

plaintiff's claims that her constitutional rights to due process and equal protection of the law (Counts I and II) were violated by defendant, it has been consistently held that this court is without jurisdiction to consider claims for relief premised upon alleged violations of either the Ohio or United States Constitution. See, e.g., *Graham v. Board of Bar Examiners* (1994), 98 Ohio App.3d 620; *White v. Chillicothe Correctional Institution* (Dec. 29, 1992), Franklin App. No. 92-AP1229. See, also, *Jett v. Dallas Indep. School Dist.* (1989), 491 U.S. 701; *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170. Inasmuch as Counts I and II of plaintiff's complaint are constitutional claims which are not cognizable in this forum, defendant's motion to dismiss Counts I and II is hereby GRANTED; however the motion to dismiss Count III (retaliation) is DENIED.

{¶3} Plaintiff began her employment with defendant in 1974. Plaintiff was a member of the Ohio Civil Service Employees Association (OCSEA), AFSCME, Local 11, AFL-CIO (union) which represented bargaining unit employees such as plaintiff. (Joint Exhibit 23.) At some point beginning in 1996, plaintiff's co-workers began to perceive plaintiff as being intimidating and hostile toward them in the workplace. Several co-workers complained to their individual supervisors about the situation after they experienced difficulties with plaintiff that prevented them from completing their assigned projects. Finally, on April 24, 1998, a co-worker identified as Kelly Armfelt filed a discrimination complaint with the Department of Administrative Services (DAS) listing plaintiff as the offender. This complaint triggered an internal investigation at ODNR. While the investigation was being conducted, plaintiff was relocated to

another facility and was prohibited from contacting her co-workers directly during business hours. Plaintiff was also required to attend a diagnostic session with a psychiatrist who reported to defendant that plaintiff did not suffer from a psychiatric disorder. A meeting was scheduled and plaintiff was notified that she was required to participate and to answer investigatory questions. Plaintiff retained private legal counsel and she and her attorney attended the first meeting. Defendant stopped the proceedings when plaintiff, who was following the advice of her attorney, refused to respond to any questions. Defendant then provided plaintiff and her counsel with copies of relevant case law that documented defendant's absolute right to require plaintiff to answer questions. Defendant informed plaintiff that failure to answer questions would result in disciplinary action, including the possibility of termination. (Joint Exhibit 17.) After plaintiff refused to answer questions at the rescheduled meeting, defendant initiated disciplinary action against plaintiff. On August 7, 1998, defendant terminated plaintiff from her position as Grants Coordinator 2 based upon insubordination, neglect of duty and failure of good behavior. (Joint Exhibit 22.)

{¶4} Plaintiff filed suit against defendant in federal district court alleging that defendant violated her constitutional rights by, among other things, forcing her to submit to a psychiatric evaluation, prohibiting her from speaking to co-workers and terminating her in retaliation for seeking legal counsel. In granting summary judgment for defendant, the federal district court held that plaintiff's due process and equal protection rights were not violated. In so holding, the court specifically found that "plaintiff was terminated for failing to cooperate with the investigation, not because of the investigation's findings. As a

matter of law, plaintiff's refusal to cooperate with the investigation was, by itself, just cause for her removal." *Peters v. Ohio Dept. of Natural Resources, et al.* (Feb. 14, 2000), S.D. Ohio No. C-2-98-0628.

{¶5} Plaintiff also filed a grievance pursuant to the collective bargaining agreement and participated in arbitration proceedings in May and September 1999. (Joint Exhibit 23.) On October 8, 1999, the arbitrator noted that plaintiff's refusal to answer questions did not support the conclusion that plaintiff had committed three violations subject to discipline. However, the arbitrator also found that plaintiff had a duty to answer questions and her failure to do so harmed defendant in its legitimate interest to investigate alleged misconduct by employees in the workplace. The arbitrator determined that plaintiff's "refusal in this case constituted a willful disobedience of a direct order by a supervisor and suspension is set forth in the Department's Disciplinary Policies as a sanction for first offense." (Joint Exhibit 23.) Accordingly, the arbitrator concluded that plaintiff's removal should be converted to a six-month suspension and that she should be reinstated to a similar position.

{¶6} In Count III of her complaint, plaintiff maintains that defendant terminated her from its employment in retaliation for her obtaining private legal counsel, despite the fact that, after reviewing the available evidence and assessing the credibility of witnesses, two separate fact finders (a federal magistrate and an arbitrator) have determined that plaintiff was terminated solely because she failed to assist defendant in its investigation into alleged employee misconduct. As noted by the arbitrator in his decision, "there is no evidence of any tainting of the procedure by

[defendant] in establishing its right to demand answers from [plaintiff]. Quite to the contrary, [defendant] took extra steps to educate both [plaintiff] and her private attorney of the basis for insisting on answers to questions at the investigatory interview." (Joint Exhibit 23.) In addition, plaintiff has failed to produce any new evidence regarding this issue at her trial before this court. Therefore, upon consideration of the evidence and testimony presented, this court finds that plaintiff has failed to prove that defendant was motivated by retaliatory animus when it instituted disciplinary action against her.

{¶7} Plaintiff has also asserted claims for discrimination based upon race and handicap. R.C. 4112.02 provides in relevant part:

{¶8} "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry 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."

{¶9} The Supreme Court of Ohio has stated that "[f]ederal case law interpreting Title 7 of the Civil Rights Act of 1964, Section 2000(e) *et seq.*, Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196. Absent direct evidence of racial discrimination, plaintiff must prove, by a preponderance of the evidence, a *prima facie* case of racial discrimination. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. If a

plaintiff is able to demonstrate a prima facie case, defendant need only show a legitimate nondiscriminatory reason for its actions. Once the employer meets its burden of proof, plaintiff-employee must prove defendant's reason was only a pretext for discrimination or was unworthy of credence. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248.

{¶10} Plaintiff has not brought forth any direct evidence of racial discrimination. Thus, in order for plaintiff to prove a prima facie case of racial discrimination, she must show that: 1) she was a member of a protected class; 2) she was discharged; 3) she was qualified for the position; and 4) either she was replaced by a person outside the class or a comparable non-protected person was treated better. See *Sivarajan v. Nationwide Life Ins. Co.* (June 16, 1998), Franklin App. No. 97APE10-1426, discussing *Henderson v. Cincinnati Bell Long Distance, Inc.* (1996), 113 Ohio App.3d 793, 796, and *Mitchell v. Toledo Hosp.* (C.A.6, 1992), 964 F.2d 577, 582.

{¶11} Plaintiff satisfies the first three elements of her prima facie case in that she is a member of a protected class (African-American), she was qualified for the position that she held, and she was terminated. However, plaintiff did not present any evidence regarding the person who replaced her after she had been terminated. Therefore, plaintiff must prove that a comparable non-protected person was treated better than she was treated. Plaintiff failed to present any credible evidence to meet that burden and accordingly, has failed to prove defendant discriminated against her based on her race. Moreover, the court observes that there was only one reason for plaintiff's termination and it has been fully and completely addressed in several forums.

{¶12} Plaintiff's claim for handicap discrimination is based on her allegation that defendant perceived that she had a psychological disability and terminated her employment because of the perceived handicap.

{¶13} R.C. 4112.02(A) prohibits an employer from discriminating against an employee due to handicap. Even a non-handicapped employee is protected by the handicap discrimination laws if the employer perceived her as handicapped. *Wiegerig v. Timken Co.* (2001), 144 Ohio App.3d 664,671. "'Handicap' [now 'disability'] means a physical or mental impairment that substantially limits one or more major life activities, including *** working, *** or being regarded as having a physical or mental impairment." R.C. 4112.01(A)(13). "To establish a prima facie case of handicap discrimination, the person seeking relief must demonstrate (1) that he or she was handicapped, (2) that an adverse employment action was taken by an employer, at least in part, because the individual was handicapped, and (3) that the person, though handicapped, can safely and substantially perform the essential functions of the job in question." *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569, 571 citing *Hazlett v. Martin Chevrolet, Inc.* (1986), 25 Ohio St.3d 279, 281. To prevail on a theory of perceived handicap, plaintiff must show that defendant considered her unable to carry out the daily duties of a Grants Coordinator 2. Plaintiff failed to present any evidence that she was terminated because defendant believed she was under a mental health disability. In fact, prior to plaintiff's termination, the psychiatrist who evaluated plaintiff reported to defendant that plaintiff did not demonstrate any evidence of a psychiatric disorder and that there was "no reason to believe she was incapable of performing her duties ***."

(Joint Exhibit 18, and Joint Stipulation of Facts at page 2, section L.) There was no credible evidence presented to support a finding that defendant disbelieved or disregarded the psychiatrist's conclusion. Thus, plaintiff has failed to prove by a preponderance of the evidence that defendant discriminated against her based on a perceived handicap.

{¶14} In Count V of the complaint, plaintiff argued that defendant exceeded its authority by requiring plaintiff to submit to a psychological evaluation. This claim was previously raised as part of plaintiff's federal action. The federal district court, in dismissing the claim, cited *Collyer v. Darling* (C.A. 6, 1996), 98 F.3d 211, wherein the court of appeals held that requiring an employee to undergo psychological evaluation does not violate an employee's due process rights. Moreover, the Ohio Administrative Code states that an employee can be required to submit to medical or psychological examination in order to determine whether or not the employee is fit to perform the duties of the job. The code indicates that failure to appear for examination may amount to insubordination, punishable by the imposition of discipline up to and including removal. Ohio Adm.Code Section 123:1-33-01. Consequently, the court finds that plaintiff has failed to prove that defendant abused its authority with regard to this matter.

{¶15} Further, plaintiff failed to prove that defendant intentionally inflicted emotional distress upon her. Specifically, plaintiff did not prove that defendant's conduct was extreme or outrageous or that defendant intentionally or recklessly caused her severe emotional distress. See *Yeager v. Local Union 20 Teamsters* (1983), 6 Ohio St.3d 369.

{¶16} For these reasons, plaintiff has not proven any of her claims by a preponderance of the evidence and judgment shall be rendered for defendant.

EVERETT BURTON
Judge

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