputed that Mr. Collins, as a 'person acting directly or indirectly in the interest of [Carter Lumber],' was an employer pursuant to R.C. 4112.01(A)(2)." *Price II* at ¶ 13. Accordingly, to establish a prima facie case of discrimination, Mr. Price [had to] prove that "'1) he is disabled; 2) he suffered an adverse employment action at least in part due to his handicap; and 3) that he could safely and substantially perform all essential functions of the job.'" *Id.*, quoting *Stembridge v. Summit Acad. Mgt.*, 9th Dist. No. 23083, 2006-Ohio-4076, ¶ 22, citing *Hood v. Diamond Prods., Inc.*, 74 Ohio St.3d 298, 302 (1996). The burden would then shift to Mr. Collins "to offer a legitimate, nondiscriminatory reason for [his] action[s]." *Stembridge* at ¶ 22. If Mr. Collins provided a reason, the burden would then shift back to Mr. Price "to demonstrate that the reason [was] actually pretext for impermissible discrimination." *Id.*

{¶10} "The Supreme Court of Ohio has consistently held that a court considering a disability discrimination claim pursuant to R.C. 4112.02 may look to case law interpreting the Americans with Disabilities Act for guidance." *Chiancone v. Akron*, 9th Dist. Summit No. 26596, 2014-Ohio-1500, ¶ 16. Because the parties here have relied upon both Ohio case law and federal case law and "have not identified any pertinent differences between Ohio case law and federal case law in their merit briefs," we look to both Ohio case law and federal case law in resolving this appeal. *Id.*

{¶11} Mr. Collins sought summary judgment on the basis that there was no evidence Mr. Price could safely and substantially perform all the essential functions of his job, with or without reasonable accommodation(s). Mr. Collins argued that the ability to repeatedly lift

heavy objects is an essential function of any position at Carter Lumber. He further argued that any accommodation Carter Lumber employed so as to circumvent the lifting requirement would unduly burden the company, such that it would be an unreasonable accommodation.

{¶12} "A job function is essential if its removal would fundamentally alter the position." (Internal quotations and citations omitted.) *Kiphart v. Saturn Corp.*, 251 F.3d 573, 584 (6th Cir.2001). "A job function may be considered essential because (1) the position exists to perform the function, (2) a limited number of employees are available that can perform it, or (3) it is highly specialized." *Rorrer v. Stow*, 743 F.3d 1025, 1039 (6th Cir.2014).

> Factors to consider when determining whether a job function is essential to the position include: (1) the employer's judgment; (2) the written job description; (3) the amount of time spent performing the function; (4) the consequences of not requiring performance of the function; (5) the work experience of past incumbents of the position; and (6) the current work experience of incumbents in similar jobs.

Keith v. Cty. of Oakland, 703 F.3d 918, 925-926 (6th Cir.2013). "Whether a job function is essential 'is a question of fact that is typically not suitable for resolution on a motion for summary judgment.'" *Rorrer* at 1039, quoting *Keith* at 926.

{¶13} "[A] court considers reasonable accommodation, or lack thereof, in relation to whether the employee could safely and substantially perform [his] essential job functions * * *." *Tripp v. Beverly Ent.-Ohio, Inc.*, 9th Dist. Summit No. 21506, 2003-Ohio-6821, ¶ 30. "To provide a reasonable accommodation, an employer may be required to modify the responsibilities of a disabled employee's existing job or transfer the employee to a vacant position with different responsibilities." *Rorrer* at 1039. "Shifting marginal duties to other employees who can easily perform them is a reasonable accommodation." *Id.* at 1044. Conversely, "[a] suggested accommodation is not reasonable if it requires eliminating an 'essential' function of the job." *Id.* at 1039. *Accord Bratten v. SSI Servs., Inc.*, 185 F.3d 625,

632 (6th Cir.1999) (employers not required to assign existing employees or hire new ones to perform the essential functions of a disabled employee's job). If the requested accommodation is to be transferred to a different position, "the plaintiff generally must identify the specific job he seeks and demonstrate that he is qualified for that position" in order to withstand summary judgment. *Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862, 870 (6th Cir.2007). "The reasonableness of a requested accommodation is generally a question of fact." *Keith* at 927.

{¶14} In his deposition, Mr. Price testified that he began working at Carter Lumber for the first time in March 1998. At that time, Mr. Price completed an application and was hired as a yard worker and back-up truck driver. He indicated that his duties consisted of aiding customers in the yard with their purchases, transporting the stock in the store, and occasionally making deliveries with the truck. Mr. Price acknowledged that his position in the yard required him to lift items in excess of 50 pounds "pretty regularly."

{¶15} In October 2001, Carter Lumber terminated Mr. Price as part of a seasonal reduction in staff. After a few months, however, the company was ready to hire again. Mr. Price testified that he met with Mr. Collins in February 2002 because Mr. Collins called him and asked whether he was ready to return to work. He further testified that Mr. Collins had him complete an application the same day that they met and hired him back as a yard worker and back-up truck driver. Mr. Price resumed his duties and worked without incident until spring 2002.

{¶16} In spring 2002, Mr. Price developed problems with his vision and ultimately had to undergo laser surgery. Mr. Price testified that, after he noticed he was having problems with his vision, he informed Mr. Collins that he would no longer be able to serve as a back-up truck driver. Mr. Price stated that Mr. Collins "didn't look real thrilled about it," but also did not voice any objections. Consequently, Mr. Price stopped driving the truck and focused on his yard

duties. After he was forced to undergo laser surgery, however, Mr. Price also became subject to a lifting restriction. Because it would take time for his eyes to heal, Mr. Price told Mr. Collins that he temporarily would be unable to lift heavy items. In response, Mr. Collins changed Mr. Price's duties. Mr. Price testified that, while his eyes recovered, he worked part-time in the yard and part-time at the sales counter. He explained that he could not perform all of the duties associated with yard work, such as lifting concrete or shingles, but that he could load lumber and perform some lighter lifting. He testified that, at that time, he was the only employee at Carter Lumber who was working both in the yard and at the counter. According to Mr. Price, Carter Lumber had employees who worked strictly at the sales counter.

{¶17} In mid-December 2002, Mr. Price experienced additional health problems that caused him to be admitted to the hospital for several days. He was diagnosed with kidney failure and learned that he would need to receive dialysis treatments three days a week from that point forward. Although he did not know it at the time, Mr. Price testified that December 11, 2002, was his last day at Carter Lumber. According to Mr. Price, up until he received his notice of termination on January 25, 2003, he was under the impression that he still had a job to return to.

{¶18} Mr. Price testified that he had difficulty recalling much of December 2002, so he was unable to relay the specifics of any conversation(s) he might have had with Mr. Collins. Nevertheless, he recalled receiving a medical work release sometime in early January 2003 and taking the release to Mr. Collins. The work release allowed Mr. Price to return to light duty work. While Mr. Price acknowledged that he could not perform any heavy lifting, he testified that he thought he would still be able to load lumber, unload the delivery truck, and put away stock. Consequently, he thought he could work part-time in the yard and part-time at the

counter. When he expressed his desire to return to work, however, Mr. Collins said that sales were down and the company would have to let him go "due to lack of work."

{¶19} Mr. Price testified that, after his January 25th termination, he routinely stopped in at Carter Lumber a few times a week to see if sales were improving. He admitted that he never filled out another job application after his second termination, but thought it was unnecessary for him to do so. He explained that, previously, Mr. Collins had called him when work was available, despite his not having filled out an application in advance. Consequently, he did not believe it was necessary for him to complete an application in order to be considered for a position. Mr. Price testified that, after speaking with Mr. Collins several times about the possibility of returning to work, Mr. Collins eventually told him that "he wasn't going to be calling me back to work because he couldn't work around my dialysis schedule." At the time of his August 2005 deposition, Mr. Price admitted that he was still under a medical restriction that prohibited him from lifting anything in excess of 50 pounds.

{¶20} In his deposition, Mr. Collins testified that he became the store manager at Carter Lumber in 1982. According to Mr. Collins, Carter Lumber has three positions: yard worker, inside sales specialist, and outside sales representative. He stated that yard workers are responsible for waiting on customers, assisting customers with loading their purchased materials, operating tow motors, and shelving new stock. Moreover, yard workers need to be able to repeatedly lift between 60 and 80 pounds. Mr. Collins acknowledged that yard workers sometimes help each other lift heavier items, but testified that their ability to do so always depends on how busy they are with other customers.

{¶21} Mr. Collins testified that inside sales specialists are responsible for helping customers find the products and building materials they need for certain projects, operating a

20/20 computer design program, and loading customers' items from the sales floor. He indicated that the store sometimes cross-trained employees to be able to work both in the yard and at the counter, but that often employees did not show an aptitude for sales. He specified that sales specialists "have to understand and listen to customers and know what their needs are and help build the projects from the ground up and some [employees] can't comprehend that and some can." Moreover, Mr. Collins testified that sales specialists still occasionally have to lift items in excess of 60 pounds.

{¶22} Mr. Collins testified that outside sales specialists must possess the skills necessary to complete a project from start to finish and help interested customers who have an idea of what they want to build. He stated that outside sales specialists have to be able to understand structural loads and have a working knowledge of blueprints. Further, he indicated that outside sales specialists have to have excellent communication skills and "be able to close the sale after they make their presentations."

{¶23} Mr. Collins testified that, during the busy season, his store generally employs up to four people as yard workers and up to three people as inside sales specialists. Each year, however, the store undergoes a seasonal cutback due to a decline in sales over the colder months. Mr. Collins testified that, when it is time to reduce his workforce, he considers the strengths and weaknesses of the employees he has on hand and makes his termination decisions based on "what we can do to operate the store more efficiently with a minimum staff."

{¶24} Mr. Collins admitted that, after he terminated Mr. Price in October 2001, he called Mr. Price to see if he wanted to return to work. He stated that he did so because the store needed to fill a yard worker position immediately and he knew Mr. Price was capable of working in the yard and driving the truck. Mr. Collins agreed that, after Mr. Price had laser surgery, he

was temporarily assigned to inside sales. Yet, Mr. Collins stated that Mr. Price "did not have good people skills" and frequently needed to be coached on how to properly communicate with customers. According to Mr. Collins, he terminated Mr. Price the second time as part of a seasonal reduction in staff. He denied ever telling Mr. Price that he would call him when they were ready to rehire. He also denied ever telling Mr. Price that they could not work around his dialysis schedule. According to Mr. Collins, he told Mr. Price to reapply and Mr. Price never did so.

{¶25} Mr. Collins admitted that he hired a total of six individuals in 2003 once sales increased.[2] He testified that he never considered Mr. Price for any of the open positions because Mr. Price never completed a job application and, in any event, he did not feel that Mr. Price was physically capable of doing the job due to his being "sick with his kidney problems." According to Mr. Collins, all of the jobs at Carter Lumber require heavy, manual lifting. Nevertheless, Mr. Collins did not list heavy, manual lifting as a duty of a sales position when he completed an affidavit in response to an investigator from the Equal Employment Opportunity Commission earlier on in the litigation. Mr. Collins acknowledged that, in his affidavit, he listed the duties and responsibilities of a sales position as: "Take care of customers by selling product, stock shelves, cleaning and daily maintenance of floors and rest rooms." Mr. Collins categorized his response as "a brief response" that he gave due to the limited amount of room he had to record his response on the form affidavit.

{¶26} David Bailey acted as the assistant manager of Carter Lumber when Mr. Price was first hired, and Michael McKee took over the position in November 2002. In his deposition, Mr. Bailey testified that he was not aware of any written job description for a yard worker, but

[2] It was necessary for Mr. Collins to hire six individuals because several of the individuals that he hired quit relatively soon after their hire date.

that their job duties consisted of waiting on customers, reading the tickets that listed their purchases, and loading their purchases for them. He also testified, however, that he did not view yard work and counter sales as separate positions. According to Mr. Bailey, during his time as assistant manager, any individual employee could be assigned to either the yard or the counter, depending on where they were needed. He testified that he never saw a separate job description for sales and that "as far as [he was] concerned, * * * if you work yard, you work sales."

{¶27} Mr. Bailey testified that, once the slow season ended, it was Mr. Collin's general practice to call back the employees who had been terminated due to seasonal cutbacks. The terminated employees would then come in, speak with Mr. Collins, and complete a new job application. At the time of Mr. Price's second termination, Mr. Bailey testified that the new assistant manager, Mr. McKee, informed him that Mr. Price was being terminated due to seasonal slowness.

{¶28} In his deposition, Mr. McKee testified that he supervised Mr. Price for about a month from the time he took over as assistant manager until Mr. Price's last day at Carter Lumber. Additionally, he worked alongside Mr. Price at the counter prior to his being hired as an assistant manager. Mr. McKee testified that Mr. Price was assigned to the counter at that time because he was unable to lift the heavy items in the yard and "the only place that we have that could be considered like a temporary light position is the counter." Even so, he described the difficulties that he observed Mr. Price having at the counter. According to Mr. McKee, Mr. Price had difficulty learning to use the computer and "would get upset and bang on the computer and [] would have tantrums and things, and it was a little embarrassing with the customers." He testified that Mr. Price did not communicate well with the customers and "had trouble staying calm and trying to learn the system they had on the counter for selling products." Mr. McKee

opined that, between Mr. Price's lifting restriction and his difficulties behind the counter, he did not feel that Mr. Price was qualified to work at the store. He confirmed that Mr. Price was the only employee that Mr. Collins actually terminated between December 2002 and August 2003, but testified that the other employees underwent a reduction in hours.

{¶29} In his deposition, James Bailey testified that he was the foreman at Carter Lumber during both periods of Mr. Price's employment there. Mr. Bailey had been with Carter Lumber for twenty years. He testified that the store used to have employees who worked strictly at the counter or in the yard, but that "since times are a little tougher and you're shorter on help, you have to have people work in both positions." Accordingly, he testified that the store's most valuable employees are the versatile ones who can work either in the yard or at the counter.

{¶30} Mr. Bailey testified that, after his laser surgery, Mr. Price spent "very little time" in the yard and told him that "he couldn't handle the [yard]" because it was too physical. Mr. Bailey testified that Mr. Price began working at the sales counter because much of the time the yard workers were too busy and had too many customers to be able to help him lift heavy items. He stated that more help was typically available at the sales counter, but not always. He specified that the sales counter still involved "a lot of heavy lifting, like 50-pound boxes of nails, [and] lifting a 120-pound steel door."

{¶31} Mr. Collins also introduced into evidence a copy of the application that Mr. Price filed with the Social Security Administration ("SSA") in seeking disability benefits. In his application, Mr. Price wrote that he became "unable to work because of [his] disabling condition on December 15, 2002" and that he was "still disabled." In answering whether there was anything that he could no longer do because of his disability, Mr. Price wrote: "Lift heavy loads.

Work with left arm more, see better since diabetes also effected (sic) eyesight. Work at employment."

{¶32} The trial court found that Mr. Price suffered from a permanent lifting restriction and that "[i]t is undisputed that repeated heavy lifting is an essential function of a yard worker at Carter [Lumber]." The court noted that Mr. Price's own assertions in his SSA application demonstrated his inability to work. It further noted that Mr. Collins was not required to either create a new position for Mr. Price or ensure that another employee was always available to help him lift heavy items. The court concluded that Mr. Price failed to set forth any evidence that he could perform the essential functions of a yard worker, with or without accommodation. Consequently, the court entered summary judgment in favor of Mr. Collins.

{¶33} On appeal, Mr. Price does not take issue with the court's findings that he suffered from a permanent lifting restriction or that it was "undisputed that repeated heavy lifting is an essential function of a yard worker." Although he argues that heavy lifting is not an essential function of a sales specialist position, he has not made that argument with respect to the yard worker position. His brief lacks any analysis targeted at showing that genuine issues of material fact remain as to whether repeated heavy lifting is an essential function of a yard worker. Instead, Mr. Price argues that he was able to perform the essential functions of a yard worker with reasonable accommodation.[3] Accordingly, we accept for purposes of our review that repeated heavy lifting is an essential function of a yard worker at Carter Lumber. Even so, that

[3] Mr. Price's brief on appeal mirrors the memorandum in opposition to summary judgment that he filed below.

conclusion does not end the analysis. That is because the trial court also had to consider whether repeated heavy lifting is an essential function of a sales specialist position and whether Mr. Price could perform the yard worker position, a sales specialist position, or some combination of the two with reasonable accommodation.

{¶34} Although there was some testimony that all of the jobs at Carter Lumber require heavy manual lifting, there is no dispute that Mr. Price previously was able to work at the sales counter with a lifting restriction. After his laser surgery, Mr. Price returned to work and told Mr. Collins that he temporarily would be unable to lift heavy items. In response, Mr. Collins allowed Mr. Price to work part-time at the sales counter and part-time in the yard. He worked at least part-time at the counter until his hospitalization in mid-December. There was no testimony that his lifting restriction negatively impacted his performance at the counter. Moreover, Mr. Collins did not include heavy, manual lifting as a duty of a sales position when he completed an affidavit in response to an investigator from the Equal Employment Opportunity Commission. Instead, he listed the duties and responsibilities of a sales position as: "Take care of customer by selling product, stock shelves, cleaning and daily maintenance of floors and rest rooms." Viewing the evidence in a light most favorable to Mr. Price, we must conclude that a genuine issue of material fact exists with regard to whether repeated heavy lifting is an essential duty of a sales specialist at Carter Lumber.

{¶35} With respect to reasonable accommodation, Mr. Price offered into evidence the testimony of Miriam Pekarek, an expert in ergonomics. Ms. Pekarek testified that Mr. Price underwent a functional capacity evaluation and that she reviewed the evaluation in preparation for her testimony. She testified that the evaluation showed Mr. Price could lift 40 pounds from the floor to the height that his knuckles would be at a standing position and 30 pounds from the

position of his knuckles to shoulder height. Additionally, Mr. Price was able to push 74 pounds and pull 55 pounds. According to Ms. Pekarek, she reviewed a description of the sales specialist job at Carter Lumber as part of her assessment and described it as requiring a sales employee to regularly lift 20 pounds and occasionally lift up to 50 pounds. It was Ms. Pekarek's opinion that Mr. Price could perform either the yard worker position or the sales specialist position with reasonable accommodation. She specified that many options are available for workers with lifting restrictions, such as rollers, dollies, sliding boards, flatbed carts, and handheld scanners that allow for pricing items without removing them from a cart or dolly.

{¶36} The trial court determined that Mr. Price never requested an accommodation at the time of his termination. *See Tripp*, 2003-Ohio-6821, at ¶ 29 ("[T]he burden of requesting [an] accommodation lies on the employee."). It is wholly questionable, however, whether Mr. Price ever had the opportunity to request an accommodation at the time of his termination. Mr. Price testified that he approached Mr. Collins with his work release in January 2003 because he believed he would still be able to work part-time in the yard and part-time at the counter. Yet, Mr. Collins did not discuss the limitations of Mr. Price's work release with him. Instead, he informed Mr. Price that he was being terminated due to seasonal cutbacks. Any accommodation that Mr. Price suggested at that point in time would have been superfluous.

{¶37} Moreover, after Mr. Price's termination, Mr. Collins never expressed an interest in rehiring him. While Mr. Collins faulted Mr. Price for never having completed another application, he also admitted that he had previously called Mr. Price back to work without him having completed an application in advance. Mr. Price set forth evidence that he routinely visited Carter Lumber after his termination to see if business was improving. He testified that, on several of those occasions he spoke with Mr. Collins about the possibility of returning to

work. It was Mr. Collins' position, however, that Mr. Price was not physically capable of doing his job. Yet, he did not explain why it would not be possible for Mr. Price to perform his job with an accommodation. Additionally, there was a factual dispute as to whether Mr. Collins told Mr. Price that Carter Lumber would not be rehiring him because the store could not work around his dialysis schedule. According to Mr. Collins, he only told Mr. Price to reapply and Mr. Price did not do so.

{¶38} Although Mr. Price made several statements about his ability to work in his SSA application, "[n]either application for nor receipt of social security disability benefits is by itself conclusive evidence that an individual is completely incapable of working." *Demyanovich v. Cadon Plating & Coatings, L.L.C.*, 747 F.3d 419, 429 (6th Cir.2014). "[O]ne may, in fact, be totally disabled under Social Security Disability Insurance ("SSDI") application guidelines, but nevertheless be capable of performing the essential functions of one's job. This is so because the focus of SSDI is distinct and does not consider, for example, the effect of a reasonable accommodation on the ability to do work." (Internal citations omitted.) *Crosier v. Quikey Mfg. Co., Inc.*, 9th Dist. Summit No. 19863, 2001 WL 196511, *6 (Feb. 28, 2001). *Accord Drogell v. Westfield Group*, 9th Dist. Medina No. 11CA0011-M, 2013-Ohio-5262, ¶ 18, fn.3, quoting *Cleveland v. Policy Mgt. Sys. Corp.*, 526 U.S. 795, 803 (1999). When a contradiction arises between the statements an employee has made in his SSA application and the averments he has made relevant to his disability discrimination lawsuit, "the employee bears the burden of going forward with evidence to explain how [he] can nevertheless perform [his] job." *Crosier* at *6.

{¶39} Mr. Price set forth evidence that he previously worked part-time as a sales specialist and part-time as a yard worker with a lifting restriction. He testified that he believed he could continue to do so. Additionally, he introduced the testimony of Ms. Pekarek, who

opined that Mr. Price could perform his job duties at Carter Lumber with reasonable accommodation. Ms. Pekarek gave several examples of the accommodations that could be implemented so as to allow Mr. Price to perform his job. Accordingly, Mr. Price set forth evidence that he could nonetheless perform his job. *See id.*

{¶40} Having conducted an exhaustive review of the record, we must conclude that the trial court erred by entering summary judgment in favor of Mr. Collins. Genuine issues of material fact remain with respect to whether repeated heavy lifting is an essential function of a sales specialist at Carter Lumber. Additionally, genuine issues of material fact remain as to whether Mr. Price could perform either the yard worker job or the sales specialist job with reasonable accommodation. Because genuine issues of material fact remain, Mr. Collins was not entitled to summary judgment on the basis that Mr. Price could not safely and substantially perform all the essential functions of his job, with or without reasonable accommodation(s). Consequently, we sustain Mr. Price's first assignment of error.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED IN GRANTING COLLINS' MOTION FOR SUMMARY JUDGMENT WHEN IT FOUND THAT COLLINS' CONDUCT WAS NOT EXTREME AND OUTRAGEOUS OR THAT PRICE SUFFERED ANY SERIOUS MENTAL ANGUISH.

{¶41} In his second assignment of error, Mr. Price argues that the trial court erred by entering summary judgment against him on his claim for intentional infliction of emotional distress. We disagree.

{¶42} We incorporate the standard of review set forth in Mr. Price's first assignment of error. Thus, we examine the record to determine whether he demonstrated that there were no genuine issues of material fact for trial, that he was entitled to judgment as a matter of law, and

that it appeared from the evidence that reasonable minds could only come to a conclusion in his favor. *Temple*, 50 Ohio St.3d at 327.

{¶43} To prevail on a claim for intentional infliction of emotional distress, Mr. Price had to prove

> 1) that [Mr. Collins] either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to [Mr. Price]; 2) that [Mr. Collins'] conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; 3) that [Mr. Collins'] actions were the proximate cause of [Mr. Price's] physic injury; and 4) that the mental anguish suffered by [Mr. Price] is serious and of a nature that no reasonable man could be expected to endure it.

(Alterations sic.) (Internal quotations and citations omitted.) *Price II*, 2012-Ohio-6109, at ¶ 18. "[T]he injury that is suffered must surpass upset or hurt feelings, and must be such that a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." (Internal quotations and citations omitted.) *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist. Summit No. 21499, 2003-Ohio-7190, ¶ 35.

{¶44} Mr. Price alleges that Mr. Collins intentionally caused him emotional distress by terminating him, refusing to recall him after his termination, and assuring him and his wife that he would be able to return to work. He argues that Mr. Collins intentionally deceived him by leading him to believe he would be rehired when, in fact, Mr. Collins was soliciting applications from others. According to Mr. Price,

> [t]he manner in which [Mr.] Collins treated [him], then reassured [him] and Mrs. Price about their future livelihood from employment with Carter Lumber[and] the numerous lies [Mr.] Collins told [him] about rehiring him in the Spring, when in fact, [Mr.] Collins never had any intention to rehire [him] is clearly extreme and outrageous.

As such, he argues that the trial court erred when it concluded that no genuine issues of material fact existed for trial on his claim for intentional infliction of emotional distress.

{¶45} In his deposition, Mr. Price testified that he "was sort of out of it" for much of December 2002, so he did not "remember a lot from [that month]." He testified that he did not recall the specifics of any conversations he might have had with Mr. Collins in December or January about his termination. According to Mr. Price, he remembered giving his work release to Mr. Collins in January and Mr. Collins telling him that Carter Lumber "was going to lay [him] off" because sales were down. He testified that, up until that point, he had been under the impression that he still had a job with Carter Lumber and would return when he received his work release. Yet, he never identified any statement(s) that Mr. Collins made that would have caused him to possess that belief. He also failed to identify any statement(s) that Mr. Collins made over the next several months that would have caused him to believe that he would be rehired. According to Mr. Price, he visited Carter Lumber a few times a week during spring 2003 and spoke with Mr. Collins on several of those occasions. His only testimony, however, was that the two discussed whether work was picking up and whether more hours would be available. Mr. Price stated: "that's about the same time when [Mr. Collins] told me that * * * he wasn't going to be calling me back to work because he couldn't work around my dialysis schedule."

{¶46} Laura Reis-Price, Mr. Price's wife, also testified by way of deposition. In her deposition, Ms. Reis-Price testified that she spoke with Mr. Collins several times on the phone during the period of time that her husband was in the hospital. She testified that she kept Mr. Collins updated about her husband's condition and that, when she mentioned her husband returning to work, "all [she] ever kept hearing was don't worry, Laurie." Ms. Reis-Price also

testified that she and her husband spoke with Mr. Collins in his office on the day that Mr. Price was released from the hospital. She testified that the two men discussed how long Mr. Price would need to be off "and that they would use vacation time and his accrued sick time and then he would be back." According to Ms. Reis-Price, Mr. Collins indicated they "would see what would happen" after Mr. Price used all of his sick and vacation time, but said: "Don't worry, Laurie, we want him back." She also testified that she was present for a few of the conversations that Mr. Price had with Mr. Collins after Mr. Price's termination. She stated that she could not remember exactly what was said, but that the conversations included "how are you doing, * * * how is it feeling, when do you think you're going to be back type stuff."

{¶47} In his deposition, Mr. Collins testified that any employee who gets terminated from Carter Lumber due to a seasonal reduction in workforce has to fill out a new application to be considered for rehire. He testified that he never considered Mr. Price for a position in spring or summer 2003 because Mr. Price never filled out another application. He denied that he ever told Mr. Price he would call him when business picked up. According to Mr. Collins, he told Mr. Price to reapply, and Mr. Price never did so. Mr. Collins acknowledged that he hired six other individuals in 2003.

{¶48} With regard to the actual loss of Mr. Price's job, this Court has recognized that "[t]ermination of employment, without more, does not constitute the outrageous conduct required to establish a claim of intentional infliction of emotional distress, even when the employer knew that the decision was likely to upset the employee." (Internal quotations and citations omitted.) *Gradisher v. Barberton Citizens Hosp.*, 9th Dist. Summit No. 25809, 2011-Ohio-6243, ¶ 6. Accordingly, Mr. Collins did not engage in extreme and outrageous conduct when he terminated Mr. Price and did not rehire him. *See id.* at ¶ 6-7. To withstand summary

judgment, Mr. Price had to set forth additional evidence of extreme and outrageous conduct on the part of Mr. Collins.

{¶49} "The Ohio Supreme Court has recognized the standard enunciated in comment d to Section 46 of the Restatement of Law 2d, Torts (1965) 71, 73, in defining the concept of 'extreme and outrageous' * * *." *Copley v. Westfield Group*, 9th Dist. Medina No. 10CA0054-M, 2011-Ohio-4708, ¶ 15, citing *Reamsnyder v. Jaskolski*, 10 Ohio St.3d 150, 153 (1984).

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt.

(Internal quotations and citations omitted.) *Reamsnyder* at 153.

{¶50} Although Mr. Price argues that Mr. Collins told him "numerous lies * * * about rehiring him in the Spring," he failed to present evidence of any affirmative statements that Mr. Collins made in which Mr. Collins actually promised to rehire him. At best, Mr. Price set forth evidence that Mr. Collins implied he would have a future with the company. Even viewing that evidence in a light most favorable to Mr. Price, however, we cannot agree that it created a genuine issue of material fact for trial. Any false sense of hope that Mr. Collins might have given to Mr. Price and his wife at a time when they were mentally and financially vulnerable was

morally reprehensible. We cannot say, however, that it was legally actionable. The allegations Mr. Price has raised, even when viewed in a light most favorable to him, do not rise to the level of extreme and outrageous conduct. *See id.* He failed to point to any evidence in the record which creates a genuine issue of material fact for trial regarding whether Mr. Collins' "conduct was so extreme and outrageous that it went beyond all possible bounds of decency, and can be considered completely intolerable in a civilized community." *Shetterly v. WHR Health Sys.*, 9th Dist. Medina No. 08CA0026-M, 2009-Ohio-673, ¶ 15. Therefore, the trial court did not err by entering summary judgment against Mr. Price with respect to his claim for intentional infliction of emotional distress. Mr. Price's second assignment of error is overruled.

III.

{¶51} Mr. Price's first assignment of error is sustained and his second assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CONCURS.

HENSAL, P. J.
CONCURRING IN JUDGMENT ONLY.

{¶52} I agree that the trial court's judgment must be reversed, but for a different reason. As the majority notes, in order to establish a prima facie case of discrimination, Mr. Price must demonstrate that he can safely and substantially perform all of the essential functions of his job, with or without reasonable accommodations. According to Mr. Price, he can perform all of the essential functions of the job with reasonable accommodations. He argued to the trial court that those reasonable accommodations are 1) obtaining help from other employees, 2) working at the sales counter, and 3) using equipment such as dollies to move heavy objects. In its decision, the trial court determined that his first two suggestions did not constitute reasonable accommodations. It did not address his third suggestion. *See* Ohio Adm.Code 4112-5-08(E)(2). In light of the fact that the trial court did not consider whether Carter Lumber could obtain equipment that would allow Mr. Price to perform the essential functions of a yard worker, I agree that its judgment must be reversed and this matter remanded for further proceedings.

APPEARANCES:

EDWARD L. GILBERT, Attorney at Law, for Appellant.

DANIEL J. FUNK and JAMES F. MATHEWS, Attorneys at Law, for Appellee.