[Cite as *Ford v. Dept. of Rehab. & Corr.*, 2017-Ohio-8281.]

NATASHA N. FORD Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2016-00675 Judge Patrick M. McGrath Magistrate Holly True Shaver DECISION

{¶1} On August 18, 2017, defendant filed a motion for summary judgment pursuant to Civ.R 56(B). Plaintiff did not file a response. The motion is now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.,* 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317 (1977).

{¶4} In her complaint, plaintiff asserts that she suffers from Keratoconus, a disease of the eye that causes sensitivity to light. In 2010, plaintiff was employed by

defendant as a transportation officer. In August 2014, plaintiff underwent surgery, during which time she took short-term disability leave. In September 2014, plaintiff requested to be placed into a non-inmate contact position upon her return from disability leave. On November 3, 2014, plaintiff was hired at Pickaway Correctional Institution (PCI) as an Administrative Professional 1. That same day, plaintiff submitted an accommodation application, in which she requested either a large computer screen or multiple screens, and a low-light working area. Plaintiff also requested an evaluation of her workspace by her Low Vision Therapist to determine whether other accommodations were necessary. On April 14, 2015, plaintiff met with the warden at PCI to discuss her accommodation requests and was granted leave pursuant to the Family and Medical Leave Act (FMLA) so that the accommodations to her workspace could be performed. On August 25, 2015, defendant recommended that plaintiff be medically separated from PCI.

{¶5} Plaintiff asserts claims of disability discrimination and failure to accommodate her disability in violation of both the Americans with Disabilities Act of 1990 (ADA), 42 USC 12101 et. seq., and R.C. 4112; and retaliation in violation of both federal and state law because of her requests for accommodations. Defendant asserts that plaintiff cannot prevail on any of her claims.

I. FEDERAL CLAIMS

{¶6} Defendant first argues that plaintiff's federal claims fail because they were not timely filed. To seek relief under the ADA, a plaintiff must file suit within 90 days of receipt of a right to sue letter from the EEOC. *See* Section 12117(a), Title 42 U.S. Code; *Peete v. American Standard Graphic*, 885 F.2d 331 (6th Cir.1989). Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on June 17, 2015. The EEOC issued her a Notice of Right to Sue dated December 9, 2015. (Plaintiff's Exhibit 1.) Although plaintiff filed her original complaint in this court on March 8, 2016, she dismissed that claim without prejudice on June 10, 2016. Plaintiff

filed the instant complaint on September 9, 2016. Although R.C. 2305.19, the savings statute, permits plaintiff to refile her action within one year of filing a notice of voluntary dismissal, R.C. 2305.19 "cannot save a federal claim that contains a specific limitations period." *McNeely v. Ross Correctional Inst.*, 10th Dist. Franklin No. 06AP-280, 2006-Ohio-5414, ¶ 9; Stevens *v. Ohio Dept. of Mental Health*, 10th Dist. Franklin No. 12AP-1015, 2013-Ohio-3014, ¶ 15. Plaintiff's federal claims of discrimination and retaliation under the ADA were therefore filed more than 90 days after December 9, 2015. Construing the facts most strongly in plaintiff's favor, the only reasonable conclusion is that plaintiff's federal claims were not timely filed in this court. Therefore, defendant is entitled to summary judgment as a matter of law on plaintiff's federal claims.

II. STATE CLAIMS

A. DISABILITY DISCRIMINATION

{¶7} R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the * * * disability * * * 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." In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights* Comm., 66 Ohio St.2d 192, 196 (1981). To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent and may establish such intent through either direct or indirect methods of proof. *Ricker v. John Deere Ins.* Co., 133 Ohio App.3d 759, 766 (10th Dist.1998), citing *Mauzy v. Kelly Servs., Inc.,* 75 Ohio St.3d 578, 583 (1996). To establish a prima facie case of discriminatory discharge, a plaintiff must show that: "(1) [s]he is disabled, (2) [s]he was otherwise qualified for the position, with or without reasonable accommodation, (3) [s]he suffered an adverse

action, (4) the employer knew or had reason to know of [her] disability, and (5) [s]he was replaced or the job remained open." *Hartman v. Ohio DOT*, 10th Dist. Franklin No. 16AP-222, 2016-Ohio-5208, ¶ 18, citing *Rosebrough v. Buckeye Valley High School*, 690 F.3d 427, 431 (6th Cir.2012). As stated in *Hartman, supra*, the elements of a prima facie case can vary based on the circumstances of the case. *See Demyanovich v. Cadon Plating & Coatings*, *L.L.C.*, 747 F.3d 419, 433 (6th Cir.2014) (stating the elements as (1) she is disabled, (2) she is otherwise qualified to perform the essential functions of a position, with or without accommodation, and (3) she suffered an adverse employment action because of her disability).

{¶8} If plaintiff establishes a prima facie case of discrimination, under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *Id.,* at 802. Once the employer does, the burden shifts back to plaintiff to show that the proffered reason was not the true reason, but was a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Plaintiff must present evidence to show that the employer's stated reason for terminating her employment has no basis in fact, was not the actual reason for her termination, or the reason was insufficient to explain the employer's action. *Smith v. Ohio Dept. of Public Safety*, 10th Dist. Franklin No. 12AP-1073, 2013-Ohio-4210, ¶ 77, citing *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994). Regardless of which option is chosen, plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against her. *Johnson v. Kroger* Co., 319 F.3d 858, 866 (6th Cir.2003). A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993). "The ultimate burden of persuading the trier of fact

that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra*, at 253.

B. FAILURE TO ACCOMMODATE

{¶9} To establish a prima facie case of failure to accommodate an employee must show that: (1) she is disabled within the meaning of the ADA; (2) she is otherwise qualified for the position, such that she can perform the essential functions of the job with or without a reasonable accommodation; (3) the employer knew or had reason to know of her disability; (4) the employee requested an accommodation; and (5) the employer failed to provide a reasonable accommodation thereafter. *Johnson v. Cleveland City Sch. Dist.*, 443 F. Appx. 974, 982-83 (6th Cir. 2011). Once an employee establishes a prima facie case, "the burden shifts to the employer to demonstrate that any particular accommodation would impose an undue hardship on the employer." *Id.,* at 983.

C. RETALIATION

{¶10} In order to establish a prima facie case of retaliation under R.C. 4112.02(I), plaintiff is required to prove that: "'(1) plaintiff engaged in a protected activity; (2) the employer knew of plaintiff's participation in the protected activity; (3) the employer engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action.'" *Motley v. Ohio Civ. Rights Comm.,* 10th Dist. Franklin No. 07AP-923, 2008-Ohio-2306, ¶ 11, quoting *Zacchaeus v. Mt. Carmel Health Sys.,* 10th Dist. Franklin No. 01AP-683, 2002-Ohio-444.

{¶11} In support of its motion, defendant filed the affidavit of Elizabeth Thompson, Human Capital Management Senior Analyst for Pickaway Correctional Institution, who avers in pertinent part:

a. "3. On September 24, 2014, Ms. Ford applied to be an administrative professional at PCI as a transfer. At the time that she applied for the transfer, Ms. Ford was employed as a corrections officer at the Franklin

Medical Center (also part of the Ohio Department of Rehabilitation and Correction), but was on medical leave.

b. "4. During the selection process, Ms. Ford provided me with a note from her physician, releasing her to return to work without restrictions on November 1.

c. "5. On October 28, Ms. Ford attended a pre-hire orientation event and inquired as to the potential for accommodation. I gave her an ADA application for her doctor to complete, and instructed Ford to provide me with the names and phone numbers of any specialists she wished to have conduct an on-site evaluation of her working conditions. Ms. Ford also indicated that she needed to wear sunglasses continuously, and I said that was fine.

d. "6. On November 2, Ford was selected to fill the position at PCI and began work. The transfer to PCI was voluntary and resulted in a pay decrease for Ford.

e. "7. On April 14, 2015, Ms. Ford met with Jeffrey Lisath, who was at that time the Warden at PCI, to discuss her accommodations. After that meeting, Warden Lisath directed us to provide the requested accommodations.

f. "8. When Warden Lisath directed us to provide accommodations to Ms. Ford, she had not returned the physician completed ADA paperwork, nor had she provided us with specialist information.

g. "9. The next day, I spoke with Ms. Ford to discuss the accommodations she was requesting. I also gave Ms. Ford another copy of the paperwork for her physician to complete. She has never provided the completed paperwork.

h. “10. Ms. Ford indicated that she would not return to PCI until the accommodations were in place.

i. “11. Under my direction, Department staff made the following changes to Ms. Ford’s office: the walls were painted a dark, matte color; the lights were replaced by low-wattage bulbs and task lamps; blinds were placed on her windows; her computer monitor was replaced with a larger one; and a new keyboard with larger markings was provided.

j. “12. On April 29, 2015, a group including Ms. Ford inspected the changes. I asked Ms. Ford what additional changes she would require, but she never made any further requests.

k. “13. Ms. Ford thereafter returned to work. On May 19, Ms. Ford was seen operating a grill for Employee Appreciation Week without sunglasses. She left that day and never returned to work at PCI.

l. “14. Throughout her time at PCI, Ms. Ford periodically called off claiming that her time was covered by the Family and Medical Leave Act (‘FMLA’), despite not having FMLA paperwork on file.

m. “15. When she left work May 19, I again reminded Ms. Ford that she did not have current FMLA paperwork, and sent forms to her for completion on June 2.

n. “16. On June 14, Ms. Ford exhausted her lifetime disability benefits with the Department, and went into an unpaid status.

o. “17. On June 22, I received notification that Ms. Ford was applying for disability retirement. I promptly completed the paperwork and returned it to the retirement system.

p. “18. On June 23, Ms. Ford called PCI and requested a separation packet, which was sent to her the same day.

q. "19. In July 2015, Ms. Ford began to submit unemployment benefit applications, which were denied because she was still employed by the Department.

r. "20. On August 12, Ms. Ford visited PCI to inspect the changes to her office, but never again returned to work.

s. "21. Effective November 27, 2015, after a hearing held on September 25, 2015, Ms. Ford was removed from her position pursuant to Ohio's involuntary disability separation process.

t. "22. In January 2016, I received notice that Ms. Ford's disability benefit application had been approved.

u. "23. Ms. Ford has never attempted to be reinstated at PCI since November 27, 2015." (Defendant's Exhibit A.)

{¶12} Upon review of Thompson's affidavit, the court finds that defendant has articulated legitimate, nondiscriminatory reasons for the adverse employment action. The burden shifts to plaintiff to produce evidence that a material issue of fact exists regarding whether defendant's proffered reason was pretext for discrimination. However, plaintiff did not file a response to defendant's motion.

{¶13} Civ.R. 56(E) states, in pertinent part: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Inasmuch as plaintiff failed to respond to defendant's motion, reasonable minds can conclude only that defendant complied with R.C. 4112 and all applicable policies when it terminated plaintiff's employment. Accordingly, defendant is entitled to summary judgment as a matter of law on all of plaintiff's claims. Judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

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NATASHA N. FORD Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2016-00675 Judge Patrick M. McGrath Magistrate Holly True Shaver JUDGMENT ENTRY

{¶14} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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