[Cite as *Barnett v. Ohio State Univ. Med. Ctr.*, 2007-Ohio-5424.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

GREGORY T. BARNETT

Plaintiff

v.

OHIO STATE UNIVERSITY MEDICAL CENTER

Defendant

Case No. 2005-10233

Judge Joseph T. Clark

DECISION

Plaintiff brought this action alleging the following claims: 1) denial of rights under the Family Medical Leave Act (FMLA), 29 U.S.C. 2601 et seq.; 2) failure to post notice of plaintiff's rights under the FMLA; 3) breach of an implied contract; and 4) disability discrimination under R.C. 4112.02(A). On January 31, 2007, the court dismissed plaintiff's claim of promissory estoppel. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.[1]

Plaintiff was employed as a supervisor in the distribution department of defendant's division of material systems. Plaintiff suffered from epilepsy and took prescribed medication to control seizures. In the summer of 2003, plaintiff's epilepsy medication became ineffective and he experienced problems as a result of taking other medications that had been prescribed as substitutes. In the fall of 2003, plaintiff was admitted to Talbot

[1]On February 6, 2007, plaintiff filed a motion in limine to prohibit the testimony of Mark Ringer and Rosalind Parkinson, and to prohibit defendant from presenting any of plaintiff's medical records that were generated after July 30, 2004. At trial, defendant did not present the testimony of Ringer or Parkinson. In addition, defendant did not offer any exhibits regarding plaintiff's medical records after July 30, 2004. Therefore, plaintiff's February 6, 2007 motion in limine is DENIED as moot.

Hall, a residential treatment facility for the condition of alcoholism. As of July 2004, plaintiff had worked for defendant for over 27 years.

From Wednesday, July 14 through Friday, July 16, 2004, plaintiff did not report to work.[2] Plaintiff's wife telephoned the "call-in" center to notify defendant that plaintiff was ill and would not report to work on those days. Plaintiff was not scheduled to work the weekend of July 17 though July 18.

According to plaintiff, his wife telephoned defendant on Monday, July 19 to again report that he would not be at work that day. Plaintiff testified that on Tuesday, July 20 he left a voice mail message for Carl Story, his supervisor, stating that he needed to take the rest of the week off. Plaintiff further testified that he admitted himself to Talbot Hall on Friday, July 23 for treatment for alcoholism.

Carl Story, plaintiff's supervisor, testified that employees could either use the call-in center, which was a central telephone number to report absences, or that his employees could call him directly to report their absences. Story testified that the "call logs" from July 14-16 show that someone called in for plaintiff to state that he was ill and would not be in for work on those days. (Defendant's Exhibit A.) According to Story, plaintiff left him a voice mail message on Monday, July 19 stating that he wanted to use a "vacation day" to "get himself turned around" and that he would return to work on the following day; however, plaintiff neither reported to nor called off work on Tuesday, July 20 through Friday, July 23. Story testified that the call logs for July 19-23 have no record of anyone having called in for plaintiff. (Defendant's Exhibit A.)

Story further testified that on July 20, after plaintiff had neither shown up for work nor called to report his absence, Story contacted Patrick Payne in the human resources

[2]All dates in July shall refer to the year 2004 unless noted otherwise.

office to inquire about his responsibilities in dealing with a "no call, no show" employee. Story further stated that by Thursday, July 22, plaintiff had neither called in nor appeared for work for three days. On Friday, July 23, after plaintiff again had neither called in nor reported to work, Story prepared a request to recommend plaintiff's dismissal and forwarded it to the human resources department.

Defendant finalized a termination letter on Friday, July 23. Late in the afternoon on July 23, plaintiff's mother telephoned Story and told him that plaintiff was going to be admitted to Talbot Hall. On Monday, July 26, defendant mailed the termination letter to plaintiff informing him that his employment was terminated effective July 30. (Defendant's Exhibit C). The reason given for termination was "job abandonment."

COUNT 1: INTERFERENCE WITH FMLA RIGHTS

Plaintiff claims that defendant's decision to terminate his employment on Friday, July 23 constitutes interference with his rights under the FMLA. The FMLA allows an eligible employee to take up to 12 weeks of unpaid leave from work for a qualifying medical or family reason. To prevail on a claim for interference with FMLA benefits a plaintiff must establish that: "(1) he is an 'eligible employee,' 29 U.S.C. 2611(2);[3] (2) the defendant is an 'employer,' 29 U.S.C. 2611(4);[4] (3) the employee was entitled to leave under the FMLA, 29 U.S.C. 2612(a)(1);[5] (4) the employee gave the employer notice of his intention to

[3]29 U.S.C. 2611(2) states, in part: "(2) Eligible employee. "(A) In general. The term 'eligible employee' means an employee who has been employed– (i) for at least 12 months by the employer with respect to whom leave is requested under section 102 [29 USCS § 2612]; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period."

[4]29 U.S.C. 2611(4) states, in part:
"(4) Employer. "(A) In general. The term 'employer'-- (i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."

[5]29 U.S.C. 2612 states, in part:
"Leave requirement "(a) In general. "(1) Entitlement to leave. Subject to section 103 [29 USCS §

take leave, 29 U.S.C. 2612(e)(1);[6] and (5) the employer denied the employee FMLA benefits to which he was entitled." *Cavin v. Honda of Am. Mfg.* (C.A.6, 2003), 346 F.3d 713, 719. The FMLA provides that an action for damages may be maintained in any

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2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

"* * * "(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee."

[6]29 U.S.C. 2612(e) states, in part:

"Foreseeable leave. "(1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable. "(2) Duties of employee. In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee– (A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and (B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable."

federal or state court of competent jurisdiction. 29 U.S.C. 2617. In Ohio, jurisdiction for suits against the state and its instrumentalities for money damages rests with the Court of Claims. See *Ewing v. Univ. of Akron,* Summit App. No. 22005, 2004-Ohio-4442.

Although the court finds that plaintiff has established that he was an eligible employee and that defendant was an employer pursuant to the statutory definitions provided in 29 U.S.C. 2611(2) and (4), respectively, the court further finds that plaintiff has failed to establish requirements three, four, and consequently five, above, all of which are necessary to sustain a claim of interference with FMLA benefits.

Under the FMLA, an eligible employee must show that he suffered from a serious health condition. To qualify as having a "serious health condition" under the FMLA, an employee must have an illness, injury, or impairment that required: 1) inpatient care "in a hospital, hospice, or residential medical care facility"; or 2) "continuing treatment by a health care provider." See 29 C.F.R. 825.114(a). Both of those scenarios also require: "(1) a period of incapacity involving an inability to work, attend school or perform other regular daily activities due to the serious health condition and (2) treatment consisting of two or more visits to a health care provider or a single visit with a continuing treatment regimen." See 29 C.F.R. 825.114(a). Plaintiff testified that he was admitted to Talbot Hall on Friday, July 23. However, upon cross-examination, plaintiff acknowledged that his admission records show that he was admitted to Talbot Hall on Saturday, July 24. (Defendant's Exhibit S.) Plaintiff conceded that his testimony about being admitted to Talbot Hall on Friday, July 23 was erroneous. In any event, plaintiff contends that his admission to Talbot Hall qualifies his alcoholism as a serious health condition. "However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave." 29 C.F.R. 825.114(d).

With regard to notice, "Nothing in the [FMLA] statute places a duty on an employer to affirmatively grant leave without such a request or notice by the employee. Rather, to invoke the protection of the FMLA, the employee must provide notice and a qualifying reason for requesting the leave." *Brohm v. JH Props.* (C.A.6, 1998), 149 F.3d 517, 523, citing *Manuel v. Westlake Polymers Corp.* (C.A.5, 1995), 66 F.3d 758, 762. Conflicting testimony was presented as to the nature of the phone calls that were placed on Monday, July 19 and Tuesday, July 20. Plaintiff claims that his wife called in for him on Monday and that on Tuesday he left a message for Carl Story asking for the rest of the week off. However, plaintiff's wife testified that she did not make such a call on Monday, July 19 and that plaintiff had told her that he had called in himself. Plaintiff admitted that during the week of July 19 he was abusing alcohol and that his substance abuse necessitated his eventual admission to Talbot Hall. Carl Story testified that plaintiff called in on Monday, July 19 and asked to use a day of vacation time but that he heard nothing further until plaintiff's mother called on the afternoon of Friday, July 23. The court finds that the testimony of Story and of plaintiff's wife was more credible than plaintiff's testimony. Accordingly, the court finds that plaintiff did not provide defendant with notice that he intended to take FMLA leave or that he needed additional time off beyond Monday, July 19. As such, plaintiff has not satisfied the fourth requirement to sustain an FMLA interference claim.

In light of the above, the court finds that plaintiff has failed to prove that defendant interfered with his entitlement to FMLA benefits. Judgment in favor of defendant shall be entered as to plaintiff's interference claim.[7]

COUNT 2: NOTICE OF FMLA BENEFITS

An employer covered by the FMLA must "conspicuously" post a notice "explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act." 29 C.F.R. 825.300(a).[8] Furthermore, "an employer

[7]Plaintiff testified that he did not suffer any epileptic seizures from July 19 to July 23. Therefore, the court finds that plaintiff's epilepsy did not cause him to seek FMLA benefits during that week.

[8]29 C.F.R. 825.300 states, in part: "(a) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any 'eligible' employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Employers may

that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave." 29 C.F.R. 825.300(b).

Plaintiff claims that defendant failed to post such a notice in violation of federal regulations; however Patrick Payne testified that the necessary posting was, at all times relevant, located in the Health Systems Human Resources Department in Doan Hall; described in detail in the University Hospitals Policy and Procedure Manual, which is distributed to all employees (Plaintiff's Exhibit 9, Policy No. 02-37); and was also available on-line to its employees. The court finds that defendant has met the posting requirements imposed by the FMLA, and accordingly, plaintiff's claim for failure to post notice of FMLA rights is DENIED.

COUNT 3: BREACH OF IMPLIED CONTRACT

Plaintiff was an employee at will. (Plaintiff Exhibit 9, Policy No. 02-26). "[T]he employment-at-will doctrine provides that 'the employment relationship between employer and employee is terminable at the will of either; thus, an employee is subject to discharge

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duplicate the text of the notice contained in Appendix C of this part, or copies of the required notice may be obtained from local offices of the Wage and Hour Division. The poster and the text must be large enough to be easily read and contain fully legible text. "(b) An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $100 for each separate offense. Furthermore, an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave."

by an employer at any time, even without cause.'" *Reasoner v. Bill Woeste Chevrolet, Inc.* (1999), 134 Ohio App.3d 196, 200. Plaintiff claims that certain of defendant's policies including the accrual of sick leave and certain progressive discipline policies, create an implied contract that constitutes an exception to an employment-at-will agreement.

Breach of an implied contract is one of the recognized exceptions to the employment-at-will relationship. See Id. There is, however, a presumption against finding implied contractual obligations, and employee manuals and handbooks are usually insufficient to create an implied contract. See *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 671. The court finds that plaintiff has failed to prove by a preponderance of the evidence that an implied contract existed.

It is undisputed that plaintiff had accumulated a substantial number of sick leave hours during his tenure in defendant's employ; however, the University Hospitals Policy and Procedure Manual requires that staff members who intend to use sick leave must notify their immediate supervisors two hours prior to their shift. (Plaintiff's Exhibit 9, Policy No. 02-06). When plaintiff failed to call in on Tuesday, July 20 through Friday, July 23 he was considered absent from work without leave. Plaintiff presented no evidence of any policy of defendant that would allow him to use sick leave without first notifying his supervisor. Therefore, even if defendant's sick leave policy created an implied contract that was an exception to the employment-at-will relationship, plaintiff failed to follow it.

Plaintiff likewise claims the existence of an implied contract with regard to the disciplinary procedures contained in the University Hospitals Policy and Procedure Manual. The relevant passage states that "The OSUH and the University follow a policy of progressive disciplinary action for *minor offenses.*" (Plaintiff's Exhibit 9, Policy No. 02-26.) (Emphasis added.) To prevail on the implied contract cause of action based upon the references to "progressive discipline" in the policy manual, plaintiff would have to show by a preponderance of the evidence that: 1) missing four days of work without calling in qualified as only a minor offense; and, 2) both plaintiff and defendant mutually assented to

something other than an employment-at-will relationship. See *Reasoner*, supra, at 200. The court finds that plaintiff has failed to show such conditions. Therefore, plaintiff's claim for breach of an implied contract must fail.

COUNT 4: DISABILITY DISCRIMINATION

Plaintiff's fourth claim is for disability discrimination. First, plaintiff claims that he was wrongfully terminated due to his alleged disabilities of epilepsy and alcoholism. Second, plaintiff claims that defendant failed to grant him a reasonable accommodation once he sought treatment for his conditions.

R.C. 4112.02 provides in relevant part:

"It shall be an unlawful discriminatory practice:

"(A) For any employer, because of the race, color, religion, sex, national origin, *disability*, 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." (Emphasis added.)

Ohio courts often look to the federal Americans with Disabilities Act (ADA), which is similar to the Ohio disability discrimination law, for assistance in interpretation of Ohio law. See *City of Columbus Civ. Serv. Comm'n v. McGlone*, 82 Ohio St.3d 569, 573, 1998-Ohio-410.

Under Ohio law, an individual has a "disability" if he or she has "a physical or mental impairment that substantially limits one or more major life activities" of such individual. R.C. 4112.01(A)(13). 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 as 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 that

same major life activity." 29 CFR 1630.2(j). 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." See *Toyota Motor Mfg. v. Williams* (2002), 534 U.S. 184, 198.

Factors to consider whether an individual is substantially limited in a major life activity include "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. 1630.2(j)(2). However, "intermittent, episodic impairments" generally are not considered to be disabilities. *Brown v. BKW Drywall Supply, Inc.* (S.D. Ohio 2004), 305 F.Supp.2d 814, 826.

To establish a prima facie case of disability discrimination pursuant to R.C. 4112.02, plaintiff must demonstrate: "(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. "Once the plaintiff establishes a prima facie case of handicap discrimination, the burden then shifts to the employer to set forth some legitimate, nondiscriminatory reason for the action taken. * * * [I]f the employer establishes a nondiscriminatory reason for the action taken, then the employee or prospective employee must demonstrate that the employer's stated reason was a pretext for impermissible discrimination." *Hood v. Diamond Prods.* (1996), 74 Ohio St.3d 298, 302, citing *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 197-198.

It is undisputed that plaintiff suffered from epilepsy. Plaintiff testified that he had his first seizure in 1974; however, under the care of his doctor, plaintiff had been relatively

successful in controlling his condition with medication. Moreover, plaintiff testified that he did not have any seizure activity for the period during which he was absent from work, until July 24, the day that he was admitted to Talbot Hall. Therefore, the court finds that plaintiff's epilepsy was not the cause of plaintiff's unexcused absence nor did the epilepsy condition impair plaintiff's ability to give notice of his intent to take leave.

Plaintiff also claims that his alcoholism is a disability. Alcoholism can qualify as a disability under R.C. 4112.01(A)(13). *Hazlett*, supra, at syllabus. However, the testimony of plaintiff's mother, sister, and plaintiff himself shows that plaintiff experienced only a few instances where his excessive consumption of alcohol combined with his prescribed medication caused him to miss significant time from work. Aside from the two weeks in July 2004, the only other mention in the record of plaintiff missing significant work was in 2003. While the court does not dispute the seriousness of plaintiff's condition during those time periods, the impact of plaintiff's impairment cannot be reasonably described as "permanent" or "long-term." Moreover, plaintiff failed to present any evidence that any major life activity was significantly restricted or curtailed due to his alcoholism.

However, even if plaintiff could establish a prima facie case of disability discrimination based upon his condition of alcoholism, the burden would shift to defendant to set forth some legitimate, nondiscriminatory reason for the termination of plaintiff's employment. The court finds that based upon the evidence presented, plaintiff failed to follow the call-in procedures from Tuesday, July 20 to Friday, July 23, and that his failure caused him to be a "no-call, no-show" employee for four consecutive days. The court is persuaded that plaintiff's four-day unexcused absence is a legitimate, nondiscriminatory reason for his termination. Furthermore, plaintiff has not provided the court with any evidence to prove that the stated basis for his termination was a pretext. Therefore, the court finds that plaintiff's claim of disability discrimination must fail.

In addition, as part of his prima facie case, an employee alleging a disability protected by the ADA must establish that his employer had either actual or constructive

notice of the disability. *Monette v. Elec. Data Sys. Corp.* (C.A.6 1996), 90 F.3d 1173, 1185. "The employer is not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation." *Brown v. BKW Drywall Supply, Inc.*, supra, at 828-829. (Citations omitted.)

The court finds that plaintiff failed to ask for any reasonable accommodation until after he had been absent from work for four days without any explanation. The court further finds that plaintiff has failed to prove by a preponderance of the evidence that he had either a legally cognizable disability that resulted in his four-day absence or that he had provided defendant with notice of such disability.

CONCLUSION

For the foregoing reasons, the court finds that plaintiff has failed to prove any of his claims for relief and accordingly, judgment shall be rendered in favor of defendant.

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Judge Joseph T. Clark

JUDGMENT ENTRY

{¶1} 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.

JOSEPH T. CLARK
Judge

cc:

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CJT/HTS/cmd
Filed September 28, 2007
To S.C. reporter October 9, 2007