[Cite as *Medlin v. Springfield Metro. Hous. Auth.*, 2010-Ohio-3654.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

KIM I. MEDLIN	:	
	:	Appellate Case No. 10-CA-15
Plaintiff-Appellant	:	
	:	Trial Court Case No. 06-CV-503
v.	:	
	:	
SPRINGFIELD METROPOLITAN	:	(Civil Appeal from
HOUSING AUTHORITY	:	Common Pleas Court)
	:	
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 6th day of August, 2010.

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GARY J. LEPPA, Atty. Reg. #0017172, and CHAD BURTON, Atty. Reg. #0078014, Leppla Associates, 2100 South Patterson Boulevard, Dayton, Ohio 45409-0612
Attorney for Plaintiff-Appellant

RANDALL M. COMER, Atty. Reg. #0072567, and WILLIAM R. GROVES, Atty. Reg. #0009440, Martin, Browne, Hull & Harper, P.L.L., One South Limestone Street, Suite 800, Springfield, Ohio 45501-1488
Attorney for Defendant-Appellee

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FAIN, J.

{¶ 1} Plaintiff-appellant Kim Medlin appeals from a judgment rendered against him on his disability discrimination action against defendant-appellee Springfield Metropolitan Housing Authority (SMHA), Medlin's former employer.

Medlin contends that the trial court erred in directing a verdict based on its conclusion that Medlin had failed to demonstrate that there was a discriminatory reason for his discharge.

{¶ 2} Construing the evidence most strongly in favor of Medlin, and assuming, as the trial court did, that Medlin had a disability (sleep apnea) that substantially limited a major life activity at the time of his constructive discharge, we conclude that Medlin failed to establish that he could safely and substantially perform the essential functions of his job, with or without reasonable accommodation. Medlin also failed to request reasonable accommodation from SMHA.

{¶ 3} Therefore, we conclude that the trial court did not err in directing a verdict against Medlin on his claim of disability discrimination. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} Plaintiff-appellant Kim Medlin began employment with SMHA in April 2004, as a facilities manager. Before then, Medlin had worked from 1993 to 2004 for Dayton Metropolitan Housing Authority (DMHA) as a maintenance supervisor and maintenance superintendent. In 1999, Medlin consulted doctors about sleep apnea, after his supervisor at DMHA told him that staff had reported that Medlin had fallen asleep at work. Dr. Burton performed sleep tests at a sleep clinic at Kettering Medical Center, and diagnosed Medlin as having sleep apnea. Dr. Burton prescribed a Continuous Positive Airway Pressure (CPAP) mask. The CPAP mask is attached to a machine that pressurizes the mouth and nose so that airways are

opened enough to allow the passage of air during sleep. The machine blows room air at the patient through a series of tubes.

{¶ 5} Dr. Burton indicated that he was able to completely stop Medlin's sleep apnea in January 2000, by using a pressure of 9 centimeters of water. Medlin was given a CPAP mask, and that pressure was locked into it. Medlin did not return to Dr. Burton until October 2006, nearly a year after his employment with SMHA ended. He also did not consult any other sleep center for treatment in the interim. Medlin testified that he had no awareness of any further incidents of falling asleep between 2000 and 2004, and that his sleep apnea had significantly improved and was largely under control.

{¶ 6} While working at DMHA, Medlin incurred a back injury in 2002, which was treated as a worker's compensation claim. During his subsequent employment with SMHA, this condition was still being treated with Tylenol 3, which contains codeine. Tylenol 3 causes drowsiness, but Medlin was not aware of that fact. In addition, Medlin had taken Lexapro since 2003, for anxiety or stress. He was aware that sleepiness is a common side effect of Lexapro.

{¶ 7} In 2004, Medlin applied for the position of facilities manager with SMHA, and was hired. Medlin did not inform SMHA that he had sleep apnea, nor did he mention any problems he had staying awake. Driving was a part of his job. Medlin was given a company car, but did not tell SMHA of any potential issues with staying awake while driving.

{¶ 8} Medlin began employment as the SMHA facilities manager in early April 2004. His job duties were to oversee the maintenance program, coordinate service

requests, make unit repairs, supervise twelve to fourteen maintenance employees, and oversee the day-to-day operations of the maintenance department. When Medlin began employment, he received an employee manual. He was aware that the manual included a prohibition against employees sleeping on the job.

{¶ 9} About two weeks after being hired, Medlin fell asleep during a meeting of the Board of Commissioners of the Housing Authority. Another employee, Ronald Beverly, noticed Medlin falling asleep several times during the meeting. Once, Medlin fell against Beverly and dropped some papers. Two commissioners also noticed Medlin sleeping, and were displeased. They mentioned the incident to Medlin's supervisor, Barb Stewart, who was the executive director of SMHA. When Stewart questioned Medlin, he said that the room was warm, that he had on a jacket and tie, and that he dozed off. Medlin also mentioned that he had sleep apnea. He did not ask for any special accommodations, other than not wearing a coat and tie to board meetings, and Stewart did not ask for documentation of the sleep apnea. Medlin was not disciplined as a result of this incident. After falling asleep in the board meeting, Medlin went to see his family doctor, Dr. Porter, who adjusted the Lexapro medication. Medlin did not go back to Dr. Burton.

{¶ 10} Subsequently, SMHA employees witnessed Medlin falling asleep during the workday quite a few times. Stewart received a few reports about Medlin sleeping at work, and discussed these reports with Medlin in late May 2005. Medlin stated that if he had been falling asleep, he was not aware of it.[1] Stewart did not

[1]Stewart's testimony was that Medlin denied sleeping on the job. However, conflicts in testimony are construed in favor of the party against whom the motion for directed verdict is made. *Anousheh v. Planet Ford, Inc*., Montgomery App. Nos. 21960

request documentation and did not discipline Medlin. Medlin did not ask for an accommodation of his sleep apnea, and also did not indicate that sleep apnea was interfering with his job. Medlin again did not schedule an appointment with Dr. Burton, but did see his family doctor.

{¶ 11} Between late May 2005 and September 15, 2005, Medlin did not receive any further reports from Stewart about falling asleep during work hours. However, in June or July 2005, Medlin fell asleep during a meeting with three of his employees: Fred Fitzsimmons, Michael Brown, and Rita Dorn. Medlin had called the meeting to discuss projects, and fell asleep for five or ten minutes, during which time the employees attempted to make noise to wake him up. When Medlin finally woke up, he said only that he had a rough night, and that he had a sleeping problem. He did not mention sleep apnea.

{¶ 12} Michael Brown, a maintenance crew leader, testified that the maintenance crew had a "running joke" about who would be the first to see Medlin nod off or doze off if they had a meeting. In the summer of 2005, Brown saw Medlin asleep in his office, and told Stewart that she should go over to the maintenance department some afternoon and just check around. Stewart's office was located in another building, and she did not go over to the maintenance department that day.

{¶ 13} On September 15, 2005, Medlin went to the office of another employee to use the computer, since his own computer was not working. Brown found Medlin asleep in that office, and reported this fact to Stewart. Stewart went to the office in

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and 21967, 2007-Ohio-4543, at ¶ 43. We therefore accept Medlin's testimony on this point, for purposes of this appeal.

question around 2:00 p.m., and waited for a while to see if Medlin would wake up. Stewart stood there for about five minutes, and then walked in to see if Medlin's eyes were closed. She then stepped back to the door and knocked. The first knock did not rouse Medlin, but the second knock did. Stewart told Medlin that she needed to see him in her office at 4:00 p.m. that day.

{¶ 14} The meeting at 4:00 p.m. was attended by Medlin, Stewart, and Angela Stephens, an administrative assistant, who took notes. Medlin testified that when he was asked about falling asleep, he said that he had sleep apnea and that his condition is such that those things involuntarily happen. Medlin denied that he told Stewart he was having problems with his diet, or that he gave Stewart other reasons for falling asleep.[2]

{¶ 15} After being told about the sleep apnea, Stewart said she did not have any documentation to that effect, and asked that Medlin meet with his doctor. Medlin told her that he would call immediately after the meeting and would see the doctor the next day. Medlin testified that Stewart did not threaten that day to terminate his employment, and that he did not feel his job was in jeopardy. In contrast to Medlin's testimony, however, Stewart testified that she told Medlin on September 15, 2005, that she was in the position of either having to ask for his resignation or terminating him. Stewart stated that Medlin's credibility was severely compromised, and that Medlin did not set a good example for the workforce.

[2]Stewart testified that Medlin said he was trying to change his eating habits and was having trouble with that (Medlin had lost 70 pounds, but his weight at the time was still about 320 pounds). Medlin additionally said that he was on medication, Lexapro, for stress, and also had sleep apnea, which made him sleepy.

Stewart told Medlin that whether he had a medical problem or not, she could not have managers falling asleep on the job.[3]

{¶ 16} During the September 15 meeting, Medlin and Stewart discussed sending Medlin to SMHA's occupational health representative for an evaluation, and an appointment was scheduled for the following day. Stephens contacted occupational health after the meeting to see if an evaluation could be made to substantiate Medlin's claims. Stephens made an appointment for Medlin. Stephens gave Stewart the information about occupational health. Stephens then told Stewart about witnessing Medlin sleeping multiple times in safety meetings, as well as during a training meeting that she and Medlin had attended in Columbus, Ohio. On one occasion, Medlin had fallen asleep while speaking directly to Stephens. Stephens nudged Medlin and asked him to stay awake because she was talking to him. When Medlin woke up, he explained that he was taking medication that made him drowsy.

{¶ 17} On the evening of September 15, 2005, Stewart talked to Stephens and a lawyer. Stewart and Stephens then again met with Medlin the following morning. Stewart stated that they had a severe problem with Medlin falling asleep on the job, and that she was giving him the opportunity to resign or be fired. Stewart handed Medlin a pre-drafted letter of resignation and gave him until 5:00 p.m. to sign the letter or be terminated. Medlin asked if he could have until Monday to consider his options, and Stewart refused.

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[3]Stewart's testimony was contradicted by Stephens, who said that Stewart made the decision to fire Medlin some time between the meeting on September 15, 2005, and a subsequent meeting the following morning.

{¶ 18} Medlin kept the appointment with his family doctor, and told his doctor that he needed documentation supporting the fact that he had sleep apnea. The doctor provided documentation on September 19, 2005, which was a Monday, and Medlin gave the letter to SMHA. By that time, Medlin had already resigned.

{¶ 19} Medlin gave Stewart his own letter of resignation by the end of the day on September 16, 2005. Medlin used Stewart's suggested ending date of employment of October 14, 2005, and stated in the letter that he was disappointed that SMHA was unable to accommodate his medical condition. Medlin did not then request, nor had he ever requested, any specific type of accommodation. Medlin returned to work that Monday, but was later placed on medical leave for the duration of his employment by his family doctor, due to high blood pressure.

{¶ 20} Medlin testified that he performed his job successfully, and that no one told him before the September 15, 2005, meeting that he had credibility or perception problems with his staff. Stewart testified that Medlin had performed his job admirably, at least according to a July 2005 report listing items that are tracked by the United States Department of Housing and Urban Development (HUD). Medlin had improved the turnaround time for repairing or replacing damages in units, to the extent that a former "F" rating in April 2004, had changed to an "A" rating by July 2005. Stewart expressed the opinion that most of Medlin's job performance was relatively good, and that she was not aware of problems caused by his falling asleep on the job, other than the significant credibility problems with his staff.

{¶ 21} Medlin filed suit against SMHA in April 2006, alleging wrongful termination in violation of public policy, disability discrimination under R.C. 4112.02

and R.C. 4112.99, breach of contract to pay sick time and wages, and breach of an employment contract. Prior to trial, Medlin dismissed all claims other than disability discrimination, and a jury trial was held on that issue before a visiting judge. At the conclusion of all the evidence, SMHA moved for a directed verdict in its favor. In ruling on the motion, the trial court assumed that Medlin's sleep apnea was a qualifying disability for purposes of R.C. 4112.02. The court concluded, however, that no reasonable jury could find that Medlin was terminated for any reason other than sleeping on the job. The trial court further concluded that whether sleeping on the job was or was not caused by sleep apnea is irrelevant in this case.

{¶ 22} Medlin appeals from the judgment directing a verdict against him.

II

{¶ 23} Medlin's sole assignment of error is as follows:

{¶ 24} "THE TRIAL COURT ERRED IN DIRECTING A VERDICT IN FAVOR OF DEFENDANT AFTER COMPLETION OF ALL EVIDENCE, IMMEDIATELY PRIOR TO DELIBERATION BY THE JURY."

{¶ 25} Under this assignment of error, Medlin contends that he has sleep apnea, which is a disability under R.C. 4112.02, and that the record is replete with evidence that he was discriminated against because of his medical condition. Medlin contends, therefore, that the trial court erred in directing a verdict at the conclusion of all the evidence.

{¶ 26} We review the grant or denial of motions for directed verdicts *de novo*.

In conducting the review, we construe the evidence most strongly in favor of the non-moving party. A motion for directed verdict must be denied "where there is substantial evidence upon which reasonable minds could reach different conclusions on the essential elements of the claim." *Anousheh*, 2007-Ohio-4543, at ¶ 43 (citations omitted).

{¶ 27} The claim in the case before us is brought under R.C. 4112.02, which states that:

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

{¶ 29} "(A) For any employer, because of the race, color, religion, sex, military status, national origin, 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."

{¶ 30} In order to establish a prima facie case of disability discrimination, a party seeking relief must demonstrate:

{¶ 31} "(1) that he or she was handicapped, (2) that an adverse employment action was taken by an employer, at least in part, because the individual was handicapped, and (3) that the person, though handicapped, can safely and substantially perform the essential functions of the job in question." *Hood v. Diamond Products, Inc.*, 74 Ohio St.3d 298, 1996-Ohio-259, syllabus.[4]

{¶ 32} In *Hood*, the Supreme Court of Ohio went on to state that:

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[4]Effective March 2000, the legislature changed all references to "handicap" to references to "disability." See 1999 H 264.

{¶ 33} "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. * * * Legitimate, nondiscriminatory reasons for the action taken by the employer may include, but are not limited to, insubordination on the part of the employee claiming discrimination, or the inability of the employee or prospective employee to safely and substantially perform, with reasonable accommodations, the essential functions of the job in question. * * * Finally, if 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." Id. at 302 (citations omitted).

{¶ 34} In the case before us, the trial court assumed that a jury could reasonably conclude that Medlin's sleep apnea is a disability. The court also held that no reasonable jury could find that Medlin was terminated for any reason other than that he fell asleep on the job. In this regard, the court agreed with SMHA that Medlin failed to prove a discriminatory reason for the disciplinary action that was taken. Instead, Medlin was fired for sleeping on the job numerous times, which violated the employer's rules.

{¶ 35} Medlin contends that falling asleep on the job did not affect his job performance, and that the trial court's decision removes any protection afforded to persons with disabilities. To which SMHA responds that Medlin never asked for an accommodation for his alleged disability, and that employers are not required to accommodate employees by excusing violations of work rules, even if the violation is

caused by a disability. Finally, SMHA contends that Medlin did not have a disability, as defined in R.C. 4112.01(A)(13), because his testimony does not support the conclusion that he is substantially limited in a major life activity.

{¶ 36} The threshold requirement for meeting the prima facie test in *Hood* is whether the party requesting relief has a disability. R.C. 4112.01(A)(13) defines a "disability" as:

{¶ 37} "[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."

{¶ 38} Because federal legislation banning disability discrimination – the Americans with Disabilities Act (ADA) – is similar to Ohio's law, we look to federal regulations and cases for guidance. *Columbus Civ. Serv. Comm. v. McGlone,* 82 Ohio St.3d 569, 573, 1998-Ohio-410, referring to Section 12102(2)(A), Title 42, U.S.Code.

{¶ 39} In responding to the motion for directed verdict, Medlin argued that his sleep apnea is a disability because it substantially affected his major life activities of "breathing" and "working." Breathing and working are listed in R.C. 4112.01(A)(3) as major life activities, and various federal courts have held that "sleeping" is also a major life activity. See, *e.g.*, *Boerst v. General Mills Operations, Inc.* (C.A. 6, 2002), 25 Fed. Appx. 403, 406 and *Pack v. Kmart Corp*., (C.A. 10, 1999), 166 F.3d 1300. In *Pack*, the Tenth Circuit Court of Appeals observed that "Sleeping is a basic activity

that the average person in the general population can perform with little or no difficulty, similar to the major life activities of walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reaching." Id. at 1305. Recent amendments to the ADA also now specifically include "sleeping" within the definition of major life activities. *Winsley v. Cook County* (C.A. 7, 2009), 563 F.3d 598, 604. Thus, whether Medlin relates his sleep apnea to breathing, to sleeping, or to working, his alleged disability would involve a major life activity. The next issue, however, is whether any of these major life activities was substantially limited at the time Medlin was discharged.

{¶ 40} Section 1630.2(j)(2), Title 29, C.F.R., lists the following factors to be considered in deciding if an impairment substantially limits a major life activity:

{¶ 41} "(i) The nature and severity of the impairment;

{¶ 42} "(ii) The duration or expected duration of the impairment; and

{¶ 43} "(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."

{¶ 44} The Supreme Court of the United States has also said that the positive and negative effect of corrective measures must be considered in assessing whether a person is substantially limited in a major life activity. *Sutton v. United Air Lines, Inc.* (1999), 527 U.S. 471, 482, 119 S.Ct. 2139, 2146, 144 L.Ed.2d 450. Accordingly, in considering whether Medlin is substantially limited in the activities of sleeping, breathing, or working, we must consider the effects of any corrective

measures, like Medlin's CPAP mask.[5]

{¶ 45} The Supreme Court of the United States also stressed in *Sutton* that:

{¶ 46} "The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection (A) if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity. For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run. The same may be true of individuals who take medicine to lessen the symptoms of an impairment so that they can function but nevertheless remain substantially limited. Alternatively, one whose high blood pressure is 'cured' by medication may be regarded as disabled by a covered entity, and thus disabled under subsection (C) of the definition. The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting." 527 U.S. at 488.

{¶ 47} In the case before us, the trial court assumed that Medlin had a disability for purposes of ruling on the directed verdict motion. In doing so, the court focused on medical testimony indicating that twenty-five percent of people with sleep

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[5]We note that Congress rejected *Sutton's* strict interpretation in the ADA Amendments Act of 2008, Pub.L. No. 110-325, 122 Stat. 3553 (2008), which was effective in January 2009. Lower federal courts have concluded that the amendments do not apply retroactively. See, *e.g, Milholland v. Sumner County Bd. of Educ.* (C.A. 6, 2009), 569 F.3d 562, 567. Therefore, Medlin's alleged disability must be evaluated pursuant to *Sutton's* interpretation, because Medlin's employment ended in 2005, before the amendments to the ADA became effective.

apnea cannot be treated properly. Trial Transcript, Volume II, p. 158. This is not the correct analysis, because "determination of whether an employee has a disability is done on a case-by-case basis." *Toyota Motor Mfg., Kentucky, Inc. v. Williams* (2002), 534 U.S. 184, 198, 122 S.Ct. 681, 692, 151 L.Ed.2d 615. In *Toyota*, the Supreme Court of the United States also stressed that:

{¶ 48} "It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those 'claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial.' " 534 U.S. at 198, citing *Albertson's, Inc. v. Kirkingburg* (1999), 527 U.S. 555, 563, 567, 119 S.Ct. 2162, 144 L.Ed.2d 518.[6]

{¶ 49} At trial, Medlin's medical expert, Dr. Burton, testified that Medlin had been diagnosed with obstructive sleep apnea in 1999. Dr. Burton described sleep apnea as the cessation of breathing during sleep, and said the most common form is

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[6]As noted in footnote 5, supra, the ADA was amended in 2008, which superseded the holding in *Sutton* as of January 1, 2009. The holding in *Toyota* has also been superseded by the amendment. However, because the Act does not apply retroactively, Medlin's claim must be analyzed with reference to case law existing at the time of the alleged discrimination. See, *e.g.*, *Palmer v. Albertson's, LLC*, No. 4:09-CV-00137-SPM-WCS, 2010 WL 785652, * 3 (N.D. Fla. March 3, 2010). We also note that the Congressional Findings and Purposes accompanying Pub. L. 110-325, 122 Stat 3553, do not indicate an intent to supersede *Toyota's* direction to consider cases individually. Congress, instead, was primarily concerned with *Toyota's* overly restrictive definitions of the terms "substantially" and "major." See Pub.L. 110-325, § 2(b) (explaining the intent in superseding the *Toyota* decision).

based on obstruction in the upper airway, with obesity or anatomical abnormalities. According to Dr. Burton, the "gold standard" for treating sleep apnea is a CPAP mask. The mask is attached to a machine that pressurizes the mouth and nose so that airways are opened enough to allow the passage of air during sleep. The machine blows room air at the patient through a series of tubes.

{¶ 50} Dr. Burton stated that he was able to completely stop Medlin's sleep apnea in January 2000, by using a pressure of 9 centimeters of water. Medlin was given a CPAP mask, and that pressure was locked into it. Dr. Burton did testify, however, that Medlin's sleep apnea could have caused the daytime drowsiness and that the incidents were more likely than not caused by sleep apnea. In view of this testimony, as well as Medlin's own testimony that sleep apnea caused him to fall asleep unexpectedly, we will assume, as did the trial court, that a reasonable jury could conclude that Medlin had a disability that substantially limited a major life activity.

{¶ 51} The remaining parts of the prima facie case require a showing of: (1) an adverse employment action based, at least in part, on the disability; and (2) that Medlin could safely and substantially perform the essential functions of maintenance supervisor, even though he had a disability. *Hood,* 74 Ohio St.3d at 298.

{¶ 52} Assuming that the sleep problem was based on Medlin's disability, his forced resignation was based in part on the disability, to the extent that he was discharged for falling asleep at work. See *Sanders v. FirstEnergy Corp*., 157 Ohio App.3d 826, 2004-Ohio-3214, ¶ 30 (finding that plaintiff was terminated because of his disability, where his sleep apnea prevented him from working overtime).

{¶ 53} The issue then becomes whether Medlin could perform the essential functions of his job. SMHA contends that Medlin could not perform the essential functions of his job, because an essential job function is to stay awake. Relying on *Miami Univ. v. Ohio Civ. Rights Comm*. (1999), 133 Ohio App.3d 28, Medlin argues that he is not required to perform every conceivable function of every job, and that it is inconsistent to fire him because he was not able to stay awake at every possible moment.

{¶ 54} In *Miami,* the court stated that: "The handicap discrimination law does not permit the requirement that every employee must be able to perform every conceivable function of every job. Rather, the handicapped applicant or employee must be able to perform the essential functions with or without reasonable accommodation." Id. at 41. Whether a function is essential is generally a question for the jury. 2004-Ohio-3214, at ¶ 32.

{¶ 55} Section 1630.2(n)(1), Title 29, C.F.R. defines "essential functions" generally as "the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." Section 1630.2(n)(2), Title 29, C.F.R. outlines several reasons why job functions may be considered essential, some of which are that: (1) the position exists to perform the function; (2) a limited number of employees are available to perform the job function; and (3) the function is highly specialized, as a result of which the incumbent is hired for expertise or ability to perform the function.

{¶ 56} Section 1630.2(n)(3), Title 29, C.F.R. further discusses evidence of

whether a particular function is essential, including but not limited to these factors:

{¶ 57} " (i) The employer's judgment as to which functions are essential;

{¶ 58} "(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

{¶ 59} "(iii) The amount of time spent on the job performing the function;

{¶ 60} "(iv) The consequences of not requiring the incumbent to perform the function;

{¶ 61} "(v) The terms of a collective bargaining agreement;

{¶ 62} "(vi) The work experience of past incumbents in the job; and/or

{¶ 63} "(vii) The current work experience of incumbents in similar jobs."

{¶ 64} Applying the above factors and evidence, the court in *Sanders* granted summary judgment to the employer, based on the fact that overtime was an essential job function. Because the employee's sleep apnea prevented him from working overtime, the court held that the employee failed to establish that he could perform essential functions of the job. 2004-Ohio-3214, at ¶35-44.

{¶ 65} Other courts have concluded that staying awake is an essential job function. See, *e.g.*, *Trawick v. Hantman* (D.D.C., 2001), 151 F.Supp.2d 54, 62 (holding that both showing up when scheduled for duty and staying awake while on duty are essential functions of a fireman/boiler plant worker in a power plant)*;* *Cannon v. Monsanto Co.*, No. 05-5558, 2008 WL 236922, * 4 (E.D.La., Jan. 28, 2008) (staying awake is an essential function of the plaintiff's job, which included performing electrical work and monitoring a plant reactor); and *Hill v. Kansas City Area Transit Auth*. (C.A. 8, 1999), 181 F.3d 891, 894 (stating that staying awake is an

essential function of a bus driver's job).

{¶ 66} Medlin attempts to distinguish these cases because they involve safety issues. But safety issues were involved in the case before us. For example, Medlin testified that he was issued a company car, and drove between various job sites. Staying awake while driving would be a safety issue. Although there is no evidence that Medlin had fallen asleep while driving, this does not negate the potential safety issue. In this regard, Dr. Burton testified that memory loss, performance loss, and sleep-related automobile accidents are the most common problems seen in people who have sleep apnea. Furthermore, the evidence indicates that driving was a part of Medlin's job; in fact, he was issued a company car for that purpose. At the time Medlin was hired, SMHA had fourteen separate housing developments, located all over the county. Medlin was responsible for overseeing the maintenance work at these developments.

{¶ 67} More importantly, Medlin failed to ask for a reasonable accommodation for his alleged disability. "An employee may satisfy the third element of his prima facie case by showing that he could have performed the essential functions of the job with a reasonable accommodation, if necessary." *Grooms v. Supporting Council of Preventative Effort*, 157 Ohio App.3d 55, 2004-Ohio-2034, ¶ 38, citing *Shaver v. Wolske & Blue* (2000), 138 Ohio App.3d 653.

{¶ 68} The evidence in the record indicates that Medlin never requested an accommodation for his alleged disability, other than asking Stewart if he could forego wearing a jacket and tie to board meetings. Stewart initially refused this request, but at some point, Medlin stopped wearing a coat and tie to board meetings, and nothing

was done, i.e., Medlin's request was tacitly allowed.

{¶ 69} Medlin continued to fall asleep on other occasions, during meetings with co-workers, or while alone in an office. However, despite having opportunities in April 2004, and May 2005, Medlin failed to ask SMHA to make reasonable accommodations for his condition. Even at trial, Medlin failed to suggest what reasonable accommodations should have been made.

{¶ 70} At trial, Medlin specifically testified that he did not inform Stewart in the May 23, 2005, meeting that his sleep apnea would in any way interfere with his ability to stay awake and do his job. Trial Transcript, p. 137. During trial, the following exchange also occurred:

{¶ 71} "Q. * * * Okay. Let me ask you this. I know you testified in your deposition you mentioned that you didn't ask for an accommodation on 4-21-04, and you didn't ask for an accommodation at the meeting on 5-23-05. Did you ever ask for an accommodation?

{¶ 72} "A. Was never given an opportunity to.

{¶ 73} "Q. So your answer is, no, you never requested an accommodation?

{¶ 74} "A. My answer is I was never given an opportunity to.

{¶ 75} "The COURT: You can answer your question yes or no, and then you can explain your answer. So go ahead and answer the question.

{¶ 76} "Mr. COMER: Thank you, you Honor.

{¶ 77} "CONTINUING BY MR. COMER:

{¶ 78} "Q. My question, again, is did you ever request an accommodation, yes or no?

{¶ 79} "A. No." Trial Transcript, p. 159.

{¶ 80} Medlin suggests that SMHA prematurely discharged him before he had an opportunity to request accommodations. Ohio Adm. Code 4112-5-08(E)(1) provides that "An employer must make reasonable accommodation to the disability of an employee or applicant, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business." We noted in *Eisman v. Clark County Dept. of Human Services*, Clark App. No. 02CA0031, 2002-Ohio-6781, that:

{¶ 81} " 'Federal 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) 38 Ohio App.3d 653. 'To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: 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.' " 2002-Ohio-6781 at ¶ 22 (citations omitted).

{¶ 82} As noted, Medlin never asked for reasonable accommodations to accommodate sleeping on the job before being given the option to resign or be terminated. At that time, Medlin did not even suggest what a reasonable accommodation might be; he simply stated in his resignation letter that he was disappointed that SMHA was unable to accommodate his medical condition. SMHA

was entitled, however, to terminate Medlin's employment the day before, when he was found asleep in violation of company rules. There is no showing that SMHA failed to act in good faith by giving Medlin the option the following day to resign or be fired for sleeping on the job, particularly when Medlin had never asked for an accommodation. This is not a situation in which an employee was ignorant of his condition. Medlin was aware for many years that he had sleep apnea, and had ample opportunity to bring the issue of accommodation to his employer's attention. Medlin was twice questioned about sleeping on the job, and was specifically informed that he had been observed sleeping by other employees and by board commissioners. Nonetheless, Medlin failed to ask for a reasonable accommodation for his condition. Accordingly, the trial court did not err in granting SMHA's motion for directed verdict.

{¶ 83} Medlin's sole assignment of error is overruled.

III

{¶ 84} Medlin's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

. . . . . .

BROGAN and FROELICH, JJ., concur.

Copies mailed to:

Gary J. Leppla
Chad Burton
Randal M. Comer
William R. Groves

Hon. Dale Crawford
(sitting for Judge Richard J. O'Neill)