[Cite as *Blashak v. Dept. of Youth Servs.*, 2019-Ohio-509.]

RENEE A. BLASHAK Plaintiff v. OHIO DEPARTMENT OF YOUTH SERVICES Defendant	Case No. 2017-00695JD Judge Patrick M. McGrath Magistrate Robert Van Schoyck DECISION

{¶1} On November 9, 2018, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). Plaintiff filed a response on November 26, 2018. On December 6, 2018, defendant filed a motion for leave to file a reply brief pursuant to L.C.C.R. 4(C), which is GRANTED instanter. The motion for summary judgment is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶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, 821 N.E.2d 564, ¶ 6, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

{¶4} Plaintiff brings this action asserting claims of disability discrimination and retaliation in violation of R.C. 4112.02. There is no dispute that plaintiff has been employed with defendant since 1993 and has worked as a juvenile probation officer (JPO) assigned to defendant's regional office in Akron since 1999. (Blashak Depo., pp. 20, 25.) According to plaintiff, at some point in 2012 or earlier she was diagnosed with and began treatment for attention deficit disorder. (Blashak Depo., pp. 106-107.) Plaintiff's disability discrimination claim was predicated, in part, upon allegations that in December 2012 defendant placed her on administrative leave and had her undergo an independent medical examination (IME) before she returned to work in February 2013. Defendant previously moved, without opposition, to dismiss as untimely any claim for disability discrimination based upon those events, and the court issued an entry dismissing any such claim on October 17, 2017.

{¶5} It is undisputed that plaintiff, citing her IME and placement on administrative leave, filed a charge of disability, age, and sex discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) in October 2013. (Blashak Depo., Ex. F.) The claims that remain for adjudication essentially provide that defendant subsequently retaliated against plaintiff for filing the EEOC charge and discriminated against her on the basis of a disability or perceived disability in various ways.

{¶6} The parties are in agreement that on May 15, 2015, plaintiff was issued a written reprimand for being late to a training session, although through the grievance process a settlement was reached on May 21, 2015, whereby the written reprimand was removed from her personnel file. (Blashak Depo., pp. 57-58.) According to plaintiff, on May 22, 2015, she broke a toe and consequently went on short term disability leave. (Blashak Depo., pp. 62, 64.) Plaintiff testified that she remained on short term disability when, sometime in August 2015, she received a notice to the effect that defendant intended to have a hearing on whether to effect an involuntarily disability separation from employment. (Blashak Depo, p. 65.) Plaintiff stated that she then contacted her

podiatrist and obtained a release to return to work, and, as a result, there was no hearing and she returned to work on August 17, 2015. (Blashak Depo., pp. 65-66.)

{¶7} Upon returning to work, plaintiff stated, Regional Administrator Joseph Marsilio informed her that, due to a pending investigation, she would not be assigned any parole cases and she was essentially placed on desk duty, checking email and answering the phone at the office she maintained at the Akron regional office. (Blashak Depo., pp. 37-38, 66-67.) Marsilio explained in deposition testimony that the investigation related to a complaint from a Mahoning County Juvenile Court judge who asked that plaintiff not be assigned to her courtroom. (Marsilio Depo., pp. 53-54, 57-59.) Plaintiff recounts that two days after returning to work, on August 19, 2015, she was injured in an automobile accident and consequently requested vacation leave because she had exhausted her sick leave, but the request was denied and she wound up taking two days of leave without pay. It is undisputed that on August 26, 2015, the EEOC issued a right-to-sue notice after determining there was no evidence to suggest plaintiff had been discriminated against. Defendant concluded its investigation in September 2015 without disciplining plaintiff, who was taken off desk duty and reassigned to parole cases to resume her normal work duties. (Blashak, p. 112; Response, p. 8.)

COUNT ONE: DISABILITY DISCRIMINATION

{¶8} "Under Ohio law, an employer may not discharge without just cause, refuse to hire or otherwise discriminate against an individual with respect to hire, tenure, terms, conditions or privileges of employment 'because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry' of that person." *Burns v. Ohio State Univ. College of Veterinary Med.*, 10th Dist. Franklin No. 13AP-633, 2014-Ohio-1190, ¶ 6, quoting R.C. 4112.02(A). The Supreme Court of Ohio has also "determined that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000e et seq., Title 42, U.S.Code, is generally applicable to cases involving alleged violations of

R.C. Chapter 4112." *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.*, 61 Ohio St.3d 607, 609-610, 575 N.E.2d 1164 (1991).

{¶9} "'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." *Dautartas v. Abbott Labs.*, 10th Dist. Franklin No. 11AP-706, 2012-Ohio-1709, ¶ 25, quoting *Ricker v. John Deere Ins. Co.*, 133 Ohio App.3d 759, 766, 729 N.E.2d 1202 (10th Dist.1998). Here, plaintiff's theory is that discriminatory intent may be established through the indirect method, which is subject to the burden shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Nist v. Nexeo Solutions, LLC*, 10th Dist. Franklin No. 14AP-854, 2015-Ohio-3363, ¶ 31.

{¶10} "Under *McDonnell Douglas*, a plaintiff must first present evidence from which a reasonable jury could conclude that there exists a prima facie case of discrimination." *Turner v. Shahed Ents.*, 10th Dist. Franklin No. 10AP-892, 2011-Ohio-4654, ¶ 11-12. "To establish a prima facie case of disability discrimination under R.C. 4112.02, a plaintiff must show that: (1) the employee was disabled, (2) that the employer took adverse employment action against the employee, which was caused, at least in part, by the employee's disability; and that (3) despite the disability, the employee can safely and substantially perform the essential functions of the job, with or without a reasonable accommodation." *Sheridan v. Jackson Twp. Div. of Fire*, 10th Dist. Franklin No. 08AP-771, 2009-Ohio-1267, ¶ 5.

{¶11} "If the plaintiff meets her initial burden, the burden then shifts to the defendant to offer 'evidence of a legitimate, nondiscriminatory reason for' the adverse action. * * * If the defendant meets its burden, the burden then shifts back to the plaintiff to demonstrate that the defendant's proffered reason was actually a pretext for unlawful discrimination." *Turner* at ¶ 14. "The ultimate burden of persuasion always remains with the plaintiff. * * * In order to show pretext, a plaintiff must show both that the reason

was false, and that discrimination was the real reason." *Ames v. Ohio Dept. of Rehab. & Corr.*, 2014-Ohio-4774, 23 N.E.3d 162, ¶ 27 (10th Dist.).

{¶12} Defendant argues that plaintiff cannot establish a prima facie case of disability discrimination because there was no materially adverse employment action. Since defendant's motion does not challenge the other parts of plaintiff's prima facie case, the court will not address them. Adverse employment actions generally entail a "'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 798 (6th Cir.2004), quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). "The adverse employment action must materially affect the terms and conditions of employment instead of being a mere inconvenience or alteration of responsibilities." *Turner* at ¶ 17. "Not everything that makes an employee unhappy or resentful is an actionable adverse action." *Canady v. Rekau & Rekau, Inc.*, 10th Dist. Franklin No. 09AP-32, 2009-Ohio-4974, ¶ 25.

{¶13} To establish an adverse employment action, plaintiff points to (1) the written reprimand she received for being late to a training session in May 2015; (2) the notice she received in August 2015, after having been on short-term disability leave since May 2015, informing her of defendant's intention to hold a hearing on whether to order an involuntary disability separation; (3) the period from August 17, 2015, to sometime in September 2015 during which she was on desk duty pending defendant's investigation into a complaint about her; and, (4) that on or about August 19, 2015, "she was denied the use of vacation time, in lieu of sick leave which she had exhausted due to a prior medi[c]al leave, for a two day medical related absence." (Plaintiff's Response, p. 11.)

{¶14} Regarding the written reprimand, there is no dispute that plaintiff received it after arriving 45 minutes late for a training session and that it was ultimately removed

from her personnel file after she filed a grievance through her union. There is no evidence that it caused plaintiff to lose any pay or endure any other materially adverse consequence. As such, the evidence before the court does not show that it constituted an adverse employment action. *See Creggett v. Jefferson Cty. Bd. of Edn.*, 491 Fed. Appx. 561, 566 (6th Cir.2012) ("A written reprimand, without evidence that it led to a materially adverse consequence such as lowered pay, demotion, suspension, or the like, is not a materially adverse employment action."); *see also Handshoe v. Mercy Med. Ctr.*, 34 Fed.Appx. 441, 446 (6th Cir.2002); *Fernandez v. Pataskala*, S.D.Ohio No. 2:05-CV-75, 2006 U.S. Dist. LEXIS 82136 (Nov. 9, 2006).

{¶15} Regarding the notice plaintiff received in August 2015 informing her that defendant intended to institute a hearing on whether to order an involuntary disability separation, it is undisputed that plaintiff had gone out on short-term disability with a broken toe in May 2015 and been on leave ever since. In her deposition, plaintiff explained how she felt the injury presented a challenge to the performance of her job duties over that time. (Blashak Depo., p. 117.) The Ohio Department of Administrative Services promulgated Ohio Admin.Code 123:1-30-01, et seq., under which defendant, upon giving an employee notice and an opportunity to be heard, may order an involuntary disability separation when an employee is unable to perform his or her essential job duties due to a disabling illness, injury or condition. As provided in Ohio Admin.Code 123:1-30-01, and as Marsilio explained in his deposition, an employee has the opportunity in this process to present evidence that she is fit to perform her job duties. (Marsilio Depo., p. 66.) Marsilio, who stated if any hearing had been held in this case he would have conducted it in his capacity as Regional Administrator, also explained that the process is not disciplinary in nature. (Marsilio Depo, pp. 64, 67.) Even if an employee is involuntarily separated, Ohio Admin.Code 123:1-30-01 includes provisions for reinstatement. It is difficult to view the notice issued to plaintiff as amounting to a threat of discharge, but even a threat of discharge alone is not an

adverse employment action. *Plautz v. Potter*, 156 Fed. Appx. 812, 817 (6th Cir.2005); *Thomas v. Potter*, 93 Fed. Appx. 686, 688 (6th Cir.2004). Here, after plaintiff received the notice from defendant, she obtained a certification from her podiatrist that she was fit for duty and she returned to work, whereupon the involuntary disability separation process ended without the need for a hearing. Plaintiff points to no evidence suggesting that she was subjected to any materially adverse consequences due to defendant having merely initiated the process. That being the case, the notice issued to plaintiff cannot rise to the level of an adverse employment action.

{¶16} Regarding plaintiff's placement on desk duty from August 17, 2015, to sometime in September 2015, pending defendant's investigation into a complaint about her from the Mahoning County Juvenile Court, plaintiff has not identified evidence showing that this involved any financial or other materially adverse consequences. While plaintiff asserts that she was substantially relieved of her normal work responsibilities during that time, it was a temporary reassignment that ended with her resuming all her normal work responsibilities without any loss of pay or other materially adverse consequence. Plaintiff points to her not having access to a state vehicle during this time, whereas she testified that in her normal work responsibilities she had access to a state vehicle "[t]o use for department work," yet during this time she was not assigned any department work that required her to travel outside the office. (Blashak Depo., p. 70.) And, when the investigation was over and plaintiff resumed her normal responsibilities, she was once again able to use a state vehicle. (Blashak Depo., p. 75.) As far as the investigation itself is concerned, "employer investigations into suspected wrongdoing by employees, standing alone, generally do not constitute adverse employment actions." *Arnold v. Columbus*, 515 Fed. Appx. 524, 531 (6th Cir.2013).

{¶17} Regarding the two days of vacation leave that plaintiff claims she was not permitted to take after being injured in an automobile accident on August 19, 2015, plaintiff concedes that she sought to take the vacation leave in lieu of sick leave

because she had exhausted all her sick leave. Plaintiff points to no evidence demonstrating that taking vacation leave in lieu of sick leave was a benefit to which she was entitled. To the contrary, in an affidavit Marsilio avers that defendant had a formal, written policy (a copy of which is attached to the affidavit) specifically prohibiting an employee from using vacation leave in lieu of sick leave unless the employee had less than one year of state service or the leave was used in conjunction with a valid Family and Medical Leave Act (FMLA) certificate, neither or which applied to plaintiff. Thus, it must be concluded that denying the request for vacation leave in lieu of sick leave did not represent a denial or material change of plaintiff's benefits.

{¶18} Accordingly, plaintiff has failed to demonstrate an adverse employment action and therefore has not demonstrated a prima facie case of disability discrimination. Furthermore, even if plaintiff could demonstrate a prima facie case of disability discrimination, defendant has presented evidence of legitimate, nondiscriminatory reasons for the alleged adverse employment actions.

{¶19} For the written reprimand, Charles Ford issued it because plaintiff was 45 minutes late to a training session in May 2015. (Blashak Depo., Ex. B.)

{¶20} For the hearing notice issued through the involuntary disability separation process in August 2015, Marsilio testified that it was issued after plaintiff had been off work for close to three months with a broken toe, so that it could be determined whether she would be able to return to her job, pursuant to the process laid out in Ohio Admin.Code 123:1-30-01, et seq.

{¶21} For the time when plaintiff was on desk duty pending the investigation from August 17, 2015, to sometime in September 2015, it is undisputed that defendant received a letter dated July 6, 2015, from Mahoning County Juvenile Court Judge Theresa Dellick complaining about plaintiff's work before her court and asking that plaintiff not be assigned to work there in the future (Marsilio Depo., Ex. 7.) Judge Dellick's letter, addressed to Marsilio, stated:

> With much reluctance and a heavy heart, I am writing this letter as a final resort. This Court is logging a complaint against your Parole Officer, Renee Blashak. Although personable, Ms. Blashak's lack of professionalism is unacceptable. Ms. Blashak works in the Akron Regional Office and has been assigned to Mahoning County Juvenile Court in the past. It has been brought to the Court's attention that Ms. Blashak may be reassigned to Mahoning County Juvenile Court.
>
> This Court respectfully requests that she not be reassigned here[.] Her work ethic is poor as she has not made any attempt to correct previous complaints made to the Akron regional office. The complaints include but are not limited to her failure to make personal contacts with her assigned parolees, coming unprepared to Court, her lack of current and relevant knowledge of assigned cases and her unprofessional work appearance. These behaviors are unacceptable for the standards set by the Court.
>
> Please accept this letter as a formal request not to have Renee Blashak reassigned to Mahoning County Juvenile Court.

Marsilio's uncontroverted testimony was that he had received several complaints about plaintiff from various court officials in addition to this letter. Marsilio recalled a deputy sheriff working in the Trumbull County Juvenile Court making a complaint about plaintiff's demeanor, which plaintiff's immediate supervisor dealt with. (Marsilio Depo., pp. 22, 54.) Marsilio recounted receiving a September 11, 2014 email from Judge Dellick, which she copied to several court officials, noting that defendant's employees needed to comply with the court's dress code or else they would not be permitted in the courtroom, and he stated that when he contacted Judge Dellick he learned that the only employee she was concerned with was plaintiff. (Marsilio Depo., p. 52, Ex. 6.) According to Marsilio, he spoke to Judge Dellick multiple times about concerns that she had with plaintiff and he also had conversations with at least four other officials from the Mahoning County Juvenile Court, including the court administrator and a magistrate, regarding their concerns about plaintiff, and plaintiff's direct supervisors were involved in responding to such concerns as well. (Marsilio Depo., pp. 21-24, Ex. 7.) Marsilio stated that there came a time when he temporarily

reassigned plaintiff off of some or all of her parole cases in Mahoning County, and that contemporaneously he and Ford worked with her to address the concerns that had been brought to their attention and help her transition back into regularly appearing at parole hearings in Mahoning County. (Marsilio Depo., pp. 58-59, 62-63.) Plaintiff too recalled Ford working with her to help her better interact with the court. (Blashak Dep., pp. 99-101.) Marsilio related, however, that Judge Dellick eventually called him and asked that plaintiff no longer be assigned to the court. (Marsilio Depo., p. 58, Ex. 7.) According to Marsilio, he then contacted his supervisor, Bureau Chief of Parole Kevin Shepherd, and a Labor Relations representative, Larry Blake, at defendant's central office, and they asked him to reach out to court officials and get documentation of their concerns. (Marsilio Depo., Ex. 7.) After he discussed the matter with Judge Dellick and a magistrate, Marsilio recounted, Judge Dellick responded with the July 6, 2015 letter. (Id.) Marsilio explained that when he saw the letter he became more concerned because the issues that had been raised in the past mostly pertained to plaintiff's demeanor and professionalism, but the letter went a step further in his view by raising criticisms about the way that plaintiff supervised youths. (Marsilio Depo., p. 62.) According to Marsilio, the judge's letter led to the investigation that defendant conducted during which plaintiff was on desk duty. (Marsilio Depo., p. 67.)

{¶22} Finally, for the denial of plaintiff's request to take vacation leave in lieu of sick leave on August 19, 2015, Marsilio's affidavit authenticates a copy of a policy prohibiting employees of defendant from taking such leave, notwithstanding some exceptions which were inapplicable here.

{¶23} Accordingly, there is evidence before the court that defendant had legitimate, nondiscriminatory reasons for taking what plaintiff alleges to be adverse employment actions. To show that an employer's proffered reason is pretextual, "a plaintiff must submit evidence that an employer's proffered reason (1) had no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was

insufficient to warrant the challenged conduct." *Hall v. Ohio State Univ. College of Humanities*, 10th Dist. Franklin No. 11AP-1068, 2012-Ohio-5036, ¶ 27. "Regardless of which option is chosen, the 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 him." *Knepper v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 12. "A plaintiff cannot establish that a proffered reason is pretext for discrimination unless the plaintiff shows '*both* that the reason was false, *and* that discrimination was the real reason.'" (Emphasis sic.) *Boyd v. Ohio Dept. of Mental Health*, 10th Dist. Franklin No. 10AP-906, 2011-Ohio-3596, ¶ 28, quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

{¶24} In arguing that defendant's reasons were pretextual, plaintiff contends that Marsilio "held a discriminatory animus that [plaintiff's] behavior from the time the IME was initiated in 2012 was due to some mental illness or psychiatric condition." (Response, p. 13.) The fact that defendant sent plaintiff for an IME in 2012, however, does not demonstrate that she was perceived as disabled, much less that Marsilio discriminated against her years later on the basis of a perceived disability. *See Dalton v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 13AP-827, 2014-Ohio-2658, ¶ 31. Plaintiff also asserts that Marsilio expressed a discriminatory animus in comments he allegedly made, including that "Renee is in a good mood today, she must have took her meds," and that he would keep plaintiff assigned to a particular case "because the mother was crazy, and [plaintiff] got along good with crazy." (Response, p. 2.) But, plaintiff stated that both comments occurred no later than 2010, if not earlier. (Blashak Depo., pp. 35-36, 40.) "Vague, ambiguous, or isolated comments cannot be used as direct evidence to establish that an adverse action was motivated by discriminatory intent." *Chapa v. Genpak, LLC*, 10th Dist. Franklin No. 12AP-466, 2014-Ohio-897, ¶ 90. Considering that these alleged statements were remote in time and unrelated to the

challenged actions, they are in the nature of stray remarks which do not demonstrate discriminatory animus. *See Id.* at ¶ 90-91; *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App.3d 770, 2003-Ohio-5340, 798 N.E.2d 1141, ¶ 47 (10th Dist.). Moreover, despite plaintiff's focus upon Marsilio, Marsilio's uncontroverted testimony was that he was not alone in having concerns about plaintiff, as her direct supervisors, her co-workers, and various court personnel raised concerns over the years.

{¶25} Plaintiff also argues that Marsilio "solicited" the letter from Judge Dellick and that the resulting investigation led to no discipline. (Response, p. 13.) Marsilio's testimony concerning the repeated complaints he received and how Judge Dellick came to send the letter is uncontroverted, however, as is the fact that the letter criticized plaintiff's job performance in a way that earlier complaints about her had not. Plaintiff does not point to evidence demonstrating that the ensuing investigation either had no basis in fact, did not actually motivate the investigation, or was insufficient to warrant the investigation. Plaintiff also contends that in general she was treated differently than other employees, but there is little in the way of specific evidence, and to characterize any such differences as evidence of discriminatory animus would be conjecture. In short, plaintiff has not met the ultimate burden of presenting evidence that disability discrimination "was the real reason for the employer's action." *Pla v. Cleveland State Univ.*, 10th Dist. Franklin No. 16AP-366, 2016-Ohio-8165, ¶ 22.

{¶26} Construing the evidence most strongly in favor of plaintiff, no reasonable finder of fact can conclude that the reasons proffered by defendant for the alleged adverse employment actions were merely pretext.

{¶27} Based upon the foregoing, defendant is entitled to judgment on Count One of the complaint.

COUNT TWO: RETALIATION

R.C. 4112.02 provides, in part:

"It shall be an unlawful discriminatory practice:

"* * *

{¶28} "(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code."

{¶29} "Absent direct evidence of retaliatory intent, Ohio courts analyze retaliation claims using the evidentiary framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 * * *." *Veal v. Upreach LLC*, 10th Dist. Franklin No. 11AP-192, 2011-Ohio-5406, ¶ 16. "Under that framework, a plaintiff bears the initial burden of establishing a prima facie case of retaliation. Specifically, the plaintiff must establish that (1) she engaged in a protected activity, (2) the defending party was aware that the claimant had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and (4) there is a causal connection between the protected activity and adverse action." *Id.*

{¶30} Defendant argues that plaintiff cannot establish that an adverse employment action was taken against her for purposes of a retaliation claim. "Plaintiff's burden of establishing a materially adverse employment action is 'less onerous in the retaliation context than in the anti-discrimination context.'" *Laster v. Kalamazoo*, 746 F.3d 714, 730 (6th Cir.2014), quoting *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 595-596 (6th Cir.2007). In contrast to a discrimination claim, "the 'adverse employment action' requirement in the retaliation context is not limited to an employer's actions that affect the terms, conditions, or status of employment, or those acts that occur in the workplace." *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 720 (6th Cir.2008), citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 2412-14, 165 L.Ed.2d 345 (2006). "The retaliation provision instead protects

employees from conduct that would have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.*, quoting *Burlington* at 2415.

{¶31} Regarding the written reprimand issued in May 2015, as previously stated it was removed from plaintiff's personnel file six days after it was issued through the grievance process and did not lead to any materially adverse consequences. This was the only written reprimand issued to plaintiff, as opposed to a pattern of intimidation through continually reprimanding her, for example. No further discipline resulted nor is there evidence it could have affected wages, professional advancement, or other future prospects. *See Taylor v. Geithner*, 703 F.3d 328, 338 (6th Cir.2013); *McDaniel v. Ohio Dept. of Rehab. & Corr.*, S.D.Ohio No. 2:14-CV-0122, 2015 U.S. Dist. LEXIS 162974 (Dec. 4, 2015). This lone written reprimand would not have dissuaded a reasonable worker from making a claim of discrimination.

{¶32} Regarding the notice plaintiff received in August 2015 informing her that defendant intended to institute a hearing on whether to order an involuntary disability separation, it is undisputed that plaintiff had gone out on short-term disability for an injury in May 2015 and been on leave ever since. Defendant issued the notice pursuant to the process in Ohio Admin.Code 123:1-30-01, et seq., for determining whether an injured employee is able to perform his or her essential job duties, and before a hearing was ever held plaintiff obtained a certification from her podiatrist and returned to work. The notice was not disciplinary in nature and merely stated the possibility of an involuntary separation if plaintiff was unable to return to work, as well as notifying her of the process and her rights. Accordingly, it must be concluded that the notice was not sufficient to dissuade a reasonable person from making or supporting a charge of disability discrimination. *See Spence v. Donahoe*, 515 Fed.Appx. 561, 573 (6th Cir.2013); *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir.1999).

{¶33} Regarding plaintiff's placement on desk duty pending the investigation into the complaint from the Mahoning County Juvenile Court, "[a]n investigation by itself, as

opposed to the results of an investigation, does not sound like an adverse employment action." *Ellis v. Shelby Cty. Land Bank Dept.*, 6th Cir. No. 12-6312, 2013 U.S. App. LEXIS 22306 (Oct. 31, 2013). This is particularly true when the investigation resulted in plaintiff returning to her normal responsibilities with no discipline. While it has been held that even a suspension with pay does not rise to the level of an adverse employment action, in this case plaintiff was not suspended amid the investigation and continued receiving full pay. *See Terry v. Donahoe*, S.D.Ohio No. 1:12cv393, 2014 U.S. Dist. LEXIS 43487 (Mar. 31, 2014), citing *Jackson v. Columbus*, 194 F.3d 737 (6th Cir.1999).

{¶34} Regarding the two days of vacation leave that plaintiff claims she was not permitted to take after being injured in an automobile accident on August 19, 2015, as previously explained, defendant had a formal, written policy prohibiting employees from using vacation leave in lieu of sick leave, which plaintiff was attempting to do in this situation. Thus, taking vacation leave in lieu of sick leave was not a benefit to which she was entitled, and the decision to deny plaintiff's request to do just that in no way represented a denial or material change of her benefits.

{¶35} Considering the facts in a light most favorable to plaintiff, the only reasonable conclusion to be drawn is that the conduct she cites as adverse employment actions is insufficient to dissuade a reasonable person from making a charge of discrimination.

{¶36} Defendant also argues that even if plaintiff could show that she was subjected to an adverse employment action for purposes of her retaliation claim, no causal connection between such action and her filing the EEOC charge can be established. "To prevail on a retaliation claim, a plaintiff must 'establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.'" *EEOC v. Ford Motor Co.*, 782 F.3d 753, 770 (6th Cir.2015). That means plaintiff "must present evidence from which a reasonable jury could find that [defendant] would not

have [taken the allegedly adverse employment actions] if she had not made her charge." *Id.*

{¶37} "Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation. But where some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality." *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir.2008). "Such additional evidence might include treatment different from that given to similarly situated employees who did not engage in protected activity or increased scrutiny after the plaintiff complained." *Allen v. Ohio Dept. of Job & Family Servs.*, 697 F.Supp.2d 854, 897 (S.D.Ohio 2010). Conclusory allegations and subjective beliefs are insufficient to establish a claim of retaliation. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir.1992).

{¶38} It is undisputed that plaintiff filed the EEOC charge in October 2013. Defendant is presumed to have received statutory notice of the charge soon after it was filed. *See Hartman v. Ohio Dept. of Transp.*, 2016-Ohio-5208, 68 N.E.3d 1266, ¶ 32 (10th Dist.). The first of the alleged adverse employment actions that plaintiff points to occurred in May 2015, with the issuance of the written reprimand. (Response, pp. 11, 14.) Given that the protected activity and allegedly retaliatory actions were separated by more than a year-and-a-half, causality cannot be shown by temporal proximity alone. *See Miller v. Canton*, 319 Fed.Appx. 411, 422 (6th Cir.2009) ("Where the protected activity and allegedly retaliatory action are separated by six months, however, more than temporal proximity must be shown to establish a causal connection."); *Wilson v. Cleveland Clinic Found.*, 579 Fed.Appx. 392, 399-400 (6th Cir.2014) (9-month gap

between filing EEOC charge and suspension was too attenuated, standing alone, to sustain a causal link).

{¶39} Beyond temporality, in arguing there was a causal connection plaintiff again points to Marsilio's treatment of her (Response, p. 14), but rather than draw a distinction between such treatment before and after the EEOC charge was filed, Blashak testified that it was the same throughout the whole time Marsilio was the regional administrator. (Blashak Depo., pp. 56, 102.) Hasani Ngozi, plaintiff's local union representative, stated in deposition testimony that plaintiff's relationship with management seemed to go "downhill" starting around 2003 or 2004, predating Marsilio. (Ngozi Depo., p. 40.) Ngozi did recall that after plaintiff returned from the IME and administrative leave in February 2013 she complained to him about management scrutinizing her more, but that too predated the EEOC charge. (Ngozi Depo., p. 33.) And, when asked whether plaintiff just took issue with management more than other JPOs or if management actually treated her differently than other JPOs, Ngozi's response was that plaintiff would not put up with things that others would. (Ngozi Depo., p. 43.)

{¶40} The written reprimand that plaintiff received for being 45 minutes late to a training session was issued not by Marsilio, but by Ford, and while plaintiff testified in conclusory fashion that other employees were late to meetings and not disciplined, she could not provide any specifics. (Blashak Depo., p. 59.) Nor is there evidence establishing that other employees were treated differently relative to the involuntarily disability separation hearing process or the policy against taking vacation leave in lieu of sick leave. In terms of what prompted the investigation during which plaintiff was on desk duty, plaintiff cannot point to anything other than Judge Dellick's letter as the reason and she admitted that she is not aware of other JPOs having such complaints made about them. (Blashak Depo., p. 99.) Indeed, Marsilio said no other JPOs were the subject of complaints about their behavior in courtrooms or their interactions with

judges and court staff. (Marsilio Depo., p. 31.) Ngozi too stated that he was not aware of any JPO other than plaintiff having such issues. (Ngozi Depo., p. 29.)

{¶41} Upon review, it is apparent that a causal connection cannot be shown between the claimed adverse employment actions and the filing of the EEOC charge for purposes of a prima facie case of retaliation. And, even if plaintiff was able to support a prima facie case, as explained above in relation to the discrimination claim, it has been demonstrated that defendant had legitimate, nondiscriminatory reasons which plaintiff cannot establish were pretext.

{¶42} Accordingly, defendant is entitled to judgment on Count Two of the complaint.

CONCLUSION

{¶43} Based upon the foregoing, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted and judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

[Cite as *Blashak v. Dept. of Youth Servs.*, 2019-Ohio-509.]

RENEE A. BLASHAK Plaintiff v. OHIO DEPARTMENT OF YOUTH SERVICES Defendant	Case No. 2017-00695JD Judge Patrick M. McGrath Magistrate Robert Van Schoyck JUDGMENT ENTRY

{¶44} 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, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. As a result, defendant's motion for summary judgment is GRANTED and judgment is hereby 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

Filed January 3, 2019
Sent to S.C. Reporter 2/13/19