[Cite as *Ressler v. Ohio Atty. Gen.*, 2014-Ohio-5943.]

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

KAREN RESSLER

Plaintiff

v.

ATTORNEY GENERAL OF OHIO

Defendant

Case No. 2013-00005

Judge Patrick M. McGrath
Magistrate Anderson M. Renick

DECISION

{¶1} On April 7, 2014, defendant filed a motion for summary judgment pursuant to Civ.R. 56(C). On April 24, 2014, plaintiff filed a response. On May 5, 2014, defendant filed a reply and a motion to file the same, which is hereby GRANTED. The motion for summary judgment is now before the court for a non-oral hearing.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean*

United, Inc., 50 Ohio St.2d 317 (1977).

{¶4} Plaintiff began working for defendant in January 2007 as the Interim Deputy Director of Human Resources. On January 16, 2007, plaintiff accepted a position at the Ohio Peace Officer Training Academy (OPOTA) as the Training Coordinator. Plaintiff's job duties included administering peace officer certification exams and leading tours of OPOTA. Soon after she transferred to OPOTA, plaintiff began reporting to John Martin, OPOTA's Deputy Director. On November 1, 2009, Martin retired and William Walker became plaintiff's supervisor. At the beginning of his tenure, Walker requested that each of his subordinates provide a list of the duties they performed.

{¶5} On November 18, 2009, plaintiff was examined by her physician for symptoms related to chronic abdominal pain. According to plaintiff, after her appointment, she notified Walker via voicemail message that she was being scheduled for surgery on December 1, 2009, to repair a hernia and that she would require two to six weeks to recover from the surgery. Plaintiff avers that on November 19, 2009, she called Kim Hahn, an administrative secretary who worked in plaintiff's office, and reported that she would not be in the office that day due to continuing abdominal pain; however, plaintiff stated that she intended to work the following day.

{¶6} On November 20, 2009, plaintiff arrived at work to gather materials to administer tests at another location. According to plaintiff, she "became panicked" when she could not find the materials and she was "upset" when she learned from Hahn that Assistant Executive Director Robert Fiatal had left to administer the tests. Plaintiff avers that when Hahn arrived at the office, they had another conversation during which Hahn inquired whether plaintiff had "calmed down." Hahn informed Walker that she felt threatened by plaintiff's conduct that morning and that she was not comfortable sharing the same office space with her. Later that day, plaintiff was asked to meet with Walker, Deputy Director Victoria Gatien and another staff member, Gaye Gossard. During the meeting, plaintiff was informed that Hahn was upset by comments plaintiff had made during their conversations that morning.

{¶7} On November 23, 2009, Walker provided defendant's human resources department with a detailed statement regarding his observations of plaintiff's performance and behavior, including the November 20, 2009 incident. Walker's statement recommended that plaintiff be dismissed and that she be placed on administrative leave until such time. Walker attached to his statement a statement

from Hahn which related difficulties she had encountered while working with plaintiff. The same day, plaintiff informed Walker and Hahn via email that she was leaving work to attend an appointment for a Family and Medical Leave Act (FMLA) qualifying event. Plaintiff submitted FMLA paperwork on December 1, 2009 and was subsequently approved for FMLA leave.

{¶8} When plaintiff returned from FMLA leave on January 3, 2010, she was reassigned to Deputy Director Fiatal's department in a similar position with the same pay and benefits. Plaintiff continued to perform many of the same duties, in addition to other clerical duties. On or about April 25, 2010, Fiatal was appointed Executive Director of OPOTA and his previously held Deputy Director position was not filled. As a result, Fiatal recommended to the Chief Operating Officer of human resources, Helen Ninos, that plaintiff be removed from the position in May 2010. Before a decision was made regarding Fiatal's recommendation, plaintiff took FMLA leave from June 1, 2010 through July 26, 2010.

{¶9} When plaintiff returned to work, she was reassigned to a similar position in the OPOTA Advanced Training Department where she continued to perform administrative, operational, and clerical work while receiving the same pay and benefits. In that position, plaintiff reported to Deputy Director Lou Agosta, although Executive Director Fiatal continued to assign her some duties.

{¶10} In January 2011, soon after Attorney General Mike DeWine was sworn into office, defendant's administration directed Fiatal to conduct a review of the personnel under his direction and to determine whether consolidations or terminations were warranted as a cost saving measure. Director Fiatal recommended that plaintiff's position be terminated because her contributions were unnecessary. Fiatal's recommendation was accepted and plaintiff was removed from her unclassified, at-will position on February 2, 2011.

{¶11} Plaintiff brought this action alleging disability discrimination, and violation of her rights under the FMLA, 29 U.S.C. 2611 et seq. Defendant argues that plaintiff cannot prevail on her claims because the recommendation to terminate plaintiff's position was not related either to her purported disability or to her requests to take FMLA leave. Defendant further contends that plaintiff cannot show that defendant's legitimate, non-discriminatory reason for eliminating her position and subsequently terminating her employment was pretext for retaliation or disability discrimination.

FMLA

{¶12} The FMLA prohibits employers from discriminating against employees for exercising their rights under the Act. Section 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 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 Cty. Bd. of Commrs*. (Jan. 28, 2002), S.D.Ohio No. 99-CV-162, 2002 WL 193576; *Soletro v. Natl. Fedn. of Indep. Business* (N.D.Ohio 2001), 130 F.Supp.2d 906; *Darby v. Bratch* (C.A.8, 2002), 287 F.3d 673, 679." *Zechar v. Ohio Dept. of Edn.*, 121 Ohio Misc.2d 52, 2002-Ohio-6873, ¶ 9.

{¶13} If plaintiff establishes a prima facie case, the burden of production shifts to defendant to "articulate some legitimate, nondiscriminatory reason for [its action]." *McDonnell Douglas, supra*, at 802. If defendant succeeds in doing so, then the burden shifts back to plaintiff to demonstrate that defendant's proffered reason was not the true reason for the employment decision. *Id*.

{¶14} Defendant does not dispute that plaintiff has satisfied the first element establishing a prima facie case of retaliation and that her termination was an adverse employment action. To the extent that plaintiff alleges that some of her job location or duties were changed in retaliation for taking FMLA leave, the court notes that such reassignments do not ordinarily constitute adverse employment action. *Kocsis v. Multi-Care Management, Inc.* 97 F.3d 879, 885, citing *Yates v. Avco Corp*, 819 F.2d 630, 638 (6th Cir. 1987).

{¶15} Furthermore, defendant argues that plaintiff cannot establish that there is a causal connection between her use of FMLA leave and her termination.

{¶16} "'A reason for dismissal that is unrelated to a request for an FMLA leave will not support recovery under an interference theory * * * an indirect causal link between dismissal and an FMLA leave is an inadequate basis for recovery.'"

Anderson v. Wellman Prods. Group, 157 Ohio App. 3d 565, 573 (2004), citing *Bones v. Honeywell Int'l, Inc.* (C.A.10, 2004), 366 F.3d 869, 878-879. "[I]f an employee's discharge would have occurred regardless of her request for FMLA leave, then that employee may be discharged even if discharge prevents her exercise of any possible right to FMLA leave." *Anderson, supra* at 572, citing *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 877 (C.A.10, 2004).

{¶17} "The court may look to the temporal proximity between the adverse action and the protected activity to determine whether there is a causal connection." *Zechar, supra,* at ¶ 11, citing *Harrison v. Metro Govt. of Nashville & Davidson Cty., Tenn.*, 80 F.3d 1107, 1118-1119 (C.A.6, 1996). "'The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close.'" *Id*., quoting *Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 273 (2001). However, the Sixth Circuit Court of Appeals has held that closeness in time is only one indicator of a causal connection and that temporal proximity, standing alone, is not enough to establish a causal connection for a retaliation claim. *Spengler v. Worthington Cylinders* (C.A.6, 2010), 615 F.3d 481, 494.

{¶18} There is no dispute that defendant approved each of plaintiff's requests for FMLA leave before her position was eliminated. After Fiatal was promoted to Executive Director of OPATA, on April 25, 2010, his former position as the Assistant Executive Director was not filled, and he determined that plaintiff's assistance was no longer needed. As discussed above, Fiatal's initial recommendation to terminate plaintiff's position was not implemented before plaintiff took FMLA leave in June and July of 2010. However, after the DeWine administration asked Fiatal to conduct a personnel review in January 2011, he again recommended that plaintiff's contributions were unnecessary, and that recommendation was accepted. Fiatal avers that he had no knowledge that plaintiff was planning to take additional FMLA leave, and plaintiff has not presented any evidence to the contrary.

{¶19} If an adverse action was considered before plaintiff engaged in protected activity, there is no inference of causation. *See Prebilich-Holland v. Gaylord Entertainment Co.*, 297 F.3d 438, 443-444 (6th Cir. 2002) (finding that close proximity creates no inference of causation when the termination procedure was instituted several days before knowledge of protected status or activity). "Evidence that the

employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity." *Sosby v. Miller Brewing Co.*, 415 F. Supp. 2d 809, 822 (S.D. Ohio 2005), citing *Smith v. Alien Health Sys., Inc.*, 302 F.3d 827, 834 (8th Cir. 2002).

{¶20} Inasmuch as the recommendation to eliminate plaintiff's position was made before January 28, 2011, when plaintiff learned that she would need another surgery, there is no inference of causation. Furthermore, "'A reason for dismissal that is unrelated to a request for an FMLA leave will not support recovery under an interference theory * * * an indirect causal link between dismissal and an FMLA leave is an inadequate basis for recovery.'" *Anderson v. Wellman Prods. Group*, 157 Ohio App. 3d 565, 573 (2004), citing *Bones, supra*, at 878-879. "[I]f an employee's discharge would have occurred regardless of her request for FMLA leave, then that employee may be discharged even if discharge prevents her exercise of any possible right to FMLA leave." *Anderson, supra* at 572.

{¶21} Plaintiff argues that the court should apply a "cat's paw" theory of causation based upon plaintiff's assertion that Fiatal's actions were the result of "transferred" discriminatory animus from Walker. "An employer may be held liable under a cat's paw theory of liability '[w]hen an adverse * * * decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias.'" *Nebozuk v. Abercrombie & Fitch Co. et al.*, 10th Dist. Franklin No. 13AP-591, 2014-Ohio-1600, ¶ 45, quoting *Bishop v. Ohio Dept. of Rehab. & Corr.*, 529 Fed. Appx. 685, (6th Cir.2013); *Arendale v. Memphis*, 519 F.3d 587, 604 (6th Cir.2008), fn. 13.

{¶22} The undisputed evidence shows that Fiatal made his decision to recommend plaintiff's removal based upon his own personnel review. Indeed, Walker's November 2009 recommendation to remove plaintiff was never implemented, he was no longer working for defendant in January 2011 when Fiatal made his recommendation regarding plaintiff's employment, and Fiatal avers that he had not even seen Walker's statement prior to making that recommendation. Based upon the undisputed evidence, plaintiff cannot establish causation under a cat's paw theory.

{¶23} Even if plaintiff were able to establish a prima facie case, plaintiff could not prevail if defendant had legitimate, nondiscriminatory reasons for terminating her employment. *McDonnell Douglas, supra*.

{¶24} It is undisputed that when Fiatal was appointed to Executive Director, his previous position was not filled. Thus, there was no longer a Deputy Director position for plaintiff to assist. For this reason, he recommended to defendant's human resources department, and then again to Attorney General DeWine's administration, that plaintiff's position be terminated. Furthermore, Fiatal avers that he had no knowledge that plaintiff was planning to take additional FMLA leave. Based upon the above facts and the applicable law, the court finds that defendant had legitimate, nondiscriminatory reasons for terminating plaintiff's position.

{¶25} Accordingly, judgment in favor of defendant shall be granted as to plaintiff's FMLA claim.

DISABILITY DISCRIMINATION

{¶26} 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.*, 25 Ohio St.3d 279, 281 (1986). The *McDonnell Douglas* burden shifting framework also applies for the analysis of plaintiff's claim of disability discrimination under R.C. Chapter 4112. *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St. 3d 175, 178 (2004); *Knepper v. Ohio State Univ.*, 10th Dist. No. 10AP-1155, 2011 Ohio 6054.

{¶27} Plaintiff asserts that defendant was aware of her hernia condition, that the condition "hampered her ability to lift and perform other reasonable physical activities," and that the termination of her employment constitutes disability discrimination. However, even if plaintiff could establish that her hernia condition constitutes a disability for the purposes of her disability claim, for the reasons stated above, she cannot show that the adverse employment action was taken, at least in part, because of the alleged disability.

{¶28} Moreover, defendant has shown that the decision to terminate her position was based upon a legitimate, nondiscriminatory reason. Thus, defendant is entitled to judgment as a matter of law as to plaintiff's claim for disability discrimination.

{¶29} For the foregoing reasons, the court finds that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted.

_____

PATRICK M. MCGRATH
Judge

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

KAREN RESSLER

Plaintiff

v.

ATTORNEY GENERAL OF OHIO

Defendant

Case No. 2013-00005

Judge Patrick M. McGrath
Magistrate Anderson M. Renick

JUDGMENT ENTRY

{¶30} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and 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.

_____
PATRICK M. MCGRATH
Judge

cc:

Emily M. Simmons
Randall W. Knutti
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Gary A. Reeve
P.O. Box 7866
Columbus, Ohio 43207

Filed June 5, 2014
Sent To S.C. Reporter 10/30/15