IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas E. Fallecker, Appellant	:	
v.	:	
Slippery Rock University, State System of Higher Education	:	No. 1929 C.D. 2007
	:	Submitted: May 6, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: July 28, 2008

Thomas Fallecker (Fallecker), appeals an order of the Court of Common Pleas of Butler County (trial court) that granted Slippery Rock University of Pennsylvania of the State System of Higher Education's (the University's) Motion for Summary Judgment with respect to Fallecker's Retaliation and Perceived Disability Discrimination claims under the Pennsylvania Human Relations Act (PHRA).[1]

Fallecker began working in the Facilities and Planning Department at the University in 1992. Fallecker was employed as a Maintenance Repairman until he was terminated on September 10, 2004.

[1]Act of October 27, 1955, P.L. 744, as amended 43 P.S. §§ 951-963.

On June 20, 2005, Fallecker filed a Civil Complaint and alleged a claim of retaliation pursuant to Section 5(d) of the PHRA[2], 43 P.S. §955(d), and perceived handicap discrimination pursuant to Section 5(a)[3] of the PHRA, 43 P.S. §955(a), as follows, in pertinent part:

> Count II PHRA Retaliation
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> 20. Plaintiff [Fallecker] engaged in protected activity under the PHRA by filing a complaint alleging age and perceived disability discrimination with the PHRC in or about April, 2004.
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> 21. Immediately following the time that Plaintiff [Fallecker] filed this charge of discrimination, the

[2] Section 5(d) of the PHRA states that it shall be unlawful:

> (d) For any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

[3] Section 5(a) of the PHRA states that it shall be unlawful:

> (a) For any employer because of . . . non-job related handicap or disability . . . to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required . . . .

Defendant [the University] . . . retaliated against the Plaintiff [Fallecker] because he engaged in protected activity.

22. The acts of retaliation include the following:

(a) The restrictions placed upon Plaintiff's [Fallecker's] leave usage were increased;

(b) Plaintiff [Fallecker] was given increasingly less time to provide medical documentation for the absences made necessary by his medical conditions despite the fact that he had explained to the Defendant [the University] that the nature of his medical conditions often made it impossible to see the doctor on the date of the absence;

(c) On or about September 10, 2004, the Defendant [the University] terminated Plaintiff's [Fallecker's] employment for not providing medical documents for an absence in August, 2004, even though Plaintiff [Fallecker] had informed his immediate supervisor that such documentation would be forthcoming, and was, in fact, provided at approximately the same time that Plaintiff [Fallecker] received notice of his discharge.

23. The Defendant [the University] . . . was motivated by an intent to retaliate against the Plaintiff [Fallecker] for engaging in protected activity when it engaged in the foregoing acts.

Count III Perceived Handicap Discrimination PHRA

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27. Beginning in 2001 and continuing through the present, Plaintiff [Fallecker] has suffered from chronic migraine headaches and rheumatoid and degenerative arthritis.

28. Although these conditions do not substantially limit Plaintiff [Fallecker] in any major life activity, as symptoms manifest irregularly, Plaintiff [Fallecker] is unable to engage in any activity when the conditions are active.

29. As a result of these conditions . . . [Fallecker] use[d] his accumulated sick and annual leave and advance leave for work absences caused by his conditions.

30. After the Defendant [the University] was informed of Plaintiff's [Fallecker's] conditions, the Defendant [the University] required Plaintiff [Fallecker] to provide medical documentation for every absence. This condition was not placed on others.

31. After being informed of Plaintiff's [Fallecker's] condition . . . [his] immediate supervisor became more critical of Plaintiff's [Fallecker's] work.

32. Although Plaintiff [Fallecker] fully complied with the leave restrictions which were placed upon him there was an occasional delay involved in obtaining the required medical documentation as Plaintiff [Fallecker] was not able to leave the house to see his . . . physicians on days when the symptoms of his condition were severe.

33. Plaintiff [Fallecker] explained the reason for the occasional delays to his immediate supervisor.

34. On August 19, 2004, Plaintiff [Fallecker] was absent from work as a result of his medical conditions.

35. Plaintiff [Fallecker] informed his immediate supervisor that medical documentation . . . would be forthcoming.

36. Despite the foregoing, the Defendant [the University] terminated Plaintiff's [Fallecker's] employment on September 10, 2004.

37. Based on the disparate conditions placed upon Plaintiff for leave usage, the increased criticism of

> Plaintiff's [Fallecker's] work performance, and the termination of Plaintiff's [Fallecker's] employment . . . the Defendant [the University] regarded Plaintiff as having a handicap that substantially limited him in the major life activity of working.
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> 38. In making the decision to terminate Plaintiff's [Fallecker's] employment, the Defendant [the University] . . . was motivated by an intent to discriminate against Plaintiff [Fallecker] because of his perceived disability.
> ****

Civil Complaint, June 20, 2005, Paragraphs 20-23, 27-38 at 4-8; Reproduced Record (R.R.) at 15-19 (emphasis added).

In response, the University filed its Answer and New Matter setting forth several affirmative defenses as follows: Fallecker was not disabled within the meaning of the Americans with Disabilities Act (ADA) or the PHRA, the University did not perceive Fallecker as being disabled, and the University acted in good faith with a reasonable belief in the lawfulness of their actions. The University's Answer and New Matter to Complaint; January 12, 2006, at 9-10; R.R. at 32-33. Thereafter, the University filed a Motion for Summary Judgment and Fallecker filed his Opposition.

The trial court granted summary judgment in favor of the University in regards to Fallecker's perceived disability discrimination claim retaliation claim:

> PHRA Perceived Disability Discrimination Claim
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> In Paragraph Twenty-Eight (28) of the Plaintiff's [Fallecker's] Complaint, the Plaintiff [Fallecker] specifically alleges that he is not substantially limited in any major life activity, thereby defeating a claim for

> perceived disability discrimination under the first prong of the definition of disability.
>
> Even though the Plaintiff [Fallecker] claims that he falls under the third prong of the definition of a disability, 'regarded as having such an impairment,' there still needs to be a limitation of a major life activity. 'In order to recover under the "regarded as" theory, the Appellant [Fallecker] must demonstrate that the employer regarded him as being disabled, i.e., as having an impairment that substantially limited one or more of the Appellant's [Fallecker's] major life activities.' Again, since the Plaintiff [Fallecker] failed to allege any substantial impairment of a major life activity, his claim for perceived disability discrimination under the third prong of the definition of disability is defeated.
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> PHRA Retaliation Claims
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> ****
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> Based upon the . . . time between the Plaintiff's [Fallecker's] filing of the EEOC Complaint and the time that the Plaintiff [Fallecker] was terminated [approximately five months later] combined with the fact that terminating the Plaintiff's [Fallecker's] employment was the next step in the [progressive] discipline process of the Defendant [the University], which the Plaintiff [Fallecker] had been warned of, the Plaintiff's [Fallecker's] termination was not in retaliation to his filing of an EEOC Complaint.

Court of Common Pleas of Butler County, Memorandum Opinion (Trial Court Opinion), September 24, 2007, at 4-6; R.R. at 380-82.

On appeal,[4] Fallecker argues the trial court erred when it determined that Fallecker could neither establish a prima facie claim of retaliation nor disability discrimination.

1. Discriminatory Retaliation Claim

In Fallecker's appeal of the trial court's grant of summary judgment in favor of the University he contends the trial court erred because he sufficiently alleged facts that if proven and accepted by the fact finder to be true would establish that the University subjected him to an adverse employment action in the form of unjustifiable discipline and termination after he engaged in a protected activity by filing a 2004 EEOC Complaint.

To establish a prima facie claim of discriminatory retaliation, a complainant must prove the following elements:

> (1) he was engaged in protected activity; (2) his employer was aware of the protected activity; (3) subsequent to participation in the protected activity, he was subjected to an adverse employment action; and (4) there is a causal connection between his participation in the protected activity and the adverse employment action.

[4] This Court's review of a trial court's grant of summary judgment is limited to determining whether the trial court abused its discretion or committed an error of law. D.C. v. Sch. Dist. Of Philadelphia, 879 A.2d 408, 413 n.3 (Pa. Cmwlth 2005). The standard of review of a grant of summary judgment requires the evidence to be viewed in the light most favorable to the nonmoving party. All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Garcia v. Cmty. Legal Serv. Group, 524 A.2d 980, 985 (Pa. Super. 1987). Summary judgment is only proper where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Kincel v. Dep't of Transp., 867 A.2d 758, 761 n.7 (Pa. Cmwlth. 2005).

Uber v. Slippery Rock University of Pennsylvania, 887 A.2d 362, 367 (Pa. Cmwlth. 2005), *citing*, Spanish Council of York v. Pa. Human Relations Comm'n, 879 A.2d 391, 399 (Pa. Cmwlth. 2005)(emphasis added).

The trial court found that Fallecker's complaint adequately pled the first three elements of a retaliation claim, but he did not allege facts sufficient to support the fourth element requiring a causal connection. The filing of a PHRC or EEOC Complaint qualifies as a protected activity and both parties acknowledged that the University was aware of Fallecker's 2004 EEOC Complaint. Additionally, Fallecker's September 2004, termination constituted an adverse employment action. The relevant inquiry is whether Fallecker alleged facts sufficient to establish a causal connection between the filing of the EEOC Complaint and his termination of employment with the University.

Controversies where the required causal link has been at issue have often focused on the close temporal proximity between the employee's protected activity and the adverse employment action. Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997); *see also* Krouse v. American Sterilizer, 126 F.3d 494 (3d Cir. 1997)("the courts generally look to whether the adverse employment action was taken within such a close time to the protected activity as to permit an inference of retaliatory motive.")[5] With respect to the degree of temporal

[5] This Court turns to the ADA as pertinent authority on the construction and application of the PHRA. Consequently, federal cases are useful to guide our interpretation of the PHRA. As stated in Imler v. Hollidaysburg Am. Legion Ambulance Serv., 731 A.2d 169, 173-74 (Pa. Super. 1999):

(Footnote continued on next page…)

proximity required, "courts generally hold that if at least four months pass after the protected action without employer reprisal, no inference of causation is created." Wood v. Bentsen, 889 F.Supp. 179 (E.D. Pa. 1995). Here, at least four months passed between the protected activity in April 2004, and the adverse employment action in September 2004, so the trial court found as a matter of law that there was no permissible inference of causation on the basis of temporal proximity. Trial Court Opinion at 5; R.R. at 381; Letter to the Pennsylvania Human Relations Commission, April 15, 2004; R.R. at 317; Termination Letter, September 10, 2004; R.R. at 165.

However, temporal proximity only provides an evidentiary basis from which an inference may be drawn, and "the absence of immediacy between the

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> The PHRA and ADA are interpreted in a co-extensive manner. This is because the PHRA and ADA deal with similar subject matter and are grounded on similar legislative goals. Kelly v. Drexel University, 907 F.Supp. 864, 874 (E.D.Pa. 1995). *See also*, Doe v. Kohn Nast & Graf, 862 F.Supp. 1310, 1323 (E.D.Pa.1994) (stating that since the PHRA was modeled after Title VII, it is analyzed the same as Title VII is analyzed and, therefore, the same as the ADA is analyzed); Chmill v. City of Pittsburgh, 488 Pa. 470, 490-91, 412 A.2d 860, 871 (1980)(although the PHRA is an independent state statute, it should be construed in light of fair employment law which emerged from federal anti-discrimination statutes). Courts of this Commonwealth may look to federal court decisions when interpreting the PHRA, even though those decisions are not binding on state courts. Hoy v. Angelone, 456 Pa. Super. 615, 691 A.2d 485, 486 (1997); Campanaro v. Pennsylvania Elec. Co., 440 Pa. Super 519, 656 A.2d 491, 493-94 (1995).

cause and effect does not disprove causation." Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 178 (3d Cir. 1997). A pattern of antagonism between the protected activity and the adverse employment action may also give rise to an inference of an improper retaliatory motive, but it is not dispositive. Woodson, 109 F.3d at 920-21 (a causal link may also be established "if the employer engaged in a pattern of antagonism in the intervening period."); Kachmar, 109 F.3d at 177.

Here, the alleged circumstances are that in 2001, Fallecker received a written warning regarding an unauthorized, unpaid absence and he was advised that further disciplinary action would be taken if such behavior persisted. Warning Letter, January 17, 2001; R.R. at 113. Fallecker then received his first formal Level I reprimand in February 2002, for abusing the University's leave policy. Fallecker received his first Level II reprimand on September 27, 2002 for continued absenteeism and was placed on leave restriction and warned that he would be terminated if his excessive absenteeism continued. In March 2004, Fallecker failed to comply with the University's request for physician statements to substantiate fourteen dates on which he had already taken leave. Fallecker was informed that he was being granted "additional time to demonstrate consistent attendance." Letter from Human Resources, March 26, 2004; R.R. at 155.

Between April 2004, when Fallecker filed the EEOC Complaint and September 2004, when he was terminated, Fallecker received his second Level II reprimand on June 7, 2004, for failing to obtain advanced approval from the department supervisor prior to taking leave. Again, on August 19, 2004, he failed

to comply with leave restrictions because he neither obtained advanced approval nor submitted medical documentation for his absence.

In reviewing the record as a whole, this Court finds no pattern of antagonism that would permit the inference of retaliatory animus. The undisputed facts establish that the University began a progressive discipline process with Fallecker well before he filed the 2004 EEOC Complaint, and the progressive discipline process continued after the EEOC Complaint was filed due to Fallecker's continued excessive absenteeism and non-compliance with the University's leave restrictions. There are no other facts alleged to indicate that the University's actions were inconsistent with its progressive discipline process. This Court finds no error with the trial court's conclusion that the facts alleged were insufficient to establish an ongoing pattern of antagonism.

Therefore, the trial court's determination that summary judgment was proper because Fallecker failed to establish a prima facie claim of retaliation inasmuch as did not allege facts sufficient to demonstrate a causal connection must stand.

2. Perceived Disability Discrimination Claim

Fallecker also argues that the trial court committed reversible error when it determined he could not establish a prima facie case of disability discrimination under the PHRA because he was not handicapped or disabled within the meaning of the PHRA. Although Fallecker admitted he was not actually disabled per se, the inquiry does not end there because a disability may be

established in one of three ways pursuant to Section 4(p.1) of the PHRA, 43 P.S. §954(p.1).

The PHRA prohibits an employer from discriminating against an employee on the basis of that employee's handicap or disability. Section 5(a) of the PHRA. To establish a prima facie case of disability discrimination, the plaintiff-employee must establish each of the following elements:

> (1) he or she is disabled as defined by the ADA;
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> (2) he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and
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> (3) he or she had suffered an adverse employment decision as a result of discrimination

Gaul v. Lucent Tech., Inc., 134 F.3d 576, 580 (3d Cir. 1998)(emphasis added).[6]

With respect to the first element, the PHRA has a three-pronged disjunctive definition of disability as follows:

> (1) a physical or mental impairment which substantially limits[7] one or more of such person's major life activities[8];

[6] If the employee establishes a prima facie case of disability discrimination then the burden shifts to the employer "to articulate a legitimate non-discriminatory reason for its action." Uber, 887 A.2d at 367. "Finally, the burden shifts back to the . . . [employee] to show that the employer's proffered reasons are pretextual." Id.

(2) a record of having such an impairment; or

(3) being regarded as having such an impairment . . .

Section 4(p)(1) of the PHRA (emphasis added).

Here, the relevant inquiry in Fallecker's disability discrimination claim is whether he sufficiently alleged facts, that if proven to be true, would establish Fallecker was disabled within the meaning of the PHRA. Fallecker does not dispute that he is not actually disabled pursuant to the first prong because he admitted that his health conditions did not substantially limit him in any major life activity. Civil Complaint, June 20, 2005, at 7; R.R. at 18. However, Fallecker argues that the University regarded him, or perceived him, as disabled and thus, he is disabled under the third prong of the definition of disability.

The trial court determined, based on Imler that Fallecker was unable to establish a prima facie claim of disability discrimination under the "*regarded as*" prong of the definition of disability because Fallecker did not allege that he suffered from "any substantial impairment of a major life activity . . . ." Trial Court Opinion at 4-5; R.R. at 380-81. The trial court was correct inasmuch as

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[7] The term "substantially limits" means the impairment "prevents or severely restricts" the individual's ability to perform major life activities. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002).

[8] "Major life activities are those functions 'such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" Robinson v. Lockheed Martin Corp., 212 Fed.Appx. 121, 123 (3d Cir. 2007), *citing*, 29 C.F.R. §1630.2(i)(emphasis added).

Fallecker did not allege he suffers from a subststantial impairment of a major life activity. However, Fallecker clearly alleged that the University perceived Fallecker as suffering an impairment that substantially limited him in the major life activity of working. See Civil Complaint, June 20, 2005, Paragraph 37, at 8; R.R. at 19 (emphasis added).

Although the trial court correctly cited to the standard set forth in Imler in reaching its conclusion, it misapplied the standard. Imler, 731 A.2d at 173-74 (in order to recover under the "*regarded as*" theory, the employee must establish that the employer regarded the employee as being disabled, i.e., an impairment that substantially limited the employee in one or more major life activities). From Imler the trial court incorrectly concluded that "[e]ven though the Plaintiff [Fallecker] claims that he falls under the third prong of the definition of a disability, 'regarded as having such an impairment,' there still needs to be a limitation of a major life activity." Trial Court Opinion at 4; R.R. at 380. Based on the trial court's analysis it follows that since Fallecker admitted that he was not substantially limited in any major life activity he cannot establish the University *regarded him* as being disabled. This Court disagrees.

Contrary to the trial court's conclusion, the Imler decision does not require an *actual* limitation of a major life activity in order to satisfy the "*regarded as*" disabled prong of the definition of disability. Rather, there must be a *perceived* limitation of a major life activity. Indeed, the trial court's analysis of a disability under the PHRA would render the "*regarded as*" disabled prong of the definition of disability meaningless as an employee would still have to meet the requirements

of the first prong of the definition requiring an *actual* disability in order to prevail. Under the correct standard, an employee may be characterized as disabled under the "*regarded as*" disabled prong of the definition of disability if the employee is able to establish that the employer regarded the employee as having an impairment that substantially limits any major life activity regardless as to whether that perception is accurate.

Here, Fallecker clearly alleged that the University regarded him as being disabled and argued it became apparent to the University that Fallecker's continued absenteeism was attributable to significant health problems that substantially limited his ability to work. The University, however, alleges it did not regard Fallecker as disabled because Fallecker was permitted to exhaust sick, annual, personal, anticipated future, and unpaid leave for his migraine and arthritic conditions over the course of approximately three and half years which demonstrates that the University believed Fallecker was a good worker, deserving of every possible chance to improve his attendance.

This Court believes that Fallecker sufficiently alleged facts that if proven and accepted by the fact finder to be true would establish a prima facie case of disability discrimination under the "*regarded as*" disabled prong of the definition of disability for purposes of the PHRA. Whether Fallecker was regarded as disabled by the University is an outstanding material factual issue which needs to be resolved. Consequently, the University was not clearly entitled to judgment as a matter of law.

The trial court erred in granting summary judgment in favor of the University when it misapplied the applicable standard set forth in Imler because there is a genuine issue of material fact whether the University regarded Fallecker as being disabled and whether Fallecker was terminated as a result of that perception.

Accordingly, this Court affirms the trial court's grant of summary judgment in favor of the University as to the retaliation claim; this Court reverses the grant of summary judgment in favor of the University as to the perceived disability discrimination claim and remands to the trial court for action consistent with this opinion.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas E. Fallecker, Appellant	:	
v.	:	
Slippery Rock University, State System of Higher Education	:	No. 1929 C.D. 2007

O R D E R

AND NOW, this 28th day of July, 2008, the order of the Court of Common Pleas of Butler County in the above-captioned matter is hereby affirmed as to the retaliation claim and reversed and remanded as to the perceived disability discrimination claim.

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BERNARD L. McGINLEY, Judge