**[Cite as *Rector v. Ohio Bur. of Workers' Comp.*, 2010-Ohio-2104.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Marcia L. Rector, | : | |
| Plaintiff-Appellant, | : | |
| | | No. 09AP-812 |
| v. | : | (C.P.C. No. 08CVH09-12738) |
| Ohio Bureau of Workers' Compensation, | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on May 13, 2010

*Ohio Legal Rights Services*, and *Kevin J. Truitt*, for appellant.

*Richard Cordray*, Attorney General, and *Timothy M. Miller*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

**{¶1}** Plaintiff-appellant, Marcia L. Rector ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Ohio Bureau of Workers' Compensation.

**{¶2}** On August 7, 2006, appellant began employment as an Accountant Examiner 2 ("AE2"), in appellee's medical claims department. Appellant has had no vision in her right eye since birth and wears a prosthetic eye. Appellant's duties in the position she held when she began employment with appellee included mostly data entry

of manual classification codes but also included other responsibilities such as preparing written correspondence, research, and various "special projects." However, as of January 2007, appellant was performing only data entry of manual classification codes on her computer. According to appellant, performance of this task 100 percent of her working day caused significant health problems, including strain, stress and soreness on her functional eye, severe headaches, neck stiffness, extreme fatigue, and exhaustion.

**{¶3}** On May 7, 2007, appellant submitted a request to her supervisor for reasonable accommodations for her disability, including more diversified duties. Some of her requested accommodations were granted, but her job duties remained the same. On July 2, 2007, appellant and other employees were transferred to the employment compliance department in the risk management division, and again data entry of manual classification codes constituted 100 percent of her working day. Appellant again reiterated her requests for more diversified job duties, and appellant was told her job duties could not be changed and that no vacant positions were available. Appellant's last day of active work status was September 26, 2007. Appellant was approved for disability leave benefits on October 10, 2007.

**{¶4}** On May 27, 2008, appellee posted the availability of a vacant AE2 position within its legal division. According to appellant, though the position involved mostly data entry, it also included other diversified duties similar to those she performed when she first began employment with appellee. Therefore, appellant submitted a civil service application. However, appellant was told the position was for promotion only and not available as a lateral transfer. On June 13, 2008, appellant submitted a written request to be reassigned to the position in the legal division as a reasonable accommodation for her

disability. In support, appellant submitted a letter from J. David Pelfrey, M.D., indicating that if appellant's duties were "highly diversified" she could perform duties involving more than 70 percent of her work day on the computer. Via an email dated July 7, 2008, appellant was notified the position had been filled by another employee.

**{¶5}** On September 15, 2008, appellant filed a complaint alleging a violation of R.C. 4112.02 for failure to transfer her to a vacant position to accommodate her vision and hearing disabilities. The complaint sought reassignment, back pay, and front pay. On June 12, 2009, appellee filed a motion for summary judgment arguing that appellant's request to be transferred to a position that she could not perform was not a request for a reasonable accommodation. Further, appellee argued that granting a lateral transfer that violates an employee's collective bargaining rights constituted an unreasonable hardship for an employer. Therefore, appellee contended it was entitled to judgment as a matter of law.

**{¶6}** The trial court agreed and granted appellee's motion for summary judgment on July 28, 2009. Specifically, the trial court found the accommodation requested by appellant was not objectively reasonable because there was no evidence appellant could fulfill the requirements of the sought position. The trial court also found that because the lateral transfer would have violated the collective bargaining agreement, undue hardship to the employer had been established.

**{¶7}** This appeal followed, and appellant brings the following two assignments of error for our review:

> 1. The trial court erred in concluding that no genuine issue as to any material fact exists regarding the reasonableness of Appellant Marcia Rector's request to be reassigned to a

> vacant position in the Legal Division of appellee Ohio Bureau of Workers' Compensation as a reasonable accommodation for her disability under R.C. 4112.02.
>
> 2. The trial court erred in concluding that acceptance of Appellant Marcia Rector's request for reassignment would have imposed an undue hardship on Appellee Ohio Bureau of Worker's Compensation as a matter of law.

**{¶8}** This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. Id.

**{¶9}** An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Society Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if

the trial court failed to consider those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

**{¶10}** In her assigned errors, appellant contends the trial court erred in concluding that her request to be reassigned was unreasonable because there are issues of fact pertaining to whether or not she could perform the essential functions of the sought position, and reassignment would not have imposed an undue hardship on appellee.

**{¶11}** Both the federal Americans with Disabilities Act ("ADA") and its state law equivalent make it an unlawful discriminatory practice for any employer, because of an employee's disability, to discharge the employee without just cause. *Sheridan v. Jackson Twp. Div. of Fire*, 10th Dist. No. 08AP-771, 2009-Ohio-1267, ¶4. Both statutes are nearly identical, and the Supreme Court of Ohio has held that we may look to cases and regulations interpreting the ADA when interpreting the Ohio anti-discrimination statutes. Id., citing *Shaver v. Wolske & Blue* (2000), 138 Ohio App.3d 653; see also *Columbus Civil Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569, 573. To state a claim of disability discrimination, the party seeking relief must establish: "(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." *Bush v. Dictaphone Corp*., 10th Dist. No. 00AP-1117, 2003-Ohio-883, ¶33, quoting *McGlone*, supra, citing *Hazlett v. Martin Chevrolet, Inc*. (1986), 25 Ohio St.3d 279, 281.

**{¶12}** Both federal and Ohio law impose a duty on employers to make reasonable accommodations for their employees with disabilities. 42 U.S.C. 12112(b)(5)(A) (requiring

employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee); Ohio Adm.Code 4112-5-08(E)(1) ("An employer must make reasonable accommodation to the disability of an employee or applicant."). As this court has stated, " '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.' " *Shaver*, supra, at 663, quoting Ohio Adm.Code 4112-5-08(E)(1). "Accommodations may take the form, for example, of providing access to the job, job restructuring, acquisition or modification of equipment or devices, or a combination of any of these. Job restructuring may consist, among other things, of realignment of duties, revision of job descriptions or modified and part-time work schedules." Ohio Adm.Code 4112-5-08(E)(2). However, as the federal courts have consistently held, disability discrimination laws do not require an employer to violate the contractual rights of other workers in an effort to accommodate a single employee. *Boback v. General Motors Corp.* (C.A.6, 1997), 107 F.3d 870, citing *Benson v. Northwest Airlines, Inc.* (C.A.8, 1995), 62 F.3d 1108, 1114; *Milton v. Scrivner, Inc*. (C.A.10, 1995), 53 F.3d 1118, 1125.

**{¶13}** Here, appellant requested that she be reassigned to the AE2 position in the legal division as a reasonable accommodation for her disability. According to appellee, however, the trial court was correct in its conclusion that this request was not reasonable since such reassignment would have violated another employee's collective bargaining rights and imposed an undue burden on appellee. We agree with appellee.

**{¶14}** It is undisputed that both AE2 positions, the one appellant sought and the one she currently occupied, were bargaining unit positions. Pursuant to the collective bargaining agreement ("CBA"), present before us, a vacancy must be filled by promotion before it can be filled by a lateral transfer. The CBA defines "promotion" as "the movement of an employee to a posted vacancy in a classification with a higher pay range within the same agency," as opposed to a "lateral transfer" that is defined as "an employee-requested movement to a posted vacancy within the same agency which is in the same pay range as the classification the employee currently holds." (CBA Article 17.02(B) and (F).) Karla Ivery, who was currently employed by appellee as a Clerk 3 in pay range 26, also applied for the AE2 position in the legal department, which was in pay range 28. In contrast, appellant was an AE2 currently in pay range 28. It is unquestionable that movement to the vacant position would constitute a lateral transfer for appellant and a promotion for Ms. Ivery. Thus, giving the position to appellant would have violated Ms. Ivery's rights under the CBA.

**{¶15}** Despite the above analysis, appellant contends she could have been placed in the vacant AE2 position without violating the CBA because Article 2.01 of the CBA provides in pertinent part:

> The Employer may also undertake reasonable accommodation to fulfill or ensure compliance with the Americans with Disabilities Act of 1990 (ADA) and corresponding provisions of Chapter 4112 of the Ohio Revised Code. Prior to establishing reasonable accommodation which adversely affects rights established under this Agreement, the Employer will discuss the matter with a Union representative designated by the Executive Director.

**{¶16}** While this provision contemplates appellee will comply with disability discrimination law and discuss with a union representative if a reasonable accommodation adversely affects another's collective bargaining rights, the provision in no way requires appellee to violate another employee's collective bargaining rights, as that in itself is not required by disability discrimination law. "An employer is not required to grant an employee a transfer to a different position if such a transfer violates a collective bargaining agreement because such an accommodation is not reasonable." *Woodruff v. School Bd of Seminole Cty. Fla.* (C.A.11, 2008), 304 Fed. Appx. 795, 801, citing *Kralik v. Durbin* (C.A.3, 1997), 130 F.3d 76, 83. See also *Smith v. Midland Brake, Inc.* (C.A.10, 1999), 180 F.3d 1154 (an existing position would not truly be vacant, even though it is not presently filled by an existing employee if under a collective bargaining agreement other employees have a vested priority right to such vacant position); *Thomspon v. E.I. Dupont Denemours & Co.* (C.A.6, 2003), 70 Fed. Appx. 332, 336, quoting *Burns v. Coca-Cola Enterprises, Inc.* (C.A.6, 2000), 222 F.3d 247, 253 (in considering reassignment, "employers are not required to create new jobs, displace existing employees from their positions, or violate other employee's rights under a collective bargaining agreement or other non-discriminatory policy in order to accommodate a disabled individual"); *Huberty v. Esber Beverage Co.* (Dec. 31, 2001), 5th Dist. No. 2001-CA-00202 (noting employers are not required to violate the provisions of a collective bargaining agreement to reassign a disabled employee).

**{¶17}** Based on the foregoing, we find no error in the trial court's determination that the accommodation appellant sought would require appellee to violate another employee's collective bargaining rights, and, as such, is not a reasonable

accommodation. Given this determination, we need not address appellant's argument with respect to whether or not there are genuine issues of material fact regarding whether or not appellant would have been able to perform the essential functions of the sought position. Accordingly, appellant's two assignments of error are overruled.

**{¶18}** Because we have overruled appellant's two assignments of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

BRYANT and BROWN, JJ., concur.

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