[Cite as *Seeling v. Ohio Dept. of Natural Resources*, 2004-Ohio-305.]

IN THE COURT OF CLAIMS OF OHIO

JEFFREY W. SEELING	:	
Plaintiff	:	CASE NO. 97-01953 Judge J. Warren Bettis
v.	:	DECISION
OHIO DEPARTMENT OF NATURAL RESOURCES	:	
Defendant	:	

: : : : : : : : : : : : : : : : : :

{¶1} Plaintiff, a former employee of the Ohio Department of Natural Resources, Division of Wildlife (ODNR), filed a claim for handicap discrimination pursuant to R.C. 4112.02 based upon ODNR's alleged failure to reasonably accommodate his disability, caused by a back condition.

{¶2} On September 24, 2001, plaintiff filed an amended complaint adding a claim under the ADA to his Court of Claims complaint.[1]

{¶3} This case came on for trial before Judge Leach on November 14, 2001. In the intervening period between trial and the filing of any decision, Judge Leach died. Accordingly, this case was reassigned to another judge. Thereafter, the parties stipulated and agreed that the case would be submitted to the court on the trial transcript and post-trial briefs. The matter is now before the court for determination on the merits.

---

[1] Seeling had previously filed a claim in federal court on August 28, 1995, asserting the same claim for disability discrimination under the Americans with Disabilities Act.

{¶4} Plaintiff became employed with ODNR in February 1983 as a District 5 Wildlife Officer in Warren County. From 1983 until approximately October 1992, Seeling's immediate supervisor was his father-in-law, Tom Fulton, the District 5 Manager.

{¶5} While working for defendant on March 13, 1989, plaintiff was involved in an automobile accident, from which he suffered a musculoskeletal injury to his low back. As a result of his back pain, Seeling claimed that he could no longer wear a "full-duty belt," as required by defendant for law enforcement officers; that ODNR subsequently discriminated against him by refusing to allow him to wear a "pancake holster" on his regular belt. (The pancake holster did not include space to attach all the other intermediate defense items worn on a state-issued full-duty belt.) Plaintiff eventually took a disability retirement and has not worked at ODNR since March 1995.

{¶6} As a wildlife officer, plaintiff was involved with fish and wildlife management and other informational and educational projects. However, his primary duty was law enforcement, including inspection of armed hunters, executing search warrants, issuing citations, making arrests, investigating reported violations, subduing individuals breaking the law, and testifying in court. Plaintiff's law enforcement activities and the risks associated with those activities were the same as any other law enforcement officer.

{¶7} As a law enforcement officer, plaintiff was required by ODNR regulations to wear the proper uniform, which included a full-duty belt. The full-duty belt is a thick, three-inch wide, leather belt used to carry a holster and handgun, handcuffs and case, mace and case, speed loader and case, mini mag lite and case, folding knife and case, and a two-way radio. The full-duty belt is secured to regular pants belts with leather "belt keepers"; it weighs approximately 15 to 20 pounds.

{¶8} From October 1989 through November 1993, Fulton allowed plaintiff to deviate from ODNR's requirements for uniformed wildlife officers by not wearing a full-duty belt while working. Plaintiff was allowed to wear a pancake holster. The pancake holster is worn under the jacket and does not include additional items which can be hung from a full-

duty belt such as a speed loader, mace, handcuffs, folding knife, two-way radio, and flashlight.

{¶9} Tom Fulton retired in 1993. Plaintiff's new supervisor, Robert Cox, ordered plaintiff to wear a full-duty belt with a slight alteration to accommodate his injury. Plaintiff complained that even with the alteration the full-duty belt aggravated his back pain. Plaintiff's physician, Dr. Fredrick Stockwell, recommended that plaintiff be given Occupational Injury Leave (OIL). Plaintiff subsequently went on OIL until February 8, 1994, when he was encouraged to return to the job for light duty by defendant's District 5 Manager, David Graham. Plaintiff returned to a desk job for two days and then left, claiming that sitting in an office for eight hours a day caused his back pain to become intolerable. Plaintiff was off work for approximately six months before Dr. Stockwell released him to work with the limitations that he could not wear a full-duty belt or lift more than 25 pounds.

{¶10} In July 1994 plaintiff made his first formal request for an accommodation allowing him to return to patrol duties with a pancake holster rather than a full-duty belt. On September 15, 1994, plaintiff was granted an accommodation allowing him to remove certain items from the full-duty belt but denying his request to use a pancake holster. Plaintiff did return to work using a modified full-duty belt but he eventually went back to the pancake holster. He received a verbal reprimand for being out of uniform and was told to stop using the holster. In November of 1994, plaintiff complained about the seat in his vehicle and again asked to use a pancake holster. Plaintiff left work on March 15, 1995, and eventually elected to take OIL.

{¶11} At trial, plaintiff's theory of the case was that defendant was aware, as early as 1993, that plaintiff was seeking an accommodation to use a pancake holster instead of a regulation full-duty belt; that defendant initially granted the accommodation for a period of two and one-half years; that defendant did not act in good faith in disallowing the accommodation; and that such conduct exacerbated his injury, which forced him into disability retirement.

{¶12} 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.[2]

{¶13} 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. The Supreme Court of Ohio has held that cases and regulations interpreting the ADA can provide guidance in interpreting Ohio law. *Yamamoto*, supra. 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."

{¶14} As stated above, plaintiff suffered a musculoskeletal injury to his low back in a work-related automobile accident. Plaintiff presented evidence that the pain in his low back increased when he was required to sit in his work vehicle while wearing a full-duty belt. However, 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,

---

[2] Similarly, under Ohio law, in order to establish a prima facie case of disability 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*, Lake App. No. 2000-L-200, 2002-Ohio-3362, citing *Hazlett v. Martin Chevrolet, Inc.* (1986), 25 Ohio St.3d 279, 281.

"[c]laimants also need to demonstrate that the impairment limits a major life activity." *Toyota Motor Mfg.*, supra, at 690.

{¶15} 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 Mfg.*, supra, at 691.

{¶16} In the instant case, plaintiff testified that he experienced pain while driving his patrol car due to the intrusive nature of a full-duty belt and that the belt created pressure on his low back. Plaintiff also testified that he was required to scale down his physical activities after his work-related accident and that he quit playing softball and basketball. Plaintiff did admit going on a two-day golf trip in November 1994.

{¶17} However, "moderate difficulty or pain experienced while walking or sitting does not rise to the level of a disability." *Penny v. United Parcel Serv.* (C.A.6, 1997), 128 F.3d 408, 415. Here, while there was evidence that plaintiff had an impairment which affected his ability to ride in his patrol car while wearing a full-duty belt, such evidence was not sufficient to demonstrate that he suffered from a disability within the meaning of the ADA. Moreover, plaintiff's former wife testified that plaintiff participated in numerous physical activities during the period he was requesting an accommodation at work, such as building a garage, putting up a fence, riding a bike, shoveling gravel, and moving furniture, saddles, and bales of hay. It is difficult for the court to conceive how a person who can

safely maintain such a level of physical activity could be considered as disabled under either Ohio law or the ADA.

{¶18} The court also 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"); *Martin v. Kansas* (10th Cir.1999), 190 F.3d 1120, (an essential function of a corrections officer position is the ability to perform a wide range of duties 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).

{¶19} Although Dr. Stockwell testified that plaintiff had experienced a reduction in the range at motion in his legs and that he reported greater pain during range of motion tests, this evidence presented by plaintiff falls far short of establishing a disability as that term is used under the relevant law.

{¶20} Moreover, even if plaintiff were to prove that he suffered from a disability, he has not proved that defendant violated any provisions of the ADA. One of plaintiff's primary contentions is that defendant acted in bad faith by disallowing his accommodation

after previously allowing him to wear a pancake holster. Defendant, on the other hand, argues that plaintiff was offered a reasonable accommodation but that he chose not to utilize.

{¶21} In regard to 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 that "'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. The ADA does not require an employer to provide the specific accommodation requested. See 29 C.F.R. § 1630.9.

{¶22} 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.

{¶23} In this case, the evidence demonstrates that defendant made an effort to work with plaintiff to fashion an accommodation that would provide plaintiff with relief yet substantially comply with department regulations designed to protect plaintiff and the public. Plaintiff made some effort to employ the modified accommodation but concluded that the pain in his back prevented him from performing his duties, and he again requested to use a pancake holster. As stated above, defendant concluded that a pancake holster did not meet minimum safety requirements and refused plaintiff's request.

{¶24} At the close of trial, plaintiff conceded that a pancake holster was not a reasonable accommodation under the circumstances. Additionally, while plaintiff maintained that he could perform his job duties as a wildlife officer if he were allowed to use a pancake holster, he nevertheless claimed that he was unable to perform light-duty clerical work.

{¶25} In the opinion of the court, defendant acted more than reasonably in dealing with plaintiff's accommodation request. Plaintiff's claim that defendant retaliated against him for seeking the accommodation by unfairly restricting him to office duty and by intentionally providing him with a vehicle with a defective seat are simply not supported by the evidence. Thus, plaintiff failed to prove a claim of handicap discrimination under either state or federal law.

{¶26} Judgment shall be rendered in favor of defendant.

{¶27} This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____

J. WARREN BETTIS
Judge

Entry cc:

Thomas M. Green — Attorney for Plaintiff
800 Performance Place
109 North Main Street
Dayton, Ohio 45402-1769

Larry Y. Chan — Attorney for Defendant
Assistant Attorney General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

LP/cmd/Filed January 12, 2004/To S.C. reporter January 26, 2004