

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| Sidney Hardgrow, Sr., | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 11AP-919 (Ct. of Cl. No. 2010-07512) |
| Department of Rehabilitation and Correction, | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |
| | : | |

D E C I S I O N

Rendered on June 19, 2012

Sidney Hardgrow, Sr., pro se.

*Michael DeWine, Attorney General, and Amy S. Brown, for
appellee.*

APPEAL from the Court of Claims of Ohio.

BRYANT, J.

{¶ 1} Plaintiff-appellant, Sidney Hardgrow, Sr., appeals from a judgment of the Court of Claims of Ohio granting the summary judgment motion of defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"). Plaintiff assigns a single error:

The [Court of Claims] should not have granted summary judgment to defendant as there were triable issues of fact.

Because plaintiff failed to submit admissible evidence establishing a genuine issue of material fact to be resolved at trial, and ODRC is entitled to judgment on the facts presented, we affirm.

I. Facts and Procedural History

{¶ 2} Plaintiff is a former employee of ODRC's Richland Correctional Institution ("RCI") in Mansfield, Ohio. After joining RCI in 1986 as a corrections officer, plaintiff was first promoted to corrections sergeant in 1998, to corrections lieutenant in 2000, and, finally, to corrections captain in 2003. Plaintiff left RCI on January 31, 2008, the cause being the subject of his appeal.

{¶ 3} Plaintiff, who is African-American, was 55 years old and coping with several medical issues prior to and at the time of his separation from RCI in January 2008. In addition to ongoing struggles with hypertension and diabetes, plaintiff suffered a stroke in January 2007, requiring him to take three months of disability leave. Upon his return in April of that year, plaintiff submitted to ODRC "two documents from his physician indicating that he was able to return to his normal job duties without any restrictions." (R. 52, exhibit A, Scruggs Affidavit, ¶ 4.)

{¶ 4} Several months later, on August 23, 2007, plaintiff had a heated argument with Larry Kenney, Jr., one of the corrections officers under his supervision, while both were on duty at RCI. Kenney later reported plaintiff assaulted him during the argument. An on-site nurse subsequently examined both men and documented scratches found on Kenney's upper chest. Plaintiff, Kenney, and two corrections officers who were present for some portion of the exchange submitted incident reports detailing the altercation. One of those officers reported that he witnessed plaintiff place his hands on Kenney.

{¶ 5} ODRC assigned employee Brett Perdue to conduct an internal investigation into the incident. Perdue reviewed the incident reports, medical examination reports, and photographs. He also interviewed both parties to the altercation, during which plaintiff admitted to pushing Kenney but in self-defense. After completing his investigation, Perdue concluded sufficient evidence substantiated the allegation of plaintiff's misconduct to warrant a hearing. A hearing before ODRC's hearing officer, Dennis Baker, resulted in a decision finding "just cause" to discipline plaintiff. RCI's warden determined the

appropriate discipline was to demote plaintiff from corrections captain to corrections lieutenant.

{¶ 6} At a November 29, 2007 meeting, Labor Relations Officer Charles Scruggs informed plaintiff, orally and in a written Order of Reduction, of his demotion. Plaintiff also received a document containing "Important Instructions to the Employee," which advised that if plaintiff wished to appeal the decision to discipline him, then he had to file his written appeal with the State Personnel Board of Review. Plaintiff did not appeal the decision.

{¶ 7} Although he was given a date to return to RCI in his new position as a corrections lieutenant, plaintiff never returned to work after his meeting with Scruggs. (R. 52, exhibit A, Scruggs Affidavit, ¶ 10.) Instead, he submitted his notice of resignation on January 31, 2008, giving his reasons as "unfair treatment [and] hostile environment." (Defendant's Motion for Summary Judgment, exhibit No. 16.) He followed with a pro se complaint against ODRC in the Court of Claims on June 26, 2008, which he voluntarily dismissed, without prejudice, on December 18, 2009. On May 24, 2010, plaintiff refiled his pro se complaint against ODRC and several department employees, seeking damages for intentional infliction of emotional distress, discrimination based on disability, age, and race, breach of implied contract, promissory estoppel, hostile work environment, sexual harassment, and slander and libel. Pursuant to R.C. 2743.02(E), the individuals were dismissed as parties to the action.

{¶ 8} On August 8, 2011, ODRC filed a motion for summary judgment on all claims pursuant to Civ.R. 56(B). To support its motion, ODRC submitted the incident reports from the employees who either witnessed or were parties to the August 23, 2007 altercation, the medical report and photographs of Kenney, Perdue's report finding evidence of misconduct sufficient to hold a disciplinary hearing, and the hearing officer's subsequent report finding just cause for plaintiff's discipline.

{¶ 9} ODRC also submitted the affidavit of Scruggs who, as the labor relations officer at RCI, stated he was familiar "with the underlying facts of this lawsuit" and had "personally reviewed [plaintiff's] personnel and disciplinary files." (R. 52, exhibit A, Scruggs Affidavit, ¶ 2.) Among the matters Scruggs addressed in his affidavit were the August 23 incident, the internal investigation and pre-disciplinary hearing process, the

resulting decision to demote plaintiff, and Scruggs' subsequent meeting with plaintiff where, according to Scruggs, plaintiff said to him, "I cannot believe this, I am not going to work for any of you mother fuckers." (R. 52, exhibit A, Scruggs Affidavit, ¶ 9.)

{¶ 10} Plaintiff submitted two responses to ODRC's motion for summary judgment. Neither directly addressed ODRC's evidence; nor did plaintiff submit any Civ.R. 56(C) evidence that ODRC had not already submitted with its summary judgment motion. Instead, plaintiff highlighted portions of the evidence ODRC submitted and included in his memorandum opposing ODRC's summary judgment motion unsworn comments attributed to Kenney and others that plaintiff suggests were aimed at compelling plaintiff to retire, as well as several of his own unsworn statements deriding the character and actions of many RCI co-workers.

{¶ 11} The Court of Claims granted ODRC's motion on all claims, entering final judgment against plaintiff on September 27, 2011. The court stated: "Concerning plaintiff's allegation that he suffered an adverse employment action in the form of a constructive discharge, * * * [t]he only reasonable conclusion to be drawn from the uncontested affidavit testimony of Scruggs is that plaintiff was not constructively discharged, but instead voluntarily resigned his employment. Further, to the extent that plaintiff's demotion constituted an adverse employment action, it is only reasonable to conclude that [ODRC] had legitimate, non-discriminatory reasons for taking such action. Accordingly, plaintiff's claims of discrimination must fail as a matter of law." (Decision, 4-5.)

II. Assignment of Error

{¶ 12} Because plaintiff's assignment of error asserts the Court of Claims wrongly granted summary judgment to ODRC but addresses only his disability discrimination claim, we consider his assignment of error only in that context. *See Michael v. Whitehall*, 134 Ohio App.3d 719, 721 (10th Dist.1999), citing App.R. 12(A)(2) and 16(A)(7).

A. Standard of Review

{¶ 13} Appellate review of summary judgments is de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (9th Dist.1988). We stand in the shoes of the Court of Claims, conduct an independent review of the record, and affirm the Court of Claims' judgment if any of the grounds the movant raised in the Court of Claims is found

to support the court's judgment, even if the Court of Claims failed to consider those grounds. *See Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996); *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 14} Summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 65-66 (1978).

{¶ 15} The party seeking summary judgment initially bears the burden of informing the Court of Claims of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher* at 293. The moving party may not fulfill its initial burden simply by making a conclusory assertion that the non-moving party has no evidence to prove its case. *Id.* Rather, the moving party must support its motion by pointing to some evidence of the type set forth in Civ.R. 56(C), which affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claims. *Id.*

{¶ 16} If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. *Id.* Once the moving party satisfies its initial burden, the non-moving party bears the burden of offering specific facts showing that a genuine issue remains for trial. *Id.* The non-moving party may not rest upon the mere allegations and denials in the pleadings but, instead, must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. Civ.R. 56(E); *Henkle v. Henkle*, 75 Ohio App.3d 732, 735 (12th Dist.1991).

B. Disability Discrimination Claim Under R.C. 4112.02

{¶ 17} The issue plaintiff raises on appeal is grounded in R.C. 4112.02, which prohibits, among others, disability discrimination in employment situations. R.C. 4112.02(A) defines a discriminatory practice, making it unlawful for any employer, "because of the [handicap] 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."

{¶ 18} To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent. *Gismondi v. M & T Mtge. Corp.*, 10th Dist. No. 98AP-584 (Apr. 13, 1999). Discriminatory intent may be proven by either direct or indirect evidence. *Id.* Plaintiff does not suggest the record contains direct evidence of discrimination. Rather, he contends "the trier of fact could infer that discrimination was the real reason for the action" ODRC took against him. (Appellant's Brief, 4.)

{¶ 19} Where, as here, a plaintiff relies on indirect evidence, discrimination claims are subject to a version of the burden shifting analysis the United States Supreme Court described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, ¶ 9. Under the three-part framework *McDonnell Douglas* articulated, a plaintiff must first present evidence from which a reasonable trier of fact could find a prima facie case of discrimination. *Lindsay v. Yates*, 578 F.3d 407, 415 (6th Cir.2009), citing *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 524 (6th Cir.2007). A prima facie case for disability discrimination in employment situations includes evidence that: (1) plaintiff was disabled; (2) ODRC took adverse employment action in part because of the disability; and (3) plaintiff could safely and substantially perform the essential functions of the job despite his disability. *Caldwell v. Ohio State Univ.*, 10th Dist. No. 01AP-997, 2002-Ohio-2393, ¶ 74, citing *Hood v. Diamond Prods., Inc.*, 74 Ohio St.3d 298 (1996), paragraph one of the syllabus.

{¶ 20} Once a plaintiff establishes a prima facie case of disability discrimination, "the burden then shifts to the employer to set forth some legitimate, nondiscriminatory reason for the action taken." *Hood* at 302, citing *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 197 (1981). "Legitimate, nondiscriminatory reasons for the action taken by the employer may include * * * the inability of the employee [to] perform, with reasonable accommodations, the essential functions of the job in question." *Id.* "[I]f the employer establishes a nondiscriminatory reason for the action taken, then the employee * * * must demonstrate that the employer's stated reason was a pretext for impermissible discrimination." *Id.*

{¶ 21} Because plaintiff's inability to create a genuine issue of material fact concerning the second prong of the *Hood* three-pronged test resolves his appeal, we address it first. To meet his burden under the second prong, plaintiff was obligated to present evidence that ODRC took adverse employment action against him at least in part because of his disability. An adverse employment action is "a materially adverse change in the terms or conditions of [the plaintiff's] employment." *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 593 (6th Cir.2007). To that end, plaintiff claimed "he was 'constructively terminated' on the basis of his disability" on January 31, 2008. (Appellant's brief, 2.)

{¶ 22} "The test for determining whether an employee was constructively discharged is whether the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578 (1996), paragraph four of the syllabus. Courts apply an objective test to determine whether a constructive discharge occurred, seeking to ascertain whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent. *Risch v. Friendly's Ice Cream Corp.*, 136 Ohio App.3d 109, 112 (1st Dist.1999). No single factor determines the issue. *Baeer v. Scotts Co.*, 10th Dist. No. 01AP-323, 2001-Ohio-3978, ¶ 7, citing *Mauzy* at 589 (considering reductions in sales territory, poor performance evaluations, criticism in front of co-employees, inquiries about retirement intentions, and expressions of a preference for employees outside the protected group).

{¶ 23} In its motion for summary judgment, ODRC presented evidence indicating the only change in plaintiff's work environment was his demotion, and ODRC presented additional evidence regarding the reason for plaintiff's demotion: his altercation at work. Nothing in the evidence suggested termination was imminent. Plaintiff did not respond with any Civ.R. 56(C) evidence suggesting his work environment was intolerable. Instead, plaintiff simply claimed he did not return to work after his meeting with Scruggs "because of the threats by Co. Kenney and the union that they would lie on me again if came back to work," and he had "witnesses that will testify to that fact." (Response to Motion for Summary Judgment, 1.) Although plaintiff also listed several former colleagues, along with non-specific comments attributable to each, his unsworn statement does not qualify

as Civ.R. 56(C) evidence, with the result that plaintiff failed to create a genuine issue of material fact regarding his work environment as it pertains to constructive discharge.

{¶ 24} Although plaintiff failed to present evidence to support his claim that ODRC constructively discharged him, a demotion itself can also be an adverse employment action for purposes of R.C. Chapter 4112. *Turner v. Shahed Ents.*, 10th Dist. No. 10AP-892, 2011-Ohio-4654, ¶ 17, citing *Farris v. Port Clinton City School Dist.*, 6th Dist. No. OT-05-041, 2006-Ohio-1864, ¶ 67, quoting *Kocsis v. Multi-Care Mgt., Inc.*, 97 F.3d 876, 886 (6th Cir.1996) (noting "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.'").

{¶ 25} Even so, plaintiff does not satisfy the second requirement of the *Hood* test unless he produced Civ.R. 56(C) evidence indicating his disability, at least in part, motivated ODRC's decision to demote him. ODRC presented evidence plaintiff was demoted for just cause; plaintiff submitted no Civ.R. 56(C) evidence to contest ODRC's evidence. Instead, plaintiff offered a conclusory unsworn statement that although ODRC "sought to give reasons for the adverse employment decision[,] [t]hat, however, simply raised an issue of pretext on its face." (Appellant's brief, 4.)

{¶ 26} In the final analysis, plaintiff failed to present evidence creating a genuine issue of material fact for a prima facie case of disability discrimination, as he failed to satisfy the second prong of *Hood*. ODRC thus was entitled to judgment as a matter of law on plaintiff's claim of disability discrimination. The Court of Claims did not err in granting summary judgment in favor of ODRC.

{¶ 27} Although the argument does not fall under his assigned error, plaintiff also contends "the Defense did not provide the information that the Plaintiff requested" at the trial level. (Appellant's brief, 3.) In particular, plaintiff identifies incident reports about Corrections Officers Spears and Kenney regarding a write-up plaintiff gave them for parking Spears' motorcycle by the entrance doors on the wrong side of the homeland security barriers. Plaintiff apparently suggests ODRC avoided providing information and documentation that would indicate other employees were treated more favorably or his

own treatment was the result of retaliation for reporting the failure of other employees to comply with applicable rules.

{¶ 28} "The remedy for a party that must respond to a motion for summary judgment prior to completion of adequate discovery is to file a motion, pursuant to Civ.R. 56(F), seeking to have the [Court of Claims] stay ruling on the motion pending completion of the required discovery." *BMI Fed. Credit Union v. Burkitt*, 10th Dist. No. 09AP-1024, 2010-Ohio-3027, ¶ 17, citing *Morantz v. Ortiz*, 10th Dist. No. 07AP-587, 2008-Ohio-1046. When a party fails to file a motion pursuant to Civ.R. 56(F), that party fails to preserve his rights on appeal, and the trial court does not err in determining the summary judgment motion. *Taylor v. XRG, Inc.*, 10th Dist. No. 06AP-839, 2007-Ohio-3209, ¶ 17.

{¶ 29} Plaintiff did not file a motion or an affidavit under Civ.R. 56(F) stating additional discovery was essential to his response to ODRC's summary judgment motion. Nor does his status as a pro se litigant excuse him from complying with the same rules as those whom counsel represents. *See Hardy v. Belmont Correctional Inst.*, 10th Dist. No. 06AP-116, 2006-Ohio-3316, ¶ 9, citing *Sabouri v. Ohio Dept. of Job & Family Servs.*, 145 Ohio App.3d 651, 654 (10th Dist.2001). Because he did not avail himself of the remedy Civ.R. 56(C) provides, any discovery he was lacking does not present a basis to reverse the Court of Claims' decision.

{¶ 30} Accordingly, plaintiff's single assignment of error is overruled.

III. Disposition

{¶ 31} Having overruled plaintiff's single assignment of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

BROWN, P.J., and KLATT, J., concur.
