[Cite as *Walser v. Ohio Univ.*, 2004-Ohio-4722.]

IN THE COURT OF CLAIMS OF OHIO

KATHERINE WALSER	:	
Plaintiff	:	CASE NO. 2003-03680 Judge Fred J. Shoemaker
v.	:	
		DECISION
OHIO UNIVERSITY	:	
Defendant	:	

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{¶1} Plaintiff brought this action against defendant alleging the following claims: 1) discrimination in violation of the Americans with Disabilities Act (ADA); 2) violations of the Family Medical Leave Act (FMLA); 3) age discrimination; and 4) intentional infliction of emotional distress. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} The record reflects that in June 1985 plaintiff began her employment in the Student Services department of defendant's Lancaster campus where she was involved with processing student applications for admission to the university. During the course of her employment, plaintiff had several different position titles; however, her primary duties remained essentially the same. As a records management associate, plaintiff was responsible for reviewing incoming student applications, corresponding with prospective students and maintaining students' files. Plaintiff generally received positive grades and comments on her annual evaluations.

{¶3} At some time during the 1980s, plaintiff was diagnosed with multiple sclerosis (MS); nevertheless, she was generally able to perform her job duties. There is no dispute that defendant was aware that plaintiff had MS.

{¶4} In April 2002, plaintiff took two weeks of vacation leave to help her family move. Plaintiff testified that the move was difficult and caused symptoms of her MS to recur. Plaintiff

determined that she was unable to return to work at the end of her vacation. She used her available sick leave before she was advised to apply for FMLA leave. Plaintiff's neurologist suggested that she "go with her feelings" in making any decision about when she should return to work. Plaintiff was unable to tell defendant exactly when she would resume her duties.

{¶5} On November 2, 2002, plaintiff met with the dean of defendant's Lancaster campus, Bari Watkins, to discuss the timing of her return to work. Dean Watkins informed plaintiff that she would be assigned to a different position when she returned due to concerns about her work performance, to include timeliness and efficiency, and because of a reorganization in the Student Services department. Plaintiff did not object to Watkins' comments at the meeting.

{¶6} Although plaintiff's physician had not yet authorized her return to work, in January 2003, Dean Watkins attempted to finalize plaintiff's new work assignment. On January 13, 2003, Watkins sent plaintiff a letter that detailed the work schedule which was discussed at the November meeting. (Plaintiff's Exhibit 1.) According to the schedule, plaintiff was assigned to work in three different offices; student services, development, and the library. Dean Watkins' letter noted that plaintiff's hourly pay rate would remain the same and that she could choose to work either 35 or 40 hours per week. Plaintiff would not agree to the terms of Watkins' letter and she continued to negotiate with defendant concerning her job duties. After further negotiation, plaintiff agreed to return to work as a records management associate. She worked three days a week at defendant's Lancaster campus and two days a week at defendant's Pickerington campus. Later, plaintiff applied for and was hired as a records management assistant at defendant's Pickerington campus.

{¶7} Plaintiff claims that she was not allowed to return to her previous position after she took FMLA leave and that her job duties were assigned to Amy Miller, a co-worker under the age of 40 whom plaintiff had trained prior to taking leave. Defendant maintains that it was forced to restructure the Student Services department due to plaintiff's extended absence, the loss of two other department employees and a state hiring freeze. Defendant also asserts that plaintiff's work performance was a factor in its decision to reassign job duties.

I. ADA

{¶8} To establish a prima facie case of discrimination under the ADA, a plaintiff must prove that: "(1) [she] has a disability; (2) [she] was qualified for the job; and (3) that [she] either was denied a reasonable accommodation for [her] disability or was subject to an adverse employment decision that was made solely because of [her] disability." *Johnson v. Mason* (S.D.Ohio 2000), 101 F.Supp.2d 566, 573. Plaintiff asserts that she has established that she has a disability based upon her physician's diagnosis of MS and her testimony regarding her symptoms. Defendant contends that plaintiff has no disability because she is able to perform her job duties.

{¶9} The ADA, Section 12102(2), Title 42, U.S.Code, defines "disability" with regard to an individual as:

{¶10}"(A)[A] physical or mental impairment that substantially limits one or more of the major life activities of such individual;

{¶11}"(B)[A] record of such an impairment; or

{¶12}"(C)[B]eing regarded as having such an impairment."

{¶13}Whether a particular condition qualifies as a disability under either state or federal law must be determined on a case-by-case basis. See *Albertsons, Inc. v. Kirkingburg* (1999), 527 U.S. 555. Ohio courts and federal courts applying Ohio law have consistently held that the case law concerning claims brought under the ADA applies equally to claims brought under Ohio's anti-discrimination statute, R.C. 4112. *Johnson v. MetroHealth Med. Ctr*., Cuyahoga App. No. 82506, 2004-Ohio-2864, at ¶41; See *Wohler v. Toledo Stamping & Mfg. Co.* (C.A.6, Sept. 30, 1997), No. 96-4187. Although the Ohio statute was modeled after the federal ADA and specifically lists MS as a physical impairment, a physical impairment does not necessarily constitute a disability. See *Kirkendall v. United Parcel Service, Inc.* (W.D.N.Y.1997), 964 F.Supp. 106, 109.; *Fitzmaurice v. Great Lakes Computer Corp*., 155 Ohio App.3d 724, 2004-Ohio-235, at ¶12. Furthermore, it has been held that "the determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather of the effect of that impairment on

the life of the individual." *Bragdon v. Abbott* (1998), 524 U.S. 624, 641-642 (declining to consider whether HIV infection is a per se disability under the ADA).

{¶14}To be considered disabled according to the terms of the statute, plaintiff must demonstrate that her impairment "substantially limits" one or more of her major life activities. *Wiegerig v. Timken Co.* (2001), 144 Ohio App.3d 664, 671. "Substantially limits" means that an individual is:

{¶15}"i) Unable to perform a major life activity that the average person in the general population can perform; or ii) Significantly restricted as to the condition, manner or duration under which [the] 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 that same major life activity." 29 C.F.R. Section 1630.2(j)(1). "Major life activities" are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. Section 1630.2(i).

{¶16}In its interpretation of the ADA, Section 1630.2(j)(3), Title 29, C.F.R. discusses the factors that should be considered in determining whether an individual is substantially limited in a major life activity:

{¶17}"With respect to the major life activity of working --

{¶18}"(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." See, also, *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569, 571.

{¶19}In this case, plaintiff testified that her condition caused constant fatigue, an occasional facial twitch, limited hand strength, impaired speach, hindered thought processes, and limited ability to walk. According to plaintiff, her co-workers would occasionally comment on her MS symptoms, but "everyone covered for each other" and she believed that she adequately performed her job duties. Plaintiff further testified that prior to 2002, her symptoms "would go into remission," but that they

have persisted since she was forced to take leave. Based upon plaintiff's testimony, the court finds that she has proven, by a preponderance of the evidence, that her condition is permanent and that MS has substantially limited her in the major life activity of working.

{¶20}Although plaintiff has proven that she suffers from a disability, defendant asserts that she has failed to prove that she was subject to an adverse employment decision. However, a prima facie case requires only a minimal showing before shifting the burden to the employer to explain an adverse employment action. *St. Mary's Honor Center v. Hicks* (1993), 509 U.S. 502, 506; *Sprenger v. Southern Fed. Home Loan Bank* (C.A.8, 2001), 253 F.3d 1106, 1111. Dean Watkins' letter to plaintiff explained that plaintiff had been reassigned to work in three departments under the direction of three supervisors. Plaintiff also testified that her new job duties were significantly different from the duties she had performed prior to her disability leave. The court finds that plaintiff has established that defendant's decision to change plaintiff's job duties and working hours was an adverse employment action.

{¶21}Once a plaintiff has established a prima facie case, the employer must then articulate some legitimate reason for the adverse employment action. *Gibson v. City of Louisville* (C.A.6, 2003), 336 F.3d 511, 513; *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. 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. *Ang v. Procter & Gamble* (C.A.6, 1991), 932 F.2d 540, 549. A plaintiff can prove pretext "by showing that the Company's reasons have no basis in fact, or if they have a basis in fact, by showing that they were not really factors motivating the [adverse action], or, if they were factors, by showing that they were jointly insufficient to motivate the [action]." *Ridenour v. Lawson Co.* (C.A.6, 1986), 791 F.2d 52, 56, quoting *La Montagne v. American Convenience Products, Inc.* (C.A.7, 1984), 750 F.2d 1405, 1414-1415. Once the employer has produced evidence of a nondiscriminatory reason for the adverse action, plaintiff must produce sufficient evidence from which the trier of fact may reasonably reject the employer's explanation. *Reeves v. Sanderson Plumbing Prods., Inc.* (2000), 530 U.S. 133, 153-54.

{¶22}In this case, defendant has produced evidence to support several nondiscriminatory reasons for changing plaintiff's job assignment. As discussed above, Dean Watkins explained that the Student Services department was reorganized as a result of losing three of its seven full-time employees during a period in which a hiring-freeze had been imposed. Amy Miller, one of the junior members of the department, began processing applications and transcript requests after plaintiff began her leave. Miller also maintained a computer database of prospective students and she became proficient in other records management duties. As a result of the department's reorganization, plaintiff's former job duties were reassigned to other staff members.

{¶23}Defendant also had some concern regarding plaintiff's job performance. According to Dean Watkins, the assistant director who was in charge of the department had become concerned with plaintiff's job performance and productivity. Although plaintiff had received generally favorable evaluations, some problems regarding her records management were discovered while she was on leave. Amy Miller testified that some of the applications that plaintiff was responsible for had not been processed for several months and that checks were found that were "too old to cash." Miller further testified that some staff members believed that it would be "disruptive" to have plaintiff return to her previous assignments.

{¶24}Upon review of the testimony and evidence, the court finds that defendant has articulated legitimate reasons for its actions. Therefore, the burden shifts back to plaintiff to prove by a preponderance of the evidence that the reason proffered by defendant was not the true reason but merely a pretext for discrimination.

{¶25}In order to establish pretext, the employee must show that the employer's proffered reason is not worthy of credence or that discriminatory reasons "more likely" motivated the employer's decision. *Bush v. Dictaphone Corp.*, Franklin App. No. 00AP-1117, 2003-Ohio-883, at ¶33. The burden of persuasion remains at all times with the employee. Id.

{¶26}Plaintiff's own testimony supports defendant's reasons for reorganizing the Student Services department and changing her job duties. Plaintiff conceded that she was not as efficient as she should have been and that "things were not getting done"; however, she believed that her

inefficiency was caused by her MS symptoms. Plaintiff also acknowledged that Amy Miller was "faster" in performing records management duties, was more proficient on the computer, and generally could perform her job duties better than plaintiff. Contrary to plaintiff's assertion, the testimony and evidence established that Miller did not simply replace plaintiff as a records management associate. While Miller did assume some of plaintiff's former job duties, after the reorganization, Miller performed additional duties including database management. Plaintiff does not dispute that defendant was required to reorganize the job duties in its Student Services department while plaintiff was on leave.

{¶27}As a general rule, this court will not substitute its judgment for that of the employer and will not second-guess the business judgments of employers regarding personnel decisions. See, e.g., *Watson v. Kent State University* (Aug. 8, 1994), Court of Claims No. 91-06627; *Dodson v. Wright State Univ.* (1997), 9 Ohio Misc.2d 57; *Washington v. Central State Univ.* (1998), 92 Ohio Misc.2d 26.

{¶28}The court concludes that plaintiff has not shown that defendant's proffered reasons for eliminating her position were pretextual. Consequently, plaintiff cannot prevail on her ADA claim.

FMLA

{¶29}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. Sections 2601(b)(2), 2612. The FMLA prohibits employers from discriminating against employees for exercising their rights under the Act. 29 U.S.C. Section 2615(a)(2). An adverse employment action based upon an employee's use of leave or retaliation for exercise of FMLA rights is therefore actionable. *Skrjanc v. Great Lakes Power Service Co.* (C.A.6, 2001), 272 F.3d 309.

{¶30}An employee can prove retaliation circumstantially, using the method established in *McDonnell Douglas Corp.*, supra. To establish a prima facie case of retaliation circumstantially, plaintiff must show that she exercised rights afforded by the FMLA, that she suffered an adverse

employment action, and that there was a causal connection between her exercise of rights and the adverse employment action. *Robinson v. Franklin County Bd. of Com'rs.* (Jan. 28, 2002), S.D.Ohio No. 99-CV-162; *Soletro v. National Federation of Independent Business* (N.D.Ohio,2001), 130 F.Supp.2d 906; *Darby v. Bratch* (C.A.8, 2002), 287 F.3d 673, 679. Pursuant to Section 2614(a)(1) of the FMLA, a covered employer is required to reinstate an employee to her former position or an equivalent position when she returns from leave.

{¶31}Defendant asserts that plaintiff cannot establish a prima facie case because she was permitted to return to an equivalent job. Plaintiff asserts that she has established the causal connection element of her FMLA claim because defendant changed her job duties when she returned to work after FMLA leave. The court may look to the temporal proximity between the adverse action and the protected activity to determine whether there is a causal connection. *Wrenn v. Gould* (C.A.6, 1987), 808 F.2d 493, 501. However, even if plaintiff established a prima facie case, plaintiff still must show that defendant's nondiscriminatory reason was in fact pretextual and that unlawful discrimination was the real reason for the adverse action. *Skrjanc,* supra; *Reeves*, supra.

{¶32}The method and manner of proof of a claim under the ADA is "roughly equivalent" to the standards used under other employment discrimination statutes. *Monette v. Electronic Data Systems, Corp*. (6th Cir. 1996), 90 F.3d 1173, 1178-79. As with ADA claims, the *McDonnell Douglas* burden-shifting framework should also be applied to FMLA retaliation claims. *Skrjanc*, supra at 315; *Petsche v. Home Fed. Savings Bank* (N.D.Ohio 1997), 952 F.Supp. 536, 537-38 (finding the burden shifting applicable to disability discrimination is also applicable to FMLA discrimination). "Moreover, the language of anti-retaliation provision(s) of the FMLA are much the same as Title VII, Americans with Disabilities Act" and the federal Age Discrimination in Employment Act. *Rosania v. Taco Bell of Am., Inc.* (D. Ohio, 2004), 303 F.Supp. 2d 878, 883. Regardless of the framework used for presenting the proof in an employment discrimination case, "the underlying substantive law is the same" and plaintiff must prove by a preponderance of the evidence that unlawful discrimination was a motivating factor in the adverse employment decision. *Gibson,* supra, at 514; *Desert Palace, Inc. v. Costa* (2003), 123 S.Ct. 2148.

{¶33}For the reasons set forth in the analysis of plaintiff's ADA claim, the court finds that defendant has articulated legitimate nondiscriminatory reasons for changing plaintiff's job assignment and that plaintiff has not established that defendant's proffered reasons were pretextual. Accordingly, the court finds that plaintiff cannot prevail on her FMLA claim.

AGE DISCRIMINATION

{¶34}Similarly, with regard to her age discrimination claim, plaintiff must show that age was the motivating factor for the adverse employment action. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501. Plaintiff has not produced any direct evidence of age discrimination. To use the indirect method of establishing a prima facie case of discrimination plaintiff must show that she was replaced by either someone outside of the protected class or someone who is "substantially younger." *Coryell v. Bank One Trust, Co.*, 101 Ohio St.3d 175, 2004-Ohio-723 (discussing the altered version of the *McDonnell Douglas* test used in federal age discrimination cases as set forth in *O'Connor v. Consolidated Coin Caterers Corp*. (1996), 517 U.S. 308).

{¶35}Although plaintiff claims that Amy Miller "replaced" her in the Student Services department when Miller was assigned some of the tasks that plaintiff had performed prior to taking leave, Miller had worked in the Student Services department prior to the reorganization. Additionally, Miller testified that she performed certain tasks for which plaintiff had not been responsible, such as maintaining the student database. Thus, the court finds that plaintiff was not replaced by Miller.

{¶36}Even if plaintiff had proven a prima facie case of age discrimination, for the reasons discussed above, plaintiff failed to establish that defendant's asserted reasons for the adverse action were false. Accordingly, her age discrimination case must fail.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶37}Plaintiff also has failed to prove intentional infliction of emotional distress. 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.

{¶38}For the forgoing reasons, the court finds that plaintiff has not proven any of her claims by a preponderance of the evidence and accordingly, judgment shall be rendered in favor of defendant.

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IN THE COURT OF CLAIMS OF OHIO

KATHERINE WALSER	:	
Plaintiff	:	CASE NO. 2003-03680 Judge Fred J. Shoemaker
v.	:	
		JUDGMENT ENTRY
OHIO UNIVERSITY	:	
Defendant	:	

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This case was tried to the court on the issue of liability. 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.

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FRED J. SHOEMAKER
Judge

Entry cc:

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