[Cite as *Turner v. Shahed Ents.*, 2011-Ohio-4654.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kathleen Turner,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-892 (C.P.C. No. 07CVH-09-12636)
Shahed Enterprises,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 15, 2011

The Isaac Firm L.L.C., *Kendall D. Isaac* and *Lasheyl Stroud*, for appellant.

Michael D. Christensen Law Offices, *LLC*, and *Chanda L. Higgins*, for appellee

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Kathleen Turner ("appellant"), appeals from the summary judgment granted by the Franklin County Court of Common Pleas in favor of defendant-appellee, Shahed Enterprises ("appellee"). For the reasons that follow, we affirm the judgment of the trial court.

{¶2} This matter concerns appellant's former employment at a Popeye's Chicken and Biscuit franchise ("Popeye's"), which was owned by appellee. In April 2007, appellant submitted an application for employment in which she disclosed the fact that

she had prior criminal convictions. Appellant received an interview that was conducted by one of appellee's managers, Japhet Ramirez ("Ramirez"). During this interview, Ramirez questioned appellant about her criminal history. In response, appellant indicated that her prior convictions were drug related. Ramirez asked appellant to provide evidence that she was no longer using drugs as a precondition to employment. Appellant provided results from drug screen tests, which showed that she was in fact drug free. Appellant was hired and began work in late May 2007.

{¶3} On June 17, 2007, $50 went missing from the manager's desk at Popeye's. Assistant manager, Tierra Scales ("Scales"), searched through the bags, pockets, and shoes of the employees who were then working. An employee informed Scales that he had seen appellant take the money and put it into her pants. When Scales approached appellant with this information, appellant offered to remove her clothes in order to demonstrate that she did not have the money. Scales took appellant into the restroom, and appellant undressed. No money was found on her person. The police had also been called in regards to the missing money. Upon arriving at the site, a police officer placed appellant in the back of a cruiser, questioned her, and then released her without filing any charges. Later that day, the missing money was found behind a microwave in the food prep area. Appellant and one other employee were working in the food prep area when the money went missing. However, all other employees had access to the food prep area.

{¶4} On June 18, 2007, appellant telephoned Popeye's in order to determine what shift she was scheduled to work. During this conversation, she was informed that she was terminated.

{¶5} On September 19, 2007, appellant filed a complaint against appellee. Of relevance to this appeal, appellant's complaint presented claims for disability discrimination and tortious invasion of privacy. Appellee filed a motion for summary judgment, which the trial court granted. Appellant then filed a motion to dismiss appellee's counterclaim, which the trial court granted. This timely appeal followed and presents the following assignments of error:

> 1. [The] Judge erred in dismissing [appellant's] ORC 4112.02 disability discrimination claim.
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> 2. [The] Judge erred in dismissing [the] tort[i]ous invasion of privacy claim.

{¶6} These assignments of error challenge the trial court's decision to grant summary judgment in favor of appellee and will be addressed in turn. At issue, therefore, is whether the trial court erred in granting summary judgment.

{¶7} An appellate court reviews de novo a trial court's decision to grant summary judgment. *Helton v. Scioto Cty. Bd. of Commrs*. (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. 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. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶8} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could 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 most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶9} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶10} In her first assignment of error, appellant argues that the trial court erred in granting summary judgment on her disability discrimination claim. We disagree.

{¶11} Discrimination may be demonstrated through either direct or indirect evidence. *Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125, 128-29, 1996-Ohio-307. "[A] plaintiff may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that an employer more likely than not was

motivated by discriminatory intent." *Mauzy v. Kelly Servs*., *Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265, paragraph one of the syllabus. In the absence of direct evidence, discrimination claims are subject to a version of the burden shifting analysis set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817. See *Hood v. Diamond Products, Inc.*, 74 Ohio St.3d 298, 1996-Ohio-259; see also *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, ¶9.

{¶12} 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. *Lindsay v. Yates* (C.A.6, 2009), 578 F.3d 407, 415, citing *Blair v. Henry Filters, Inc*. (C.A.6, 2007), 505 F.3d 517, 524. Both the Ohio Civil Rights Act and the Americans With Disabilities Act ("ADA") prohibit discrimination on the basis of a disability. See *Niles v. Natl. Vendor Servs.*, 10th Dist. No. 10AP-128, 2010-Ohio-4610. Ohio's statute is modeled after the ADA, and Ohio courts may use case law interpreting the ADA as guidance in analyzing claims under the state statute. *Pinchot v. Mahoning Cty. Sheriff's Dept*., 164 Ohio App.3d 718, 722, 2005-Ohio-6593; see also C*olumbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 573, 1998-Ohio-410.

{¶13} To establish a prima facie case for disability discrimination, a plaintiff must demonstrate: (1) that she was disabled; (2) that an adverse employment action was taken at least in part because of the disability; and (3) that she could safely and substantially perform the essential functions of the job despite her disability. *Hood* at 302; see also *Pinchot* at 722; and *Tibbs v. Ernst Enterprises., Inc.*, 2d Dist. No. 22850, 2009-Ohio-3042, ¶22.

{¶14} 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. Id. 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. Id. When presented with a motion for summary judgment on such claims, a court must consider "whether there is sufficient evidence to create a genuine dispute at each stage of the *McDonnell Douglas* inquiry." *Cline v. Catholic Diocese of Toledo* (C.A.6, 2000), 206 F.3d 651, 661.

{¶15} In the instant matter, appellant argues that she was a former drug addict who had successfully completed rehabilitation programs and was therefore afforded the safe harbor protections set forth in the Ohio Civil Rights Act and the ADA. Appellant argues that she suffered from disparate treatment discrimination in two distinct ways. First, she argues that she was required to submit to a drug test prior to receiving an offer for employment. Second, she argues that she was the only employee who was terminated because $50 went missing. For these reasons, appellant argues that summary judgment was improperly granted.

{¶16} The Ohio Civil Rights Act and the ADA both set parameters with respect to the use of illegal drugs and controlled substances. See R.C. 4112.02(Q); see also 42 U.S.C. 12114. Specifically, they exclude from protection any purported disability caused by the use of illegal drugs and controlled substances when an employer acts in response to such use. See R.C. 4112.02(Q)(1)(a); see also 42 U.S.C. 12114(a). The Acts also establish safe harbor provisions, which afford protections for individuals who have completed supervised drug rehabilitation programs and are currently no longer engaging

in the use of illegal drugs and controlled substances. See R.C. 4112.02(Q)(1)(b)(i); see also 42 U.S.C. 12114(b)(1). Individuals who are covered by the safe harbor provisions are protected from adverse employment actions. See *Corr. Corp. of America v. Youngstown Human Relations Comm.*, 139 Ohio App.3d 58, 2000-Ohio-2639; see also *Zenor v. El Paso Healthcare Sys., Ltd.*, (C.A.5, 1999), 176 F.3d 847.

{¶17} With respect to the purported discrimination in relation to the drug test, we see no adverse employment action. The second element of appellant's prima facie case is lacking. "An adverse employment action involves 'significantly diminished material responsibilities,' including 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices that might be unique to a particular situation.' " *Farris v. Port Clinton City School Dist.*, 6th Dist. No. OT-05-041, 2006-Ohio-1864, ¶67, quoting *Kocsis v. Multi-Care Mgmt., Inc.* (C.A.6, 1996), 97 F.3d 876, 886. The adverse employment action must materially affect the terms and conditions of employment instead of being a mere inconvenience or alteration of responsibilities. Id. citing *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App.3d 715.

{¶18} Moreover, it is neither a violation of the ADA nor of R.C. 4112.02 for an employer to adopt and administer reasonable policies and procedures, including drug testing, in order to ensure that safe harbor individuals are no longer engaging in the use of illegal drugs and controlled substances. See R.C. 4112.02(Q)(2)(a); see also 42 U.S.C. 12114(b). Indeed, "Congress intended to ensure that employers would be able to 'discharge or deny employment to persons who illegally use drugs on that basis, without

fear of being held liable for discrimination.' " *Shafer v. Preston Mem. Hosp. Corp.* (C.A.4, 1997), 107 F.3d 274, 279, quoting H.R. Conf. Rep. No. 101-596, at 64, reprinted in 1990 U.S.C.C.A.N. 267, 573. For these reasons, appellant's first contention with regard to the purported disability discrimination fails.

{¶19} With respect to appellant's termination, appellant has failed to demonstrate that appellee's legitimate, nondiscriminatory reason for terminating appellant was a mere pretext. Assuming, for the sake of argument, that appellant met her initial burden under *McDonnell Douglas* in regards to her termination, appellee indicated that appellant was terminated because of the attempted theft that occurred on June 17, 2007. Again, at least one employee allegedly saw appellant put the missing money into her pants. The money was later found in the food prep area where appellant had been working. While the record demonstrates that the food prep area was accessible to all employees, the owner of the Popeye's franchise, Hasan Shahed, explained that appellant was fired because he believed she had been involved in the attempted theft. In response to this explanation, appellant did nothing more than present bare, legal conclusions that this reason was a pretext for impermissible discrimination. More is required in response to a properly supported summary judgment motion. Indeed, based upon the record before us, there is no genuine issue of material fact with respect to the pretext component in the *McDonnell Douglas* paradigm. See *Cline* at 661. For this reason, appellant's second contention with regard to the purported disability discrimination fails. We therefore find no error in the trial court's decision to grant summary judgment on this claim.

{¶20} By way of her second assignment of error, appellant argues that the trial court erred in granting summary judgment on her invasion of privacy claim. Again, we disagree.

> An actionable invasion of the right of privacy is [1] the unwarranted appropriation or exploitation of one's personality, [2] the publicizing of one's private affairs with which the public has no legitimate concern, * * * [3] the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.
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> * * *
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> [or] [4] [the publicizing of a matter concerning another that places the other before the public in a false light, so long as certain conditions are met].

Welling v. Weinfeld, 113 Ohio St.3d 464, 2007-Ohio-2451, ¶15, 61. Appellant classifies her claim as the third type, or an invasion of her seclusion.[1]

{¶21} An invasion of seclusion implicates an individual's reasonable expectation of privacy and seclusion. *Sowards v. Norbar, Inc*. (1992), 78 Ohio App.3d 545, 555, citing *Estate of Leach v. Shapiro* (1984), 13 Ohio App.3d 393. To establish a wrongful intrusion, a plaintiff must demonstrate that she had a reasonable expectation of privacy in the area allegedly intruded. *Olson v. Holland Computers*, *Inc.*, 9th Dist. No. 06CA008941, 2007-Ohio-4727, ¶18, citing *Peitsmeyer v. Jackson Twp. Bd. of Trustees*, 10th Dist. No. 02AP-1174, 2003-Ohio-4302, ¶26. In other words, there is no wrongful intrusion where there is no reasonable expectation of privacy.

[1] In this appeal, appellant also presents a publicity claim under the second type of invasion of privacy. However, nowhere in appellant's complaint is such a claim raised. Because the invasion of privacy encompasses four distinct torts and appellant never raised a publicity claim, we find that appellant has waived such an argument. See *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163, 166.

{¶22} Based upon the undisputed evidence, appellant voluntarily undressed in front of an assistant manager, while in a private bathroom, in order to show that she did not have the missing money on her person. Nobody asked her to undress. Rather, appellant was instructed that she did not have to undress, and she insisted in an attempt to exonerate herself. The expectation of privacy appellant now seeks to protect was lost when she undressed on her own volition. See *Miller v. Cincinnati Children's Hosp. Med. Ctr.*, 1st Dist. No. C-050738, 2006-Ohio-3861, ¶17 (analyzing the privacy interests where plaintiff openly discussed purported private matters with co-workers and overall community in general). As a result, we find no error in the trial court's decision to grant summary judgment on appellant's invasion of privacy claim.

{¶23} Based upon the foregoing, we overrule appellant's two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and TYACK, JJ., concur.

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