[Cite as *Ressler v. Atty. Gen.*, 2015-Ohio-777.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Karen Ressler,	:	
Plaintiff-Appellant,	:	
v.	:	No. 14AP-519 (Ct. of Cl. No. 2013-00005)
Attorney General of the State of Ohio,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 5, 2015

Karen Ressler, pro se.

Michael DeWine, Attorney General, *Randall W. Knutti*, and *Emily M. Simmons*, for appellee.

APPEAL from the Court of Claims of Ohio.

BROWN, P.J.

{¶ 1} Karen Ressler, plaintiff-appellant, appeals from the judgment of the Court of Claims of Ohio in which the court granted summary judgment to the Attorney General of the State of Ohio ("the AG"), defendant-appellee, on appellant's claims for disability discrimination and violation of her rights under the Family Medical Leave Act ("FMLA").

{¶ 2} On January 16, 2007, appellant accepted a position at the Ohio Peace Officer Training Academy ("OPOTA"), which was an unclassified, at-will position in the curriculum department. Appellant eventually began administering peace officer certification examinations which accounted for most of her time, and performing other duties such as giving tours of OPOTA and sending mass e-mail "blasts" to notify the public of training courses. Administrative secretary Kim Hahn would sometimes

substitute for appellant to administer the exams. Appellant sat at a cubicle near Hahn's cubicle, outside of an office occupied by John Martin, appellant's supervisor. Martin retired November 1, 2009, at which time appellant's supervisor became Bill Walker.

{¶ 3} On November 18, 2009, appellant's doctor informed her that she needed surgery for a hernia. Appellant testified that, after her appointment, she notified Walker via voicemail that she would need surgery and would require several weeks of FMLA leave for recovery. She also left a voicemail for Hahn. Appellant testified via deposition that, on November 19, 2009, she informed Hahn and Walker that she would miss that day of work due to abdominal pain but she would be at work the following day to administer the peace officer exams at a remote location. Hahn testified via deposition that appellant told her that she might be in, and Hahn responded that Hahn would administer the tests the next day regardless.

{¶ 4} On November 20, 2009, appellant arrived at work to prepare to travel to the remote location to administer the exams but she could not find the testing manuals. She eventually telephoned Hahn who told her that she and Walker decided she should not administer the tests that day, and Robert Fiatal, the then-deputy director of OPOTA, would be administering the tests that day. When Hahn arrived at the office, appellant and Hahn had a conversation about the issue after which Hahn testified she felt threatened and afraid.

{¶ 5} On November 23, 2009, the next workday following the November 20, 2009 incident, Walker submitted to the AG's human resources department a statement regarding appellant's performance and behavior, including her actions on November 20, 2009. Attached to Walker's statement was a statement written by Hahn regarding appellant's behavior. In the statement, Walker recommended that appellant be terminated from employment. On the same day, appellant told Walker that she had a medical appointment and would need paperwork to apply for leave pursuant to FMLA. Appellant submitted the FMLA paperwork on December 1, 2009, and was approved for FMLA leave until January 3, 2010.

{¶ 6} Appellant returned to work on January 3, 2010. At that time, appellant was reassigned to a different position that did not involve administering peace officer

certification exams. Fiatal was her new supervisor. Appellant was given a workstation outside of Fiatal's office. Her pay and benefits remained the same.

{¶ 7} On April 25, 2010, Fiatal was appointed executive director of OPOTA, and his former position was not filled. Fiatal testified that he recommended to the human resources department that appellant be terminated from her position because the position was no longer necessary.

{¶ 8} Appellant again took FMLA leave from June 1 through July 26, 2010. Upon appellant's return from FMLA leave, she was reassigned to a position in OPOTA's advanced training department, and her former position was eliminated. Her pay and benefits remained the same. Lou Agosta became appellant's new supervisor.

{¶ 9} After Michael DeWine became the AG in January 2011, the AG asked Fiatal to review personnel to consider terminations and job consolidations for cost-savings purposes. Fiatal recommended that appellant's position be terminated because her position was unnecessary. On January 28, 2011, appellant learned she would need surgery again. She was terminated February 2, 2011.

{¶ 10} On January 3, 2013, appellant filed the present action in the Court of Claims against the AG, alleging disability discrimination and a violation of her FMLA rights. On April 7, 2014, the AG filed a motion for summary judgment, asserting that the recommendation to terminate appellant's position was unrelated to her disability or FMLA leave requests, and its reasons for terminating appellant were legitimate and not a pretext for discrimination or FMLA retaliation. The Court of Claims granted the AG's motion for summary judgment on June 5, 2014. Appellant appeals the judgment of the Court of Claims, asserting the following assignments of error:

> [I.] The Court of Claims erred in granting defendant-appellee Ohio Attorney General['s] motion for summary judgment by accepting the numerous and substantial material error as found in the Decision.
>
> [II.] The Court of Claims erred in granting defendant-appellee Ohio Attorney General['s] motion for summary judgment by making a decision which is inconsistent with the depositions of Robert Fiatal and Louis Agosta.
>
> [III.] The Court of Claims erred in granting defendant-appellee Ohio Attorney General['s] motion for summary

> judgment by accepting as fact the mis-characterization of the events of November 20, 2009 and accepting as fact the Walker document entitled "Statements Regarding Karen Ressler."

{¶ 11} We will address appellant's assignments of error together, as they are all related. Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the non-moving party, and that conclusion is adverse to the non-moving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 12} When seeking summary judgment on grounds that the non-moving party cannot prove its case, the moving party bears 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 non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving 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 non-moving party has no evidence to support its claims. *Id*. If the moving party meets its burden, then the non-moving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. If the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Id*.

{¶ 13} Here, appellant brought claims for retaliation in violation of her FMLA rights and disability discrimination. With regard to FMLA, it entitles a qualifying employee up to 12 weeks of unpaid leave during any 12-month period due to a serious

health condition that makes the employee unable to perform his or her employment functions. 29 U.S.C. 2612(a)(1)(D). An employee need not take FMLA leave all at once, but may take leave intermittently due to a single qualifying reason. *Collins v. United States Playing Card Co.*, 466 F.Supp.2d 954, 964 (S.D.Ohio 2006), citing former 29 C.F.R. 825.203.

{¶ 14} FMLA prohibits employers from discriminating against employees for exercising their rights under FMLA. 29 U.S.C. 2615(a)(2). Thus, an employer cannot base an adverse employment action on an employee's use of leave or retaliation for exercise of FMLA rights. *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309 (C.A.6, 2001). An employee can prove FMLA retaliation circumstantially. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a prima facie case of retaliation circumstantially, a plaintiff must show that: (1) she exercised rights afforded by FMLA, (2) she suffered an adverse employment action, and (3) there was a causal connection between her exercise of rights and the adverse employment action. *Zechar v. Ohio Dept. of Edn.*, 121 Ohio Misc.2d 52, 2002-Ohio-6873, ¶ 9, citing *Robinson v. Franklin Cty. Bd. of Commrs.*, S.D.Ohio No. 99-CV-162 (Jan. 28, 2002); *Soletro v. Natl. Fedn. of Indep. Business*, 130 F.Supp.2d 906 (N.D.Ohio 2001); *Darby v. Bratch*, 287 F.3d 673, 679 (C.A.8, 2002). Under the retaliation theory, the employer's motive is relevant because retaliation claims impose liability on an employer that acts against an employee specifically because the employee invoked FMLA rights. *Edgar v. JAC Prods., Inc.*, 443 F.3d 501, 508 (C.A.6, 2006).

{¶ 15} Upon establishing a prima facie case, the burden of production then shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. *McDonnell Douglas* at 802. At that point, the burden shifts again to the employee to demonstrate that the proffered reason was not the true reason for the employment decision and was only a pretext for unlawful discrimination. *Id*. To establish pretext, the plaintiff must demonstrate the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. *Knepper v. Ohio State Univ.*, 10th Dist. No. 10AP-1155, 2011-Ohio-6054, ¶ 12.

{¶ 16} With regard to disability discrimination, R.C. 4112.02(A) makes it an unlawful discriminatory practice for any employer, because of an employee's disability, to discharge the employee without just cause. In order to establish a prima facie case of disability discrimination, the person seeking relief must demonstrate that: (1) she was disabled, (2) an adverse employment action was taken by an employer, at least in part, because the individual was disabled, and (3) the person, though disabled, can safely and substantially perform the essential functions of the job in question. *DeBolt v. Eastman Kodak Co.*, 146 Ohio App.3d 474, ¶ 39 (10th Dist.2001), citing *Columbus Civ. Serv. Comm. v. McGlone,* 82 Ohio St.3d 569, 571 (1998). In a case such as this one, where the employer denies terminating the employee due to an alleged disability and where no direct evidence of discrimination exists, the *McDonnell Douglas* burden-shifting framework is used to analyze cases of alleged discrimination. *See McDonnell Douglas.*

{¶ 17} Although the arguments contained in appellant's brief are couched entirely in terms of FMLA retaliation and do not address her discrimination claim, and she presented little evidence in the Court of Claims that related directly to her disability due to her hernia condition, we will address both claims together, as the evidence and analysis relating to both are similar. With specific regard to the prima facie elements of her FMLA claim—the only claim that appellant addresses directly—there is no dispute that appellant exercised rights afforded by FMLA and, therefore, satisfied the first prima facie element. As for the second prima facie element, appellant alleges two adverse employment actions: (1) when her duties were changed after she informed Walker on November 19, 2009, and further reduced from managerial to clerical when she returned from FMLA leave on January 3, 2010, at which point she was reassigned to another position and given an inferior work station, and (2) when she was terminated from employment with OPOTA on February 2, 2011. With respect to the third prima facie element of an FMLA retaliation claim, the AG asserts that appellant cannot establish there is a causal connection between her use of FMLA leave and her termination or reassignments.

{¶ 18} However, even assuming arguendo that appellant established a prima facie case for both her FMLA retaliation and disability discrimination claims, we find that the AG had legitimate, non-discriminatory reasons for reassigning appellant to other positions and, eventually, terminating her. Fiatal, Agosta, and Hahn testified via

depositions regarding the non-discriminatory reasons for changing appellant's job duties and/or reassigning appellant to different jobs. Although appellant claims that it was her statement to Walker on November 18, 2009 that she would need to take FMLA leave that led to her not administering the peace officer exams on November 20, 2009, Hahn's testimony addressed why appellant did not administer the peace officer exams that day. Hahn testified that she originally told appellant during a phone conversation on November 19, 2009 that Hahn would be going to the remote location to administer the exams the next day since appellant was in pain. Hahn stated that appellant told her only that she would try to come to work on November 20, 2009, so Hahn encouraged appellant to stay home to take care of her health and Hahn would administer the exams. Hahn testified that, after she spoke to appellant, her son became ill and she did not know if she would be able to administer the exams on November 20, 2009, so Fiatal agreed to administer them. Hahn's testimony provides evidence that appellant was relieved of her task of administering the exams on November 20, 2009 for reasons that were not due to her disability or need to take FMLA leave.

{¶ 19} Appellant disagrees with Hahn's deposition testimony regarding the incident, and disagrees with nearly everything in Walker's statement to the human resources department regarding the incident. Appellant testified that, in her communications with Hahn and Walker on November 19, 2009, although she said that she would not be in to work that day, she made it clear she would be in the following day to administer the exams. However, in order to show pretext, a plaintiff must show both that the reason was false, and that discrimination or retaliation was the real reason. *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 14; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). Although Hahn's and appellant's differing memories regarding their communications on November 19, 2009 might arguably raise a genuine issue of material fact as to the falsity of the AG's reasons for removing appellant from administering the exams, appellant has failed to show that discrimination or retaliation was the real reason that Fiatal administered the exams on November 20, 2009. Appellant's argument is based purely upon conjecture, which is insufficient, particularly when the actual reason here could be just as likely attributable to a misunderstanding or miscommunication. *See Goodyear v. Waco Holdings, Inc.*, 8th Dist. No. 91432, 2009-

Ohio-619, ¶ 32 (concluding that mere conjecture that the employer's stated reason is a pretext for discrimination is an insufficient basis for the denial of a summary judgment motion made by the employer). Therefore, we find appellant has failed to satisfy her burden with regard to the decision to have Fiatal administer the exams on November 20, 2009.

{¶ 20} Hahn and Fiatal also provided testimony explaining that appellant was reassigned to her next position on January 3, 2010, based upon the confrontation between appellant and Hahn on November 20, 2009. With regard to that incident, Hahn testified that appellant called her the morning of November 20, 2009 while Hahn was driving to work. Appellant asked her if she was on her way to the exam location, and Hahn told her that Fiatal was administering the exams. Appellant got very upset, raised her voice, and said she could make the trip to administer the exams. Hahn told her they could talk about it when she arrived at work. When she got to work, Hahn asked appellant if she had calmed down, and appellant "shot" her a "dirty" look. Hahn said appellant complained that she was not told about the change, but Hahn claimed that she told appellant the previous day. Hahn told her that they made the change because they were not sure if she was going to make it to work that day due to her abdominal pain. Hahn said it was not her understanding at that time that appellant would no longer be administering exams in the future. Hahn told Walker about appellant's behavior, and Hahn said she was upset and afraid because appellant had lashed out at her. She said appellant's tone of voice was irate and she felt threatened. Appellant was very loud, hostile, and angry.

{¶ 21} Although appellant disputes Hahn's testimony on many of these points and denies she was angry or ever raised her voice, what is important for our review is Fiatal's testimony at his deposition that he removed appellant from her job under Walker and had her begin reporting directly to him based upon the incident with Hahn. Fiatal said he wanted to remove appellant from the tense environment. Thus, despite whether Hahn's or appellant's viewpoint on the events of that day are accurate, the relevant inquiry is: Did Fiatal reassign appellant because of her disability or use of FMLA leave? As Fiatal testified that he removed appellant from her job under Walker because of the conflict with Hahn, such was a non-discriminatory reason, regardless of whose version of the incident was

more factually accurate. Appellant was then required to show that Fiatal's removal of her from her position under Walker was pretext, which she failed to do. She presented no evidence that, even if Hahn's view of the incident was ultimately false or mistaken, Fiatal had any knowledge that Hahn was lying or incorrect. Appellant has not shown that Fiatal had any unlawful motive for removing her from Walker's supervision.

{¶ 22} Furthermore, with regard to her changing work tasks after January 3, 2010, Fiatal explained that, when appellant began reporting to him, he assigned appellant to whatever jobs he needed assistance with. Fiatal said that appellant sent e-mails to potential candidates for training courses which she had already been doing in her previous position; coordinated the revision to the commander's manual; inventoried equipment; and conducted department tours. Appellant likewise acknowledged that she continued to send e-mails promoting the AG's courses, worked on the commander's manual, and sometimes conducted tours of OPOTA. Although she complains that she no longer had access to the curriculum department after she was reassigned in January 2010, the only former task she no longer performed was administering the peace officer exams. However, because she had begun working for a new supervisor, that she had different duties does not appear to be the result of FMLA retaliation or her disability but, rather, the result of having a new supervisor. Fiatal testified that appellant's incident with Hahn had no bearing on what assignments he gave her when she reported directly to him, and he did not view appellant as a problem employee.

{¶ 23} Furthermore, although appellant complains that her desk was moved into a hallway next to a storage cabinet when she returned to work after FMLA leave on January 3, 2010, and neither her computer nor phone worked when she arrived for work, appellant fails to present any evidence tending to demonstrate this was related to her FMLA leave or disability. She admitted that there were only two work areas in that particular part of the office, and there was another desk on the other side of the same storage cabinet for another worker. Therefore, there is no evidence that her work conditions were diminished based upon her FMLA leave or disability, but, instead, they were due to the change in her work assignments and supervisor.

{¶ 24} The deposition testimony also supports the conclusion that appellant's reassignment to Agosta as her manager was unrelated to her FMLA leave or disability.

Fiatal left his position to become executive director in April 2010, after which he assigned appellant to report to Agosta. She was assigned to Agosta in order to provide her with work because no one filled Fiatal's position. Fiatal said he assigned her to Agosta specifically because one of the instructors had asked for assistance in making copies and doing other clerical duties. We fail to find any evidence that Fiatal's reassignment of appellant to Agosta was motivated by appellant's FMLA leave or disability.

{¶ 25} As for her work assignments under Agosta, Agosta testified that when Fiatal reassigned appellant to him, Fiatal told him to use appellant as he needed. Appellant conducted tours, made copies of materials, helped law enforcement training officers, conducted inventory and salvage of equipment, worked with the online catalogue, and proofread materials, but he said her duties for him were mostly clerical. It does appear that appellant's job assignments were continuing to change under Agosta, although she was continuing to perform some of the same job duties she had done previously. However, the evidence suggests that her change in duties was, again, the result of working under a new supervisor who was trying to find tasks for her to do and not based upon her FMLA leave or disability.

{¶ 26} With regard to appellant's termination, appellant presented no evidence to show that it was due to her use of FMLA leave or disability. Fiatal testified that he recommended appellant be terminated in February 2011 after Michael DeWine took over the AG's office in January 2011 because her position was no longer necessary and not crucial to the mission of the agency. Pursuant to a request from the incoming administration, Fiatal reviewed whether appellant's assignments were crucial, particularly for the amount of compensation she was being paid. At the time she was terminated, appellant was no longer sending mass e-mails, as that was being done through the online catalogue, and she was not involved in assisting with the online catalogue. The only duty he knew of at that time for appellant was assisting instructors with copying. Fiatal explained that he had already decided in April 2010 when he became executive director that appellant's services were unnecessary. He said he left a telephone voicemail with the director of human resources in April 2010 recommending that appellant be terminated, but he received no response, and he never followed up. He also said that he was not aware that appellant had requested leave on January 28, 2011, when he suggested she be

terminated. He said it was not that appellant personally was unnecessary, but her position was unnecessary. Agosta testified that he had only a vague recollection that appellant told him she was going to have an operation prior to her being terminated, and he never discussed such with Fiatal. Thus, there is no evidence that the AG terminated appellant's employment for taking FMLA leave or due to any disability. Instead, Fiatal believed that appellant's job duties were not essential to the AG, and he had felt this way for numerous months. Appellant presents no evidence to the contrary to dispute Fiatal's stated reason for terminating her. It is also interesting that, in a letter appellant sent to Attorney General DeWine the day after she was terminated, appellant never alleged that her firing was due to her disability or her need to take FMLA leave. With no evidence to support that the AG's reason for terminating her was pretext, her claims must fail.

{¶ 27} Finally, it is also important to note that appellant was at all times an employee-at-will. An at-will-employee may be terminated for any reason not contrary to law. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100 (1985). Because she was an employee-at-will, appellant could have been terminated for a good reason, bad reason, or no reason at all. *DeCavitch v. Thomas Steel Strip Corp.*, 66 Ohio App.3d 568, 571 (11th Dist.1990). Therefore, Fiatal had no duty to conduct any further investigation to verify the allegations as reported by Hahn or Walker before reassigning her to a different position. Furthermore, even if Fiatal's opinion as to whether appellant's position was still necessary as of January 2011 was misguided or flatly wrong, as long as he did not seek to terminate her for illegal discriminatory reasons, the AG's actions were not actionable. For the foregoing reasons, we find the Court of Claims did not err when it granted summary judgment to the AG. Appellant's first, second, and third assignments of error are overruled.

{¶ 28} Accordingly, appellant's three assignments of error are overruled, and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

LUPER SCHUSTER and BRUNNER, JJ., concur.
