[Cite as *Ray v. Dept. of Health*, 2017-Ohio-6960.]

CAROL RAY Plaintiff v. OHIO DEPARTMENT OF HEALTH Defendant	Case No. 2015-01051 Judge Patrick M. McGrath Magistrate Holly True Shaver DECISION

{¶1} On March 15, 2017, defendant filed a motion for summary judgment and plaintiff filed a motion for partial summary judgment pursuant to Civ.R. 56. On March 29, 2017, the parties filed their respective responses. On April 5, 2017, both parties filed reply briefs with accompanying motions for leave to file the same, which motions are GRANTED. The cross-motions for summary judgment are now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶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).

FACTS

{¶4} Plaintiff was employed by defendant as an Assistant Legal Counsel in the Office of General Counsel for approximately 24 years. Plaintiff served at the pleasure of the appointing authority in that she was an at-will employee. (Plaintiff's deposition, pp. 79-80.) In 1993, plaintiff was diagnosed with depression after the birth of her son. (*Id*., p. 92.) Plaintiff was treated with medication for that condition. Plaintiff discussed with her supervisor at the time, Jodi Govern, the fact that her health insurance company required her to "see a shrink" to obtain coverage for her medications for depression. (*Id*., p. 110.) Plaintiff testified that she had known Lance Himes since 2004, and that she also discussed her health conditions of depression and anxiety with him. (*Id*., p. 116.) On April 11, 2011, plaintiff lost a daughter to suicide. After the death of her daughter, plaintiff was diagnosed with ADHD and she continued treatment with a therapist and medication. In September 2011, Govern left defendant's employment and Himes became plaintiff's supervisor.

{¶5} Plaintiff asserts that from December 2011 through August 2012, she had an overwhelming work load. In 2012, defendant's former director, Dr. Ted Wymyslo, became concerned with plaintiff's behavior and suggested to Himes that plaintiff be sent to an Independent Medical Examination (IME). (Himes' deposition, p. 90.) Specifically, Dr. Wymyslo observed that plaintiff was working long hours, that she was either in a "bad" or "low" mood, and that she would occasionally get tears in her eyes when she spoke to him. (*Id*.) As a result of his discussions with Dr. Wymyslo, Himes decided not to send plaintiff to an IME, but, rather, he discussed Dr. Wymyslo's concerns with plaintiff, made adjustments to her workload, and placed her on a "work plan," where she was to consult Himes before accepting any additional projects. (*Id*., pp. 91-92.) Throughout her employment, plaintiff received favorable evaluations and was never formally disciplined. However, Himes recalled counseling plaintiff during her evaluations that she could be more effective if she did not exhibit strong emotions

during meetings, and he related his concerns with plaintiff's ability to manage interpersonal relationships with coworkers. (*Id*., p. 41, 43.) In February 2014, Himes was appointed as Acting Director for defendant. On March 14, 2014, Mahjabeen Qadir was appointed as defendant's Acting General Counsel. In that role, Qadir became plaintiff's supervisor.

{¶6} On March 26, 2014, Qadir received a complaint about plaintiff's behavior from two of plaintiff's coworkers, Sean Keller and Nicole Brennan. (Qadir deposition, pp. 94-96.) Specifically, Keller and Brennan informed Qadir that plaintiff had called a contractual vendor without request or input by program employees about a contractual modification that the program was proposing. (*Id*.) After the conversation with plaintiff, the vendor called Keller to complain about plaintiff's "aggressive" style during the phone call. (*Id*.) Keller and Brennan informed Qadir that they were concerned that plaintiff's actions had damaged the relationship with the vendor. (Plaintiff's Exhibits 11, 15.) Later that same afternoon, Qadir observed that plaintiff entered her office unannounced, while Qadir was on speakerphone, and that plaintiff became upset when Qadir would not include her in the conversation. (*Id*., pp. 108-111.) Later that day, plaintiff returned to Qadir's office and began speaking to Qadir in a loud voice, stating that she knew that Qadir had been speaking to another attorney earlier about one of plaintiff's contracts and that if she wanted information, Qadir should ask plaintiff instead of the other attorney. (*Id*.) Plaintiff asserts that during this meeting Qadir called her "paranoid." (Complaint, ¶ 56.)

{¶7} On March 28, 2014, plaintiff went to Qadir's office at approximately 6:00 p.m., and Qadir observed that she had tears in her eyes. (Qadir's deposition, p. 124.) According to Qadir, they discussed improving communication skills, and Qadir stated to plaintiff: "[c]ommunication is a two-way street and that means that she cannot talk to me in a rude, disrespectful or condescending way. I told her she needed to knock before entering my office and wait for me to tell her to come in, she could not yell at me or

make condescending comments toward me. She claimed she did not do any of those things. I pointed out that she was yelling at me right at that moment and she said that she did not see it as yelling, but her voice was elevated and she was waiving her arms around in a rapid and exasperated manner. Also her eyes started getting teary again." (*Id*., pp. 125-127; Plaintiff's Exhibit 11.) Plaintiff asserts in her complaint that at this meeting, Qadir "jumped out of her chair, threw her hands up into the air, and shouted 'You're crazy!'" at plaintiff. (Complaint, ¶ 62.) Plaintiff called Himes on his cell phone after this meeting and told Himes that she was having problems with Qadir and asked him not to share any information regarding plaintiff's mental health status with Qadir. (Himes' deposition, pp. 82-83.)

{¶8} Qadir scheduled a meeting with Will McHugh, defendant's Assistant Director of Administration, and Jamie Erickson, defendant's Chief of Human Resources, to discuss plaintiff's behavior. They decided to speak to Himes about Qadir's recommendation to terminate plaintiff's employment based upon both the complaints that had been reported to Qadir by Keller and Brennan, and plaintiff's rude and disrespectful behavior toward Qadir. Specifically, Qadir testified that during the March 28 encounter, plaintiff had made a "face" at her and complained that Qadir was acting like a child; that plaintiff had told Qadir that she was treating her poorly because Qadir did not have a boyfriend; and that plaintiff was yelling at her. (Qadir's deposition, p. 136.) Himes decided that instead of termination, he would send plaintiff to an IME to "make sure she was okay; to see if something else was going on." (Himes' deposition, p. 72.) Himes testified that the anniversary of plaintiff's daughter's suicide factored into his decision to send plaintiff to an IME. (*Id.*, p. 98.)

{¶9} On April 4, 2014, Belinda Kerr, Human Resources Administrator, sent a letter to Nick Marzella, Ph.D., scheduling an IME of plaintiff on April 8, 2014. In the letter, Kerr stated: "Carol has been with the Ohio Department of Health since 1990 and

is employed as an Attorney 5 in the Office of the General Counsel. Her duties include serving as a senior legal counsel for the department.

{¶10} "Concerns have been raised on and off throughout the last couple of years with regard to inappropriate behavior and outbursts but have recently escalated and become more erratic, frequent and severe.

{¶11} "The Office of Human Resources has received reports in the past couple of weeks that Carol has been experiencing frequent crying episodes, has outbursts along with exaggerated body movements and has expressed signs of paranoia in which she feels others in the department are treating her unfairly and conducting work 'behind her back.'" (Plaintiff's Exhibit 1.) Kerr also referenced concern about plaintiff's ability to "use good judgment" in her work as an attorney, and referred to the incident when the contract vendor called to complain about her unprofessional behavior during a phone conversation. (*Id*.)

{¶12} Plaintiff attended the IME. On April 8, 2014, Dr. Marzella issued his psychological fitness for duty evaluation, wherein he diagnosed plaintiff with major depression by history, ADHD, and histrionic personality traits and features. (Plaintiff's Exhibit 8.) Marzella stated that "[t]hough these traits and features do not rise to the level of a personality disorder, they will nonetheless bring her into more conflict with her environment than most of her peers." (*Id*.) Marzella also stated that at times, she may have difficulty understanding the impact of her behavior on others. (*Id*.) Marzella stated that plaintiff's "psychological conditions are dynamic in some respects though adequately stable at this point. She is compliant with her medication regimen. * * * Her perception of her performance in the workplace seems to differ significantly from the perception of her coworkers. These discrepancies and her behavior in the workplace are more administrative concerns rather than psychological issues. As her psychological condition is relatively stable, duty restrictions are not warranted. * * * Her current emotional resources are adequate to perform the essential tasks and duties of

her position as an attorney for the Department of Health. There is no evidence suggesting the need for reasonable accommodation." (*Id*.) In his recommendation, Dr. Marzella stated that "she has reached stabilization and should be considered fully accountable for her personal and professional responsibilities. At this time, she is psychologically fit to perform the essential tasks and duties of her position as an attorney in an unrestricted manner. She is fully able to understand and endure the consequences of her actions." (*Id*.)

{¶13} After obtaining the results of the IME, Kerr met with plaintiff to inform her that she had been "cleared to work," that she should resume her normal duties, and that she was responsible for her actions in the workplace. (Kerr's deposition, pp. 97-98; Plaintiff's Deposition, p. 186.) Kerr testified that she shared only the fact that plaintiff was fit for duty with Himes and Qadir; she did not discuss any diagnosis that appears in the report. (Kerr's deposition, p. 93.) Erickson testified that although she saw the report, she did not remember reading it thoroughly. (Erickson's deposition, p. 77.) According to Erickson, once the IME is completed, if an employee is determined to be fit for duty, the employee is notified to go back to work. If an employee is determined not to be fit for duty, the HR department starts the process for disability separation. *(Id.,* pp. 77-78.)

{¶14} On April 16, 2014, plaintiff met with Qadir and McHugh, during which time plaintiff was given a new position description and was informed of the expectations of her job. (McHugh's deposition, p. 66; Qadir's deposition, pp. 203-210; Defendant's Exhibit A to plaintiff's deposition.) McHugh and Qadir testified that, as a result of the meeting, Vanessa Harmon-Gouhin was to be the primary attorney for all contracts going through the department, and plaintiff was no longer to supervise Harmon-Gouhin, but could "trouble-shoot" if necessary. (McHugh's deposition, p. 70; Qadir's deposition, pp. 203-210; Defendant's Exhibit A.) Qadir gave plaintiff a list of expectations and explained to her that there must be better communication between them. (Qadir

deposition, pp. 196, 203-210; Defendant's Exhibit A.) Harmon-Gouhin testified that when plaintiff returned to work after the IME, plaintiff told her that her responsibilities had changed, and that Harmon-Gouhin would be "doing the contracts solely." (Harmon-Gouhin's deposition, p. 49.) At that point, Harmon-Gouhin was doing most of the contracts herself, plaintiff was not doing the "double review," and Harmon-Gouhin was not reporting to plaintiff anymore; she was reporting to Qadir. *(Id.)* Plaintiff's recollection of the April 16, 2014 meeting was different from that of Qadir, McHugh, and Harmon-Gouhin. According to plaintiff, Qadir and McHugh met with her, assigned her to the smoke-free program, and told her to continue with her contract duties until Vanessa was "off probation" in July. (Plaintiff's deposition, p. 209; Complaint, ¶ 94-95.)

{¶15} On May 29, 2014, plaintiff attended two separate Program Procurement meetings to discuss pending contracts. (Plaintiff's Exhibit 21; Plaintiff's deposition, pp. 381-382.) According to plaintiff, the meetings were uncomfortable, and a coworker, Carol Cook, accused her of going on a "fishing expedition" because of the number of questions plaintiff asked. However, after the meetings, Paul Maragos, defendant's Chief of Procurement, received complaints from multiple attendees about plaintiff's behavior. (Maragos' deposition, pp. 41-42.) Maragos sent an email to Chief Financial Officer, Harry Kadmar, McHugh, and Qadir asking that plaintiff be removed from attending regularly scheduled procurement meetings, due to plaintiff having "a difficult time in building positive relationships with coworkers and partners." (*Id*.; Plaintiff's Exhibit 20.) Maragos testified that this was the first time in his career that he had ever asked that someone be removed from attending a meeting; that "it was getting to a point that what [plaintiff] was bringing to the table wasn't outweighing the issues that were happening" with staff. (Maragos' deposition, pp. 40, 53.) Maragos' request led to an informal investigation of the incidents that occurred during the meetings. (Deposition of Elaine Stewart, pp. 15-16.) Witness statements were gathered from employees who had attended the meetings, including Sean Keller, Carol Cook, Vanessa Harmon-

Gouhin, and Reginald Surmon. (Plaintiff's Exhibit 21.) On June 4, 2014, Elaine Stewart, Labor Relations Administrator, issued an investigative report regarding the conduct displayed in the procurement meetings, concluding that witnesses reported that plaintiff's behavior in the meetings was unprofessional in that she communicated aggressively with other meeting members. (*Id*.) The report noted that plaintiff had not been interviewed. (*Id*.)

{¶16} On June 5, 2014, at 4:00 p.m., Himes met with Qadir and Erickson to discuss the most recent complaints about plaintiff. (Himes' deposition, pp., 117-20; Qadir's deposition, p. 224; Plaintiff's Exhibit 16, Bates # 511.) Qadir and Erickson recommended that plaintiff's employment be terminated. (Himes' deposition, p. 130; Qadir's deposition, p. 227.) At the meeting, Himes decided to terminate plaintiff's employment because he concluded that she was unwilling to be a team player and interact professionally with her colleagues. (Himes' deposition, p. 136.) On June 6, 2014, Himes signed plaintiff's letter of termination for no cause and her unclassified status was revoked. (Himes' deposition, p. 133.)

{¶17} In her complaint, plaintiff asserts that she met with Qadir on June 5, 2014, after business hours, and asked for a reasonable accommodation. Specifically, plaintiff asserts that she asked permission to transition out of the day-to-day contract process duties due to increased anxiety, and that she offered to continue to serve as contract backup and be available for consult, if needed. (Complaint, ¶ 112, 113.) Plaintiff asserts that Qadir did not respond to her accommodation request, but, rather, told plaintiff to go home and get some rest. (*Id*., ¶ 114; Plaintiff's deposition, ¶ 265.) Qadir denies that any such meeting took place. (Qadir's deposition, ¶ 235.)

{¶18} Plaintiff asserts claims of disability discrimination and failure to accommodate her disability in violation of both Ohio and Federal law. Defendant asserts that it terminated plaintiff's employment for legitimate, non-discriminatory reasons, and that plaintiff cannot show that its reasons were a pretext for discrimination.

In addition, defendant asserts that the decision to terminate plaintiff's employment had been made prior to any request for a reasonable accommodation.

DISABILITY DISCRIMINATION

{¶19} R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the * * * disability * * * 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." In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights* Comm., 66 Ohio St.2d 192, 196 (1981).

{¶20} Plaintiff argues that because defendant terminated her employment for behavior that was caused by and consistent with her mental disability, she has direct evidence to support her claim of disability discrimination. "Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. * * * If that evidence is credible, 'discriminatory animus may be at least part of an employer's motive, and in the absence of an alternative, non-discriminatory explanation for that evidence, there exists a genuine issue of material fact suitable for submission to the jury without further analysis by the court." *Ceglia v. Youngstown State Univ.,* 10th Dist. Franklin No. 14AP-864, 2015-Ohio-2125, ¶ 16, *Norbuta v. Loctite Corp*., 1 Fed.Appx. 305, 312 (6th Cir.2001). "If a plaintiff can produce direct evidence of a discriminatory animus, 'the burden [of production and persuasion] shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive.'" *Id.,* quoting *Skelton v. Sara Lee Corp*., 249 Fed.Appx. 450, 454 (6th Cir.2007).

{¶21} Plaintiff asserts that Himes' testimony that at the time he made the decision to terminate plaintiff's employment, he "had concluded that she did not have the ability to perform the duties because she couldn't get along with and be a team player with the programs that she was assigned to work with and advise," and that his testimony that he sent her to an IME because he "wanted to make sure she was okay, to see if something else was going on" constitutes direct evidence of disability discrimination. (*See* Himes' deposition, pp. 136, 72.) Even construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that Himes' testimony does not constitute direct evidence of discrimination. Specifically, sending an employee to an IME is not evidence that an employer perceived an employee as disabled. *See Dalton v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 13AP-827, 2014-Ohio-2658, ¶ 31. In addition, the statement that plaintiff could not get along with others and be a team player does not require the conclusion that defendant terminated her employment on account of a mental disability. Himes' comments require a factfinder to draw further inferences to support a finding of discriminatory animus. "[C]omments or remarks that 'require a factfinder to draw further inferences to support a finding of discriminatory animus' do not constitute direct evidence." *Ceglia, supra*, ¶ 23, quoting *Krupnic v. ARCADIS of U.S., Inc.*, S.D. Ohio No. 2:12-CV-273 (Mar.13. 2014).

{¶22} Accordingly, plaintiff's claim shall be analyzed pursuant to the indirect method of proof, pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If the plaintiff establishes a prima facie case of discrimination, under *McDonnell Douglas*, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *Id.,* at 802. Once the employer does, the burden shifts back to the plaintiff to show that the proffered reason was not the true reason, but was a pretext for discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

{¶23} To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent and may establish such intent through either direct or indirect methods of proof. *Ricker v. John Deere Ins.* Co., 133 Ohio App.3d 759, 766 (10th Dist.1998), citing *Mauzy v. Kelly Servs., Inc.,* 75 Ohio St.3d 578, 583 (1996). To establish a prima facie case of discriminatory discharge, a plaintiff must show that: (1) she is disabled, (2) she was otherwise qualified for the position, with or without reasonable accommodation, (3) she suffered an adverse action, (4) the employer knew or had reason to know of her disability, and (5) she was replaced or the job remained open." *Hartman v. Ohio DOT*, 10th Dist. Franklin No. 16AP-222, 2016-Ohio-5208, ¶ 18, citing *Rosebrough v. Buckeye Valley High School*, 690 F.3d 427, 431 (6th Cir.2012). As stated in *Hartman, supra*, the elements of a prima facie case can vary based on the circumstances of the case. *See Demyanovich v. Cadon Plating & Coatings*, *L.L.C.*, 747 F.3d 419, 433 (6th Cir.2014) (stating the elements as (1) she is disabled, (2) she is otherwise qualified to perform the essential functions of a position, with or without accommodation, and (3) she suffered an adverse employment action because of her disability).

{¶24} Defendant concedes for purposes of argument only, that plaintiff has stated a prima facie case of disability discrimination: she suffered a mental disability (depression and ADHD); she was otherwise qualified for her position with or without an accommodation; her employment was terminated; and defendant knew or had reason to know of her disability. As the burden of production shifts to defendant, it has produced evidence to show that multiple coworkers complained about plaintiff's aggressive and unprofessional behavior, and the stress that it caused in the workplace. (*See* depositions of Qadir, Harmon-Gouhin, and Maragos; informal investigation of Stewart.) Accordingly, even construing the evidence most strongly in plaintiff's favor, defendant had legitimate, non-discriminatory reasons to terminate plaintiff's employment:

repeated instances of unprofessional behavior, and her failure to get along with coworkers.

{¶25} The burden then shifts to plaintiff to produce evidence to show that the employer's stated reason for terminating her employment has no basis in fact, was not the actual reason for her termination, or the reason was insufficient to explain the employer's action. *Smith v. Ohio Dept. of Public Safety*, 10th Dist. Franklin No. 12AP-1073, 2013-Ohio-4210, ¶ 77, citing *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994). Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against her. *Johnson v. Kroger* Co., 319 F.3d 858, 866 (6th Cir.2003). A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

{¶26} With regard to whether the reason for plaintiff's termination has no basis in fact, the investigation conducted by Stewart shows that the people who were interviewed corroborated the behavior that plaintiff displayed in the meetings. In addition, plaintiff cannot dispute that a vendor called and complained about her behavior, and that Paul Maragos asked for plaintiff to be removed from the contract process based upon her behavior. Plaintiff has not brought forth evidence to show that the stated reason has no basis in fact.

{¶27} With regard to whether the proffered reason for plaintiff's termination did not actually motivate defendant to terminate her employment, plaintiff points to the fact that she engaged in the same sort of conduct in 2012 but was not sent for an IME or terminated at that time. Plaintiff asserts that her behavior was "accommodated" until

Qadir, who she alleges called her "paranoid" and "crazy" became her supervisor. Plaintiff argues that defendant tolerated her difficult personality for her entire career, and that once Qadir became her supervisor, defendant terminated her because of her mental disability. However, it is undisputed that after plaintiff attended the IME, she was "cleared" to work; she was informed that she was responsible for her actions, and that she engaged in conduct during the contract procurement meetings that led to Maragos asking that she be excluded from further meetings, and that her behavior was causing stress in other employees, including Vanessa Harmon-Gouhin and Carol Cook. Even construing the evidence most strongly in plaintiff's favor, she has not produced evidence from which to infer that defendant was not actually motivated to terminate her employment as a result of her behavior. "So long as the employee's misconduct is related to the performance of her job, an employer may discipline or terminate the employee even if her misconduct was caused by her disability." *Sper v. Judson Care Ctr., Inc.*, 29 F.Supp. 3d 1102, 1110 (S.D.Ohio 2014).

{¶28} Plaintiff argues that any inappropriate behavior that she engaged in was a direct result of her disability. However, it is undisputed that the IME doctor stated that she was fit for duty and that she should be held accountable for her actions. Moreover, plaintiff never provided defendant with medical information from her own treating psychiatrist Dr. Anthony Martin, M.D., until after her termination. Specifically, when plaintiff filed a claim with the Ohio Civil Rights Commission, Dr. Martin submitted a form stating that he had diagnosed her with chronic depression, panic disorder, ADD, bereavement, and PTSD. (Defendant's Exhibit E.) However, when asked whether plaintiff's condition significantly restricted any of her functional abilities, (e.g., hearing, thinking, learning, ambulating, communicating, interacting with others, etc.) Dr. Martin stated: "No, not when she takes her medication. However, I do not believe she could work without medications." (*Id.)* Dr. Martin also stated that her condition did not necessitate any restrictions upon her ability to work; that he had never supplied her

employer with any information regarding her condition on ways in which to provide an "accommodation" for her; and that he had never refused any request for information about any accommodation from her employer. *(Id.*)

{¶29} In addition, "an employer may enforce any conduct rules, even those not found in workplace policies, employee handbooks or other such documents, as long as those policies are job-related and consistent with business necessity." *Yarberry v. Gregg Appliances, Inc*., 625 Fed. Appx. 729, 739 citing The Americans with Disabilities Act: Applying Perfomance and Conduct Standards to Employees with Disabilities, 2008 WL 4786697, at *13. Whether an employer's application of a conduct rule to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including the manifestation or symptom of a disability affecting an employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment." *Id*. at *10. In this matter, plaintiff's behavior was described as unprofessional, aggressive and inappropriate by a number of her coworkers and a contractual vendor; her problematic behavior occurred on at least 5 occasions from March to June 2014; the nature of her job was to give legal advice and to interact with coworkers and clients; the conduct at issue was being argumentative, aggressive, and second-guessing coworkers and a contract vendor; and the working environment was a professional setting. It is reasonable to conclude that it was necessary for plaintiff to behave in a professional manner to perform her job. Accordingly, plaintiff has not presented evidence from which to infer that the proffered reason for her termination did not actually motivate defendant to terminate her employment.

{¶30} Finally, plaintiff was an unclassified employee, in that she served at the pleasure of the appointing authority. Therefore, she cannot argue that the reasons stated by defendant were insufficient to explain her termination: her employment was

subject to termination at any time, even without cause. *See Hanly v. Riverside Methodist Hospitals*, 78 Ohio App.3d 73, 77 (10th Dist.1991).

{¶31} Construing the evidence most strongly in favor of plaintiff, the only reasonable conclusion is that she has not brought forth sufficient evidence from which a trier of fact could reasonably reject defendant's explanation for her termination, her behavior in the workplace, and infer that defendant intentionally discriminated against her because of her disability of depression and ADHD. Accordingly, although there may be certain disputed factual issues between the parties, the court finds that no *genuine* issues of *material* fact exist and that defendant is entitled to summary judgment as a matter of law on plaintiff's claims of disability discrimination.

REASONABLE ACCOMMODATION

{¶32} To establish a prima facie case of failure to accommodate an employee must show that: (1) she is disabled within the meaning of the ADA; (2) she is otherwise qualified for the position, such that she can perform the essential functions of the job with or without a reasonable accommodation; (3) the employer knew or had reason to know of her disability; (4) the employee requested an accommodation; and (5) the employer failed to provide a reasonable accommodation thereafter. *Johnson v. Cleveland City Sch. Dist.*, 443 F. App'x 974, 982-83 (6th Cir. 2011). Once an employee establishes a prima facie case, "the burden shifts to the employer to demonstrate that any particular accommodation would impose an undue hardship on the employer." *Id.,* at 983.

{¶33} Plaintiff testified that she approached Qadir after business hours on June 5, 2014, the day before she was notified that her employment was terminated, and asked, "Can I get out of this?" meaning the day-to-day responsibility of managing contracts. (Plaintiff's deposition, pp. 263-280.) Plaintiff testified that it was causing her great angst, with Carol Cook screaming at her in meetings, and Vanessa Harmon-Gouhin being upset with her. According to plaintiff, Qadir told her to go home and get some

rest. (*Id*., p. 277.) Plaintiff assumed that Qadir would discuss it with her and Himes the next day. Instead, she was fired. Plaintiff testified that she had never made any other requests for an accommodation for any of her health conditions, because she did not want Qadir to know that she had any health conditions. (*Id*., p. 279.)

{¶34} Even assuming that plaintiff's request constitutes a reasonable accommodation as that term is defined in the ADA, the fact that Himes had already decided to terminate her means that defendant was not required to engage in the interactive process. "The timing of a request [for a reasonable accommodation] is crucial, as 'an employer does not have to rescind discipline (including termination) warranted by misconduct.'" *Yarberry, supra, at* 742. In that the decision to terminate her employment was made prior to her request for a reasonable accommodation, defendant was not obligated to rescind her termination or engage in the interactive process. *See also Cash v. Siegel-Robert, Inc*., 2012 U.S. Dist. LEXIS 120117 (W.D. Tennessee, August 24, 2012) (Because he had been effectively terminated when he requested the reasonable accommodation, his accommodation request was untimely, and defendant's failure to consider it did not violate the ADA.)

{¶35} Upon review of the evidence permitted by Civ.R. 56, the only reasonable conclusion is that plaintiff's termination was not based upon her disability, and that defendant was not required to engage in the interactive process with plaintiff for a reasonable accommodation. Although certain facts may be in dispute between the parties, the court finds that there are no *genuine* issues as to any *material* fact, and that defendant is entitled to summary judgment as a matter of law on all of plaintiff's claims. Accordingly, judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

[Cite as *Ray v. Dept. of Health*, 2017-Ohio-6960.]

CAROL RAY Plaintiff v. OHIO DEPARTMENT OF HEALTH Defendant	Case No. 2015-01051 Judge Patrick M. McGrath Magistrate Holly True Shaver JUDGMENT ENTRY

{¶36} A non-oral hearing was conducted in this case upon the parties' cross-motions 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. Plaintiff's motion for partial summary judgment is DENIED. All previously scheduled events are VACATED. 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:

Sharon K. Cason-Adams
1335 Dublin Road, Suite 104D
Columbus, Ohio 43215

Peter E. DeMarco
Timothy M. Miller
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

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