[Cite as *Rehab. Serv. Comm.*, 2004-Ohio-3812.]

IN THE COURT OF CLAIMS OF OHIO

ROBERT BADDOUR	:	
Plaintiff	:	CASE NO. 2002-04712 Holly True Shaver, Magistrate
v.	:	
		MAGISTRATE DECISION
REHABILITATION SERVICES COMMISSION	:	
	:	
Defendant		

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

{¶1} Plaintiff brought this action against defendant alleging the following claims: 1) unfair labor practices; 2) discrimination in violation of the Americans with Disabilities Act (ADA) and R.C. 4112; 3) sex discrimination;[1] 4) violations of the Family Medical Leave Act (FMLA); 5) breach of a "Last Chance Agreement" (LCA); and 6) constructive discharge. Plaintiff also sought a determination of whether Mary Gasser, Jeffrey Mackey, David Ott, Radene Mattheny, Kay Kelso and John Downs were entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. The case proceeded to trial on the issues of liability and damages before a magistrate of the court. At trial, defendant's October 17, 2003, motion in limine was held in abeyance; in light of the following decision, defendant's motion is DENIED.

{¶2} Testimony at trial revealed that plaintiff began his employment with defendant in 1978 as a Vocational Rehabilitation Counselor 1 (VRC1). His duties included assisting disabled individuals to obtain job training and employment. Plaintiff was a member of a

[1] While plaintiff alleged discrimination on the basis of sex in his pretrial statement, he produced no evidence of sex discrimination at trial; the allegations of discrimination centered around disability. Therefore, the court finds that plaintiff has failed to prove his claim of sex discrimination by a preponderance of the evidence and recommends that this claim be denied.

union, 1199 Service Employees International Union (SEIU). In 1986, plaintiff was promoted to a VRC3 position. When his employment ended, he was a VRC4 in defendant's Rocky River, Ohio office.

{¶3} Plaintiff was born with spina bifida. He suffered from a neurogenic bladder which necessitated the use of a catheter. In 2001, he became afflicted with foot ulcers that limited his mobility.

{¶4} In 1997, Mary Gasser began supervising plaintiff. Gasser testified that pursuant to agency policy, the determination by a VRC of whether a consumer was eligible for defendant's services must be made within 60 days. According to Gasser, an extension could be granted only if the VRC timely filed a request for extension of time. Gasser found several problem areas within plaintiff's case files, including instances where: applicants for defendant's services had not been interviewed in a timely manner; applications had not been timely filed; deadlines for filing requests for extensions of time had not been met; plans had not been written timely; and a general "stagnation" of cases had been allowed to happen.

{¶5} Gasser also received complaints about plaintiff from consumers regarding lack of contact, lack of timeliness, not returning phone calls, and having no plan written for over a year. Because of these findings, Gasser implemented discipline against plaintiff in 1999 and placed him on a "Performance Improvement Plan" (PIP) which included an action plan outlining what needed to be done in each case. Pursuant to the PIP, Gasser met with plaintiff on a weekly basis to review his cases and to monitor his progress. However, Gasser testified that plaintiff's work performance did not improve while she was his supervisor. Gasser further testified that she did not take plaintiff's physical

limitations into consideration when she placed him on a PIP because his job was primarily sedentary.

{¶6} In 2000, Kay Kelso became plaintiff's supervisor. She worked at the central office but traveled to Rocky River one to two times per week for meetings with plaintiff. Kelso testified that plaintiff was often absent from scheduled meetings with consumers and from scheduled meetings with her, and that she wrote him a memo regarding his absenteeism. Kelso further stated that she received complaint letters from consumers who wanted to change counselors because they felt that plaintiff was not adequately following up on their cases and was unresponsive to their concerns.

{¶7} On January 4, 2001, Kelso met with plaintiff and advised him to call her directly when he would be absent, and if Kelso were not available, to call the office manager, Denise Belcher. (Defendant's Exhibit NN.) Kelso denied that she required plaintiff to go to the central office frequently or that she considered plaintiff's medical condition when she implemented the call-in procedure.

{¶8} On February 16, 2001, plaintiff was issued a 10-day suspension for "neglect of duty/caseload neglect." (Defendant's Exhibits N-O.) On March 26, 2001, Radene Mattheny, Human Resource Coordinator for the northeast area, conducted an investigatory interview with plaintiff as a result of his pattern of absences. She testified that, at the meeting, she called into question a medical excuse that plaintiff had submitted to support his FMLA leave request in 2001 because the return to work date appeared to have been altered. (See Defendant's Exhibit YY, Plaintiff's Exhibit 33.)

{¶9} Jeff Mackey, area manager, supervised Mary Gasser and Kay Kelso. He testified that he attended several hearings regarding plaintiff, and noted that plaintiff was on a PIP in 1999, 2000, and 2001. Mackey stated that plaintiff had not successfully completed any of his PIPs but that he had continually worked with plaintiff to improve his performance. In September 2000, Mackey concluded that it would be beneficial to transfer plaintiff to the central office to be closer to Kelso; however, since plaintiff opposed the transfer, it did not take place. Mackey stated that plaintiff's only request for a reasonable accommodation was for a reduced workload. Mackey recommended that plaintiff be terminated in 2001 because he was not accomplishing work, because consumers were complaining about him, and because he was not compliant with the call-in procedure.

{¶10} Plaintiff testified that he was disciplined in 2001 for not following the call-in procedure; that on July 25, 2001, he was given a letter of termination for failure to follow the call-in procedure; that on August 20, 2001, he was notified that he would be reinstated as a result of an LCA; and was directed to return to work on August 22, 2001. However, on August 22, 2001, plaintiff sent defendant a fax wherein he stated that he would not return to work until a waiver of union representation was signed by defendant and received in his attorney's office. On August 22, 2001, June Gutterman, Agency Director, sent plaintiff a letter advising him that it was his responsibility as an employee to process the waiver, and that if he did not return to work by August 24, 2001, he would be considered AWOL and a recommendation for termination would be made. Plaintiff was sent another letter on August 24, 2001, informing him that because he had not returned by August 24,

2001, and did not follow the call-in procedure for August 23 or 24, 2001 that his continued failure to follw the call-in procedure would result in a recommendation of termination. Plaintiff resigned effective October 19, 2001. (Plaintiff's Exhibit 1.)

{¶11} Plaintiff testified that he felt that he was treated differently than other VRC's because they were allowed to function independently without supervision and were allowed more freedom in their work routines. Plaintiff asserts that defendant discriminated against him in the following ways: by implementing disciplinary action against him while he was on approved FMLA leave in February 2001; by requiring him to adhere to a strict "call-in" policy to report his absences; by attempting to transfer him to the central office; and by requiring him to carry files to the central office. As a result of these alleged actions, plaintiff asserts that he was constructively discharged from defendant's employment.

UNFAIR LABOR PRACTICES

{¶12} As a union member, plaintiff was subject to the collective bargaining agreement that was in effect during his employment. The State Employment Relations Board (SERB) has exclusive jurisdiction to hear unfair labor practice disputes against state employers pursuant to R.C. 4117. *State ex rel. Fraternal Order of Police, Ohio Labor Council, Inc. v. Franklin Cty. Court of Common Pleas*, 76 Ohio St.3d 287, 1996-Ohio-424, citing *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No.* 9 (1991), 59 Ohio St.3d 167 at paragraph one of the syllabus. The Court of Claims lacks jurisdiction over an action alleging a violation of a collective bargaining agreement because R.C. 4117.09 grants exclusive jurisdiction over such actions to the courts of common pleas. *Moore v. Youngstown State Univ.* (1989), 63 Ohio App.3d 238. Therefore, it is recommended that plaintiff's claims of unfair labor practices be dismissed for lack of subject matter jurisdiction.

II. DISCRIMINATION IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT (ADA) AND R.C. 4112

{¶13} 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]

{¶14} 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 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 just 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."

{¶15} Plaintiff testified that in order to prepare for the workday, he would wake up early, make sure that his leg brace was functioning, check his feet for sores, put lotion on his feet to prevent friction, take his medication for bladder management and to control back pain, and that he would limit his walking time during the workday. He added that in winter conditions, he had to be extremely careful when walking on snow and ice. He further

[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.

stated that he had intermittent problems with driving when he was afflicted with foot ulcers but that the ulcers were not a permanent condition.

{¶16} However, such evidence is not dispositive as to whether plaintiff 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 Mfg.*, supra, at 690.

{¶17} Based upon plaintiff's testimony, the court finds that he has proven, by a preponderance of the evidence, that his medical condition of spina bifida and related health concerns limited the major life activity of walking. Plaintiff has proven that he suffers from a disability; however, plaintiff has not proven that defendant violated any provisions of the ADA.

{¶18} One of plaintiff's primary contentions is that defendant refused to reasonably accommodate his disability. In regard to the duty of an employer to accommodate an employee, "[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.

{¶19} 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. Univ. of Wis. Bd. of Regents* (7th Cir. 1996), 75 F.3d 1130, 1135-1137.

{¶20} Based upon the foregoing, plaintiff has failed to establish that defendant refused his request for a reasonable accommodation.

{¶21} The only instance where plaintiff asked for a reasonable accommodation was on March 5, 1999. (Defendant's Exhibit KKK). In the request, plaintiff stated that he was "frequently either in the crucial stages or convalescing stages of spina bifida with neurogenic bladder disorder." He asked for scheduling flexibility to compensate for FMLA-related absences that occurred due to the side effects of high doses of antibiotics treatment; scheduling flexibility of necessary appointments with consumers and in travel time to appointments related to mobility issues; and extensions on deadlines for action plans. (Defendant's Exhibit KKK.)

{¶22} Defendant responded to plaintiff's request in a letter dated March 25, 1999, wherein defendant asked for medical information to "verify and support" plaintiff's need for a reasonable accommodation; defendant also asked for more clarity in the request, that is, for more information about mobility-related issues and any side effects from antibiotic treatment that affected attendance. On April 5, 1999, plaintiff explained that scheduling flexibility pertained to sudden, recurrent and unexpected disability-related incidents

regarding side effects from antibiotics and that he needed additional travel time if there were inclement weather conditions or back-pain flare-ups affecting mobility.

{¶23} On May 18, 1999, defendant advised plaintiff to discuss any additional travel time with his supervisor, Mary Gasser and to provide medical documentation for any additional travel time. Defendant also added that any flexibility in deadlines to the action plan due to absences covered by the FMLA would be referred to the human resource officer who coordinated FMLA matters. Based upon the evidence presented, the court finds that plaintiff has failed to prove that defendant did not make a good faith effort to assist him in seeking a reasonable accommodation. Therefore, it is recommended that plaintiff's ADA claim be denied.

{¶24} Further, this court's decision on plaintiff's ADA claim is also dispositive of his claim under R.C. 4112.02. See *City of Columbus Civ. Serv. Comm'n. v. McGlone,* 82 Ohio St.3d 569, 1998-Ohio-410.

III. VIOLATIONS OF THE FAMILY MEDICAL LEAVE ACT (FMLA)

{¶25} The FMLA provides eligible employees up to 12 work-weeks of unpaid leave in any 12-month period "for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. §§ 2601(b)(2), 2612. The FMLA prohibits employers from discriminating against employees for exercising their rights under the Act. 29 U.S.C. § 2615(a)(2). Basing an adverse employment action on an employee's use of leave or retaliation for exercise of FMLA rights is therefore actionable. *Skrjanc v. Great Lakes Power Serv. Co.* (C.A. 6, 2001), 272 F.3d 309. An employee can prove FMLA retaliation circumstantially, using the method of proof established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. To establish a prima facie case of retaliation circumstantially, plaintiff must show that he exercised rights afforded by the FMLA, that he suffered an adverse employment action, and that there was

a causal connection between his exercise of rights and the adverse employment action. *Soletro v. Natl. Fed'n. of Indep. Bus.* (N.D.Ohio, 2001), 130 F.Supp.2d 906.

{¶26} Patricia Thomas, a personnel officer in human resources, was responsible for approving plaintiff's FMLA leave requests. She testified that in 2001, plaintiff made several requests for FMLA leave and that his requests with supporting medical documentation were granted but that his requests without medical documentation were denied. She wrote plaintiff a letter, dated April 16, 2001, wherein she advised plaintiff that the FMLA did not relieve an employee from any obligation to follow the employer's required call-in procedures. (Plaintiff's Exhibit 16.) On October 1, 2001, Thomas sent plaintiff a letter wherein she approved FMLA leave from September 13, 2001, through October 20, 2001, contingent upon plaintiff's obtaining clarification from his physician. She also mentioned in the letter that since plaintiff's absence had been for more than two weeks, he could apply for disability leave, and reminded him that approval of FMLA leave did not "circumvent [his] responsibilities to follow agency requirements or union contractual obligations with regard to absence reporting." (Defendant's Exhibits BBBB.)

{¶27} Although plaintiff requested FMLA leave a number of times in 2001, the evidence shows that he did not call in to report his absences as required. Furthermore, defendant's exhibits show that plaintiff often failed to provide sufficient medical documentation to support his FMLA requests when asked to do so by his employer. Therefore, the court finds that plaintiff has failed to prove a causal connection between the exercise of his right to request FMLA leave and any adverse employment action.

{¶28} Moreover, even if plaintiff could establish a prima facie case of retaliation, the employer must then articulate some legitimate reason for the employee's discharge. *McDonnell Douglas*, supra. If the employer meets this burden of production, then the

burden shifts back to plaintiff to prove by a preponderance of the evidence that the reason proffered by defendant was not its true reason, but merely a pretext for discrimination. Id.

{¶29} John Downs, assistant director, was responsible for direct supervision of area managers. In April 2001, he recommended plaintiff's removal based on consultation with local offices, the human resources department, and the interim director. He explained that plaintiff was not calling his supervisor to report his absences and that sometimes he was not calling in at all.

{¶30} Based upon the testimony of the witnesses and the evidence, the court finds that plaintiff was not improving his job performance, not following directives regarding the reporting of absences, and not accomplishing his work in a timely manner. In short, defendant had ample legitimate reasons to ask for his termination. Therefore, it is recommended that plaintiff's FMLA claim be denied.

IV. BREACH OF A "LAST CHANCE AGREEMENT"

{¶31} Plaintiff and defendant entered into an LCA, effective August 14, 2001. (Defendant's Exhibit A.) The LCA provides that plaintiff's July 25, 2001, termination for neglect of duty would be changed to a 15-day suspension if he met the terms of the agreement. One of the terms of the agreement was that plaintiff would return to work. Plaintiff did not return to work.

{¶32} David Ott, assistant manager of human resources, testified that he initially recommended termination but was later involved in writing plaintiff's LCA. Ott further testified that he was aware of plaintiff's physical limitations when he made the recommendation for termination.

{¶33} Based upon the evidence presented, the court finds that plaintiff breached the terms of the LCA. Therefore, it is recommended that his claim regarding the LCA be denied.

V. CONSTRUCTIVE DISCHARGE

{¶34} Plaintiff also claims that he was constructively discharged. However, because plaintiff voluntarily resigned his position, he must establish that defendant's "actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *Mauzy v. Kelly Services, Inc.* 75 Ohio St.3d 578, 589, 1996-Ohio-265.

{¶35} The court finds that defendant's reporting requirements with regard to plaintiff were not so egregious or pervasive as to render working conditions intolerable. The court concludes that plaintiff failed to establish a claim for constructive discharge and recommends that this claim be denied.

IMMUNITY

{¶36} Plaintiff also asserts that Mary Gasser, Jeffrey Mackey, David Ott, Radene Mattheny, Kay Kelso, and John Downs, are not entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶37} R.C. 2743.02(F) provides, in part:

{¶38} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶39} R.C. 9.86 provides, in part:

{¶40} "*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.* ***" (Emphasis added.)

{¶41} In *Thomson v. University of Cincinnati College of Medicine* (October 17, 1996), Franklin App. No. 96 API02-260, at p. 13, the court noted that:

{¶42} "'It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment.' *James H. v. Dept. of Mental Health & Mental Retardation* (1980), 1 Ohio App.3d 60, 61. Even if an employee acts wrongfully, it does not automatically take the act outside the scope of the employee's employment even if the act is unnecessary, unjustified, excessive, or improper. *Thomas v. Ohio Dept. of Rehab. and Corr.* (1988), 48 Ohio App.3d 86. The act must be so divergent that its very character severs the relationship of employer and employee. *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246."

{¶43} Based upon the totality of the evidence presented, the court finds that Mary Gasser, Jeffrey Mackey, David Ott, Radene Mattheny, Kay Kelso, and John Downs acted within the scope of their employment with defendant at all times relevant hereto. The court further finds that Mary Gasser, Jeffrey Mackey, David Ott, Radene Mattheny, Kay Kelso, and John

Downs did not act with malicious purpose, in bad faith, or in a wanton or reckless manner toward plaintiff. Consequently, the magistrate recommends that the court make a determination that Mary Gasser, Jeffrey Mackey, David Ott, Radene Mattheny, Kay Kelso, and John Downs are entitled to civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F) and that the courts of common pleas do not have jurisdiction over civil actions against them based upon the allegations in this case.

{¶44} For the foregoing reasons, the court finds that plaintiff has failed to prove any of his claims by a preponderance of the evidence and accordingly, judgment is recommended in favor of defendant.

{¶45} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).*

_____
HOLLY TRUE SHAVER
Magistrate

Entry cc:

Howard V. Mishler
Jeffrey R. Froude
The Atrium Bldg., Suite 108
30400 Detroit Road
Westlake, Ohio 44145-1855

Attorneys for Plaintiff

Larry Y. Chan
Lisa M. Eschbacher
Assistant Attorneys General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

Attorneys for Defendant

HTS/cmd
Filed July 12, 2004
To S.C. reporter July 19, 2004