[Cite as *Leasure v. Ohio Dept. of Rehab. & Corr.*, 2002-Ohio-7401.]

IN THE COURT OF CLAIMS OF OHIO

NORBERT LEASURE, et al.	:	
Plaintiffs	:	CASE NO. 2000-10693
v.	:	MAGISTRATE DECISION
DEPARTMENT OF REHABILITATION AND CORRECTION	:	Lewis F. Pettigrew, Magistrate
Defendant	:	

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{¶1} Plaintiffs bring this action alleging that defendant discriminated against plaintiff, Norbert Leasure,[1] in violation of the Americans with Disabilities Act (ADA), Section 12101, et seq., Title 42 U.S.Code and the Ohio Civil Rights Act, R.C. 4112.02. Plaintiffs also allege claims for an intentional tort, intentional infliction of emotional distress, loss of consortium and violation of public policy. The case was tried to a magistrate of the court on the issue of liability.

{¶2} Plaintiff began his employment with defendant in 1986. During the time of the events at issue, plaintiff was a corrections officer (CO) at the Corrections Medical Center (CMC) in Columbus. CMC is a maximum security facility under the control and supervision of defendant, where specialized medical care was provided for inmates.

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[1] Hereafter, plaintiff Norbert Leasure shall be referred to individually as "plaintiff."

{¶3} In November 1997, plaintiff injured his left knee while attempting to remove a wheelchair-bound inmate from a transport van. Specifically, plaintiff lost his balance and fell from an elevated wheelchair ramp, striking his left knee on the pavement below. Plaintiff continued with his duties that day, but the next morning his leg was swollen. He initially was treated by a physician in Circleville, and in September 1998 the physician performed arthroscopic surgery on the knee. Plaintiff subsequently filed a workers' compensation claim.

{¶4} In 1999, plaintiff worked third shift at CMC as a Control II officer. His responsibilities included maintaining security of the rear sally port area where vans enter and exit the institution for transportation of inmates.

{¶5} In June or July 1999, plaintiff began experiencing pain in his right knee, and he started to use a cane to assist him with walking. Plaintiff, who is six feet one inch tall, 350 pounds, stated that he began using the cane to give him a little support and take a little weight off the right leg. In July or August 1999, plaintiff brought the cane to work one evening and utilized it during that work shift. According to plaintiff, he was able to perform his duties using the cane without any problems; however Major Kenneth Bucy told him that he was not permitted to have the cane at work.

{¶6} In September 1999, plaintiff asked Warden Rodney Francis if he would be permitted to use the cane after obtaining a note from a physician. The warden informed plaintiff that he saw no problem with that. Plaintiff denied that the warden told him he would have to fill out any type of paperwork to seek an accommodation, or that he needed to talk with Personnel Officer

Dorothy Terry or a Title I coordinator in order to receive authorization to use a cane. Plaintiff testified that he never knew there was that type of an individual at CMC.

{¶7} The warden testified that he recalled a conversation he had with plaintiff in the clinic area of the institution, when plaintiff approached him and inquired about the use of a cane. The warden told plaintiff that he personally had no problem with plaintiff using a cane, but that there was a procedure which he had to follow; specifically, the warden informed him that he would have to contact PO Terry to get the necessary forms to request an authorization. The warden also stated that he did not remember plaintiff ever coming to his office between September 30, 1999, and January 27, 2000, for such a request.

{¶8} Other testimony introduced at trial revealed that:

{¶9} On September 23, 1999, plaintiff began treatment with Dr. James Sides. Dr. Sides took x-rays of plaintiff's left knee and determined that plaintiff had "severe degenerative arthritis" of the left knee.[2] Dr. Sides initially gave plaintiff Synvisc injections in December 1999. Plaintiff informed Dr. Sides that he was using a cane to assist with walking, and he asked for a note to take to work. While Dr. Sides did not specifically recommend that plaintiff use the cane to prevent further injury to his right knee, he agreed to write plaintiff a prescription so that he would be allowed to use his cane.

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[2] Following the trial of this matter, the court issued an entry stating that the record would be left open to allow a deposition of Dr. Sides to be conducted at a mutually agreeable time. Plaintiff subsequently filed a transcript of a deposition of Dr. Sides taken prior to trial. That deposition has been marked and admitted as Plaintiff's Exhibit No. 9.

{¶10} When plaintiff went to work on September 23, 1999, he attached the prescription to a note which he sent to the warden and Bucy. The next morning, Captain Phoenix told plaintiff he was not permitted to use the cane. According to plaintiff, he saw Bucy a few days later and asked him if he had heard anything about his request to use a cane. Bucy informed plaintiff that an administrative assistant named Carrie was reviewing the issue under the ADA, and that he would get back with plaintiff. Plaintiff denied being told by Bucy that he needed to contact Terry or a Title I work-site coordinator.

{¶11} Bucy retired in 2001 from the position of major chief of security at CMC, but he recalled that plaintiff brought a doctor's note to work regarding the use of a cane. He informed plaintiff that this was an ADA issue and that he should contact their ADA coordinator. Bucy denied telling plaintiff that he would get back to him concerning his request to use a cane.

{¶12} On September 30, 1999, plaintiff filled out an incident report and submitted it to the warden, wherein he asked why he had not been permitted to use his cane. That report contained a notation by the warden stating: "Refer to Dot." After a few weeks, plaintiff began to experience more pain, so he submitted another incident report to the warden on October 25, 1999.

{¶13} On December 7, 1999, plaintiff filed a charge with the Ohio Civil Rights Commission, in which he alleged that he suffered from a "torn menecus [sic] with aggravation of arthritis," and that he qualified as a disabled person as defined under R.C. 4112.01(A)(13). According to plaintiff, in January 2000, Terry contacted him and asked why he hadn't contacted her about the situation. Plaintiff explained that he had filled out incident

reports but that no one had contacted him. Terry told plaintiff that she felt this was a reasonable accommodation and that plaintiff should have contacted her. Terry gave plaintiff paperwork to fill out, and later phoned plaintiff to inform him that she had obtained authorization, and that he had permission to use the cane. Prior to January 20, 2000, no one at the institution had informed plaintiff of the need to fill out any particular paperwork in order to request an accommodation.

{¶14} Plaintiff eventually was treated by another physician, Dr. Mark Hathaway, regarding the pain in his right knee. Dr. Hathaway diagnosed plaintiff's right knee condition as a possible torn or degenerative medial meniscus. On June 5, 2000, plaintiff had replacement surgery on his right knee. Later that year, plaintiff also had replacement surgery on his left knee.

{¶15} At trial, plaintiff's theory of the case was that defendant was aware, as early as September 1999, that he was seeking an accommodation to use a cane at work; that defendant did not act in good faith in failing to allow him to use a cane for more than a four-month period; and that such delay directly resulted in the need for knee replacement surgery.

{¶16} To establish a prima facie case of discrimination under the ADA, a plaintiff must prove that: "(1) he has a disability; (2) he was qualified for the job; and (3) that he either was denied a reasonable accommodation for his disability or was subject to an adverse employment decision that was made solely because of his disability." *Johnson v. Mason* (S.D.Ohio 2000), 101 F.Supp.2d 566, 573.[3]

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[3] Similarly, under Ohio law, in order to establish a prima facie case of disability

{¶17} R.C. 4112.02, part of the Ohio Civil Rights Act, is similar to the ADA with respect to the definition of disability and requirements for employers, and the Supreme Court of Ohio has held that cases and regulations interpreting the ADA can provide guidance in interpreting Ohio law. *Yamamoto v. Midwest Screw Products*, Lake App. No. 2000-L-200, 2002-Ohio-3362. R.C. 4112.02(A) states in part that it shall be an unlawful discriminatory practice "[f]or any employer, because of the *** disability *** of any person, to discharge without cause, to refuse to hire, or otherwise 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} At the outset, the court notes there was evidence that plaintiff suffered a torn medial meniscus and/or degenerative arthritis, and that such condition impaired his ability to walk, but that such evidence is not dispositive as to whether he suffers from a disability under the ADA. See *Toyota Motor Mfg. v. Williams* (2002), 122 S.Ct. 681, 690 ("Merely having an impairment does not make one disabled for purposes of the ADA"). See, also, *Dutcher v. Ingalls Shipbuilding* (5th Cir. 1995), 53 F.3d 723, 726 ("A physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA"). Rather, "[c]laimants also need to demonstrate that the impairment limits a major life activity." *Toyota Motor*, supra, at 690.

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discrimination, the individual seeking relief must show "(1) that he or she was disabled; (2) that an adverse employment action was taken by an employer, at least in part, because the individual was disabled, and; (3) that the person, though disabled, can safely and substantially perform the essential functions of the job in question." *Yamamoto v. Midwest Screw Products* (June 28, 2002), Lake App. No. 2000-L-200, citing *Hazlett v. Martin Chevrolet, Inc.* (1986), 25 Ohio St.3d 279, 281.

{¶19} Thus, under the ADA, an individual has a "disability" if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." Section 12102(C)(A), 42 U.S.Code. Pursuant to 29 C.F.R. Section 1630.2(j), the term "substantially limits" means: "(i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity." Further, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives," and "[t]he impairment's impact must also be permanent or long-term." *Toyota Motor*, supra, at 691.

{¶20} In the instant case, there was testimony by plaintiff that he experienced pain while walking, and that he had difficulty running or climbing stairs; however, "moderate difficulty or pain experienced while walking does not rise to the level of a disability." *Penny v. United Parcel Serv.* (C.A.6, 1997), 128 F.3d 408, 415. Plaintiff testified that, at the time he first asked about using a cane in September 1999, the pain in his right knee was not very great; however, he felt that he needed the cane to give him added support. Although plaintiff testified that the pain was much greater by January 2000, the evidence indicates that Dr. Sides did not specifically recommend that he use the cane to avoid further injury to his right knee. Rather, plaintiff informed the doctor that he was already using the cane, and that he initiated

the request for Dr. Sides to write a physician's note on his behalf. When asked whether plaintiff was capable of doing a lot of walking at the time, Dr. Sides stated that he thought plaintiff was capable of walking but that the hard part was how much pain plaintiff could endure. Here, while there was evidence that plaintiff had an impairment which affected his ability to walk, such evidence was not sufficient to demonstrate that he suffered from a disability within the meaning of the ADA.

{¶21} The court notes that federal courts have denied ADA claims filed by plaintiffs that involve similar factual circumstances. See, e.g., *Graver v. National Engineering Co.* (July 25, 1995), N.D.Ill. No. 94-C-1228 (plaintiff, who suffered from arthritis, and testified that he "walked with a pronounced limp and experienced pain while walking," was not disabled as defined by the ADA; the court held that, "although plaintiff walks with a marked limp, there is no evidence that this limp significantly impaired his ability to walk, care for himself, or perform the functions in his job"); *Richardson v. Powell* (Nov. 10, 1994), S.D.Ohio No. C-1-93-528 (summary judgment granted in favor of defendant in plaintiff's ADA action in which plaintiff alleged that she suffered from degenerative arthritis and that her arthritis made it difficult for her to climb stairs; it was held that plaintiff failed to present any evidence "tending to show that her condition interfered with any major life activity"); *Talk v. Delta Airlines, Inc.* (1999), 165 F.3d 1021, 1025 (although plaintiff, who walked with a limp and moved at a significantly slower pace than the average person, experienced some impairment to her ability to walk, "it does not rise to the level of a substantial impairment as required by the ADA").

{¶22} Even if plaintiff were to prove that he suffered from a disability, he has not proved that defendant violated provisions of the ADA. One of plaintiff's primary contentions is that defendant failed to engage in an interactive process with him to provide a reasonable accommodation. More specifically, plaintiff maintains that defendant acted in bad faith by delaying, for approximately four months, his request for an accommodation. Defendant, on the other hand, argues that plaintiff was reasonably accommodated after he properly notified defendant of a request for such an accommodation.

{¶23} Regarding the duty of an employer to engage in an interactive process with an employee requesting an accommodation, "[f]ederal courts have recognized that the duty of an employer to make a reasonable accommodation also mandates that the employer interact with an employee in a good faith effort to seek a reasonable accommodation." *Shaver v. Wolske & Blue* (2000), 138 Ohio App.3d 653, 664. In order to show that an employer failed to participate in the interactive process, a disabled employee must demonstrate "'1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.'" Id., quoting *Taylor v. Phoenixville School Dist.* (C.A.3, 1999), 184 F.3d 296, 319-320.

{¶24} It has been held that, in order for the interactive process "to work, '[b]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.'" *Jensen v. Wells Fargo Bank* (2000), 85 Cal. App.4th 245,

261, quoting *Barnett v. U.S. Air, Inc.* (9th Cir. 2000), 228 F.3d 1105, 1114-1115. Further, "[w]hen a claim is brought for failure to reasonably accommodate the claimant's disability, the trial court's ultimate obligation is to 'isolate the cause of the breakdown *** and then assign responsibility' so that '[l]iability for failure to provide reasonable accommodations ensues only where the employer bears responsibility for the breakdown.' ***" *Jensen,* supra, at 261, quoting *Beck v. University of Wis. Bd. of Regents* (7th Cir. 1996), 75 F.3d 1130, 1135-1137.

{¶25} In this case, the evidence demonstrates that defendant had a policy for handling ADA issues. (Plaintiffs' Exhibit 1.) Pursuant to that policy, defendant's director "shall appoint a Central Office Title I (Employment) Coordinator," who "shall monitor and assist staff in assuring compliance with Title I of the ADA, provide training to Worksite Title I Coordinators *** and appoint respective ADA committee members," where the Worksite Title I Coordinator is primarily responsible for providing information to the staff related to Title I, "and providing information on and coordinating the procedure for requesting reasonable accommodations." Id.

{¶26} As to employee requests for an accommodation, defendant's policy provides in relevant part:

{¶27} "1. Employees who wish to request a reasonable accommodation shall complete the appropriate forms, available from the Worksite Title I coordinator or other EEO committee members. Once the forms are completed by the requesting employee the forms shall be forwarded to the Title I Worksite Coordinator.

{¶28} "2. The Title I Worksite Coordinator shall then consult with the employee's immediate supervisor and/or other appropriate

staff and the appointing authority or designee to determine whether a reasonable accommodation should or can be made and the nature of the accommodation, if any. ***

{¶29} "3. The Central Office Title I Coordinator shall consult with the ADA Title I committee members and other relevant staff regarding the request and advise the Worksite Title I Coordinator, in writing, of approval or disapproval of the Worksite Coordinator's recommendation. If a recommendation is disapproved, the Central Office Title I Coordinator shall work with the Worksite Title I Coordinator to develop an acceptable response to the request for accommodation.

{¶30} "4. All requests for accommodation shall be evaluated pursuant to the standards and mandates of the ADA. ***" Id.

{¶31} According to defendant's policy, plaintiff should have submitted an appropriate ADA accommodation request form, to be forwarded to the Title I Worksite Coordinator. The record is undisputed that plaintiff did not submit the proper form until January 2000, at which time he received an accommodation to use his cane. What is disputed, however, is whether plaintiff was aware of the proper procedure when he first raised the issue of using the cane at work, and whether defendant made a good faith effort to inform him to request an accommodation. Based upon the evidence presented, the court concludes that plaintiff knew, or should have known, the proper procedure for requesting an accommodation.

{¶32} As noted under the facts, in September 1999 plaintiff presented a doctor's note to Bucy regarding the use of a cane. Bucy testified that he told plaintiff that this was an ADA situation, and that plaintiff should contact the ADA coordinator. The warden also testified that he was approached by plaintiff

regarding the use of a cane. The warden told plaintiff that he had no problem with him using a cane, but that he would have to follow procedures including contacting Terry, to obtain the necessary forms for an accommodation.

{¶33} Plaintiff did not fill out an ADA accommodation form at the time; rather, on September 30, 1999, he submitted an incident report. According to Francis, incident reports are used by defendant's employees to report anything unusual that occurred during a CO's shift, such as an incorrect inmate count, a search or a use-of-force incident. Both Francis and Terry testified that an incident report would not be the appropriate method to request an accommodation.

{¶34} While plaintiff denied that anybody ever informed him of the proper procedure for requesting an accommodation, in considering the conflicting evidence and the credibility of the witnesses, this court finds more credible the testimony of Francis and Bucy, in which they stated that they specifically advised plaintiff to contact the personnel officer regarding his request. The court notes that plaintiff was a former union president at the institution, and that he acknowledged during cross-examination that he knew Terry was the personnel director at CMC. In addition, the warden testified that plaintiff was very familiar with the union grievance process. The evidence also shows that plaintiff should have been aware of defendant's procedures based upon in-service training that he had received regarding EEO and ADA issues. At trial, Terry identified (Defendant's Exhibit H) as a sign-in sheet, containing plaintiff's signature, for a training session conducted on June 17, 1999. The warden testified that these training sessions included a discussion of ADA issues and the forms

associated with ADA. Bucy likewise attended such training during his employment with CMC. He testified that individuals are instructed that ADA and EEO issues are to be referred to the personnel office.

{¶35} It has been held that "[a]n employee has the initial duty to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations." *Beck*, supra, at 1134. Further, because "'the responsibility for fashioning a reasonable accommodation is *shared* between the employee and the employer,' *** courts have held that an employer cannot be found to have violated the ADA when responsibility for the breakdown of the 'informal interactive process' is traceable to the employee and not the employer." *Loulseged v. Akzo Nobel Inc.* (C.A.5th 1999), 178 F.3d 731, 736.

{¶36} In the present case, the evidence shows that plaintiff and defendant engaged in an interactive process, although there was also evidence that the process broke down in September 1999 when plaintiff, although being informed of the proper procedure to seek an accommodation, failed to provide appropriate notice and essential information to the individuals responsible for processing an ADA request. The court finds that any delay in providing an accommodation was not because the employer failed to act in good faith in the interactive process but, rather, was the result of plaintiff's own failure to comply with defendant's procedures. Here, where there is credible evidence that an employee knew, or should have known, the proper method for requesting an accommodation, but nonetheless failed to provide the employer with necessary information, the employee is precluded from claiming that

the employer violated the ADA by failing to provide a reasonable accommodation.

{¶37} The court finds that defendant's requirement that employees adhere to its specific policy for requesting an accommodation is not unreasonable given the nature of the duties performed by those employees. One federal court has noted that "an essential function of a corrections officer position is the ability to perform a wide range of duties (usually involving inmate contact)," and that "the very reason a corrections officer position exists is to provide safety and security to the public, as well as to *** [the institution's] employees and inmates." *Martin v. Kansas* (10th Cir.1999), 190 F.3d 1120. In the present case, both the warden and Terry testified regarding concerns that must be addressed in evaluating a CO's request for an accommodation in light of safety concerns inherent at a maximum security institution. The warden testified that specific requests for accommodations are carefully evaluated, and that the institution attempts to meet all of those that do not jeopardize the security of the institution or the safety of the inmates or staff who are housed there or employed there. To the extent that defendant's policy for handling accommodation requests may require a more deliberative process than in other employment settings, the evidence shows that such a process is justified by safety concerns inherent at a maximum security facility.

{¶38} Finally, the court finds that plaintiff failed to produce sufficient evidence that any delay in allowing plaintiff to use a cane over a period of four months proximately caused an exacerbation of a pre-existing injury. The record contains no medical evidence that the use of a cane for those four months would

have prevented plaintiff from undergoing replacement knee surgery. Dr. Sides testified that he had no opinion whether the lack of a cane during that period of time had any effect on plaintiff's right knee. Dr. Sides noted that there were degenerative changes present in plaintiff's knee in September 1999, and he further stated that the use of a cane would not have been a permanent or long-term solution regarding plaintiff's difficulties with either of his knees.

{¶39} Based upon the foregoing, plaintiff has failed to establish a disability discrimination claim under the ADA. Further, this court's decision on plaintiff's ADA claim is also dispositive of his claim under R.C. 4112.02. See *Lockard v. General Motors Corp.* (Jan. 16, 2001), N.D.Ohio No. 4-99CV0786.

{¶40} In addition to his ADA claim, plaintiff has brought an intentional tort claim against defendant. In order to establish a prima facie case of an intentional tort by an employer, an employee must demonstrate the following: "(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." *Fyffe v. Jeno's Inc.* (1991), 59 Ohio St.3d 115, paragraph one of the syllabus. In the present case, the evidence does not show that defendant knew, or should have known, that by prohibiting the use of a cane during the period at issue that harm to plaintiff was either likely or a substantial

certainty. As previously noted, Dr. Sides testified that he did not specifically recommend that plaintiff use a cane to prevent further injury to his right knee.

{¶41} Plaintiff's complaint also alleges a claim for intentional infliction of emotional distress. Under Ohio law, a plaintiff claiming the tort of intentional infliction of emotional distress must show: "(1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff, (2) that the actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community, (3) that the actor's actions were the proximate cause of the plaintiff's psychic injury, and (4) that the mental anguish suffered by the plaintiff is serious and of a nature that no reasonable man could be expected to endure it." *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 375. Further, "[s]erious emotional distress requires an emotional injury which is both severe and debilitating." Id.

{¶42} Under the evidence presented, plaintiff has failed to show extreme and outrageous conduct on the part of defendant. As noted above, the record indicates that defendant, through its agents, the warden and Bucy, made efforts to inform plaintiff what he needed to do in order to request an accommodation. Further, plaintiff has not demonstrated that he suffered extreme and severe emotional distress.

{¶43} Plaintiff further alleges that defendant violated public policy as set forth in R.C. 4101.12, mandating that an employer provide a safe working environment. As discussed above, however,

plaintiff failed to provide defendant with appropriate notice or information concerning any unsafe working environment. Accordingly, the court finds no merit with plaintiff's public policy claim.

{¶44} Finally, plaintiff Sandy Leasure has brought a cause of action for loss of consortium. A cause of action based upon a loss of consortium is a derivative action, dependent upon the existence of a primary cause of action. *Messmore v. Monarch Machine Tool Co.* (1983), 11 Ohio App.3d 67, 68-69. Because the court finds that the evidence fails to support plaintiff's primary causes of action, the court also concludes that plaintiff's loss of consortium claim must fail.

{¶45} Based upon the evidence presented, the magistrate recommends judgment in favor of defendant.

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LEWIS F. PETTIGREW
Magistrate

Entry cc:

Nicholas E. Kennedy — Attorney for Plaintiffs
3040 Riverside Drive
Suite 103
Columbus, Ohio 43221

Larry Y. Chan — Assistant Attorneys General
Anne Berry Strait
65 East State St., 16th Fl.
Columbus, Ohio 43215

BB/cmd
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