[Cite as *Roberson v. Ohio Dept. of Dev. Disabilities*, 2017-Ohio-7541.]

LASHANTA ROBERSON Plaintiff v. OHIO DEPARTMENT OF DEVELOPMENTAL DISABILITIES Defendant	Case No. 2016-00372 Judge Patrick M. McGrath Magistrate Holly True Shaver DECISION

{¶1} On June 16, 2017, defendant filed a motion for summary judgment pursuant to Civ.R 56(B). On June 30, 2017, plaintiff filed a response. The motion is now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4.

{¶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 was employed by defendant at Montgomery Developmental Center (MDC) as a Registered Nurse (RN) from February 24 to May 2, 2014. For

approximately 16 years prior to her employment at MDC, plaintiff was employed by the Ohio Department of Rehabilitation and Corrections (DRC) as a Corrections Officer (CO) and later as an RN at Allen Correctional Institution (ACI). Plaintiff was a member of a collective bargaining unit, SEIU/District 1199 when she worked for DRC.

{¶5} Plaintiff learned of a part-time position as an RN at MDC, and as a union member, she bid on the position while she was employed by DRC at ACI. Plaintiff asserts that she was promised that she would not have to serve a probationary period if she took the job at MDC. However, once she arrived at MDC, plaintiff was informed that she would have to serve a probationary period of 180 days, despite her 16 years of state service. Plaintiff also asserts that once her supervisors at MDC learned that she had a history of bipolar disorder, they terminated her employment before her probationary period expired. Plaintiff asserts that her termination was a pretext for discrimination on the basis of her disability. Plaintiff asserts two claims: 1) promissory estoppel, and 2) disability discrimination, in violation of R.C. 4112. Defendant asserts that it is entitled to summary judgment as a matter of law on both claims.

Promissory Estoppel

{¶6} To establish a claim for promissory estoppel, plaintiff must prove: "'(1) a clear and unambiguous promise, (2) reliance by the party to whom the promise was made, (3) the reliance is reasonable and foreseeable, and (4) the party relying on the promise must have been injured by the reliance.'" *Reif v. Wagenbrenner,* 10th Dist. Franklin No. 10AP-948, 2011-Ohio-3597, ¶ 42, quoting *Callander v. Callander,* 10th Dist. Franklin No. 07AP-746, 2008-Ohio-2305, ¶ 33.

{¶7} On February 12, 2014, plaintiff signed a document which states, in pertinent part: "I, LaShanta Roberson, consent to a transfer from the position of full-time Nurse 1 at ODRC, Allen/Oakwood Correctional Institution in Allen County to the position of part-time Psychiatric/MR Nurse (PN 20035522) at Montgomery Developmental Center, in Montgomery County.

{¶8} "I understand with the approval of all necessary paperwork the effective date of this transfer will be February 23, 2014. I will report for orientation on Monday, February 24, 2014.

{¶9} "*I understand, per the contract between the State of Ohio and SEIU/District 1199 Bargaining Unit, Article 9.02C, I will serve and must successfully complete a one hundred eighty (180) day initial probationary period.*

{¶10} "I understand my pay range and step will not change and that if I currently receive any pay supplements that are in addition to longevity, I will no longer be eligible for such supplements.

{¶11} "I further understand that there will be no moving expenses involved with this transfer." (Emphasis added.) (Defendant's Exhibit B.)

{¶12} Plaintiff asserts that despite signing the above-referenced document, she was promised that if she transferred to the position at MDC, she would not have to serve a probationary period. Specifically, plaintiff asserts that she signed an agreement that stated that probation was not applicable to her. (Complaint, ¶ 9.) Plaintiff points to a form, dated February 14, 2014, which states that she agrees to accept the appointment to "classification psych/MR nurse, PN 20035522. I understand this is a PT-Perm permanent position. *The probationary period will be N/A days.* Provided I successfully complete all pre-hire requirements, my tentative start date is 2/23/14 but come 2/24/14." (Emphasis added.) (Plaintiff's Exhibit A.) Plaintiff testified that Caroline Anderson, an employee in the human resources division at MDC, filled out this form and that she promised plaintiff that her employment was not subject to a probationary period. (Plaintiff's deposition, pages 83, 113.)

{¶13} Defendant filed the affidavit of Caroline Anderson, who states, in relevant part, the following:

{¶14} "On February 14, 2014, Ms. LaShanta Roberson reported to Montgomery Developmental Center to complete pre-employment paperwork. Ms. Roberson met with

me and went over the paperwork that all new hires get when coming into work at the facility. The particular paperwork which included the employee's name, classification, position number, part/full time permanent position, probationary period and tentative start date and the signature of employee are included on the form. All information was completed with Ms. Roberson but, in error, I indicated 'n/a' on the form instead of putting 180-day probation. Even though a mistake was made on the form, the [union] contract governs the probationary period of an employee that transfers from one agency to another and these cannot be modified by any party.

{¶15} "At no time during a conversation with Ms. Roberson did I advise her that she would not serve a probationary period. I also do not have authority to change the contractual requirements for Ms. Roberson or any other employee at Montgomery Developmental Center." (Affidavit of Caroline Anderson, attached to defendant's motion.)

{¶16} Plaintiff testified that although she signed the form at ACI that referenced a 180-day probationary period, she relied on the statements of Glenda Turner, the head of personnel for ACI, who told plaintiff that the form only gets her transfer started, and that plaintiff did not have to accept the position even after she signed the form. (Plaintiff's deposition, pgs. 51-52.) Plaintiff testified that she questioned the language in the form, because she was "never going to transfer being on probation. [Turner] guaranteed me that this paper was nothing." (*Id*. p. 52.) Plaintiff acknowledged that when she was promoted from CO to RN at ACI, she served a 180-day probationary period. (*Id*. p. 54.)

{¶17} On March 14, 2014, Nancy Banks, Superintendent and appointing authority for MDC, issued a memo to plaintiff regarding job training and performance expectations. In the memo, Banks states, in part: "You began your employment with Montgomery Developmental Center on Monday, February 24, 2014. While you are not new to state service, you are new to this facility and the individuals we serve. As is the

case with every new employee, you are expected to participate in and successfully complete an orientation and to successfully perform during your 6-month probationary period in order to continue your employment." (Defendant's Exhibit D.) Plaintiff refused to sign the memo. (*Id*.) Plaintiff admits in her deposition that she was a member of the SEIU/District 1199. (Plaintiff's deposition, p. 43.) Both parties attached relevant language from the collective bargaining agreement to support their positions. (Defendant's Exhibit A; Plaintiff's Exhibit B.) Section 9.02C, "Inter-Agency Transfer" states: "Employees who accept an inter-Agency transfer pursuant to Article 30, shall serve an initial probationary period. If the employee fails to perform the job requirements of the new position to the Employer's satisfaction, the Employer may remove the employee. The employee has the right to grieve such decision." (*Id*.)

{¶18} It is well-settled that public officers cannot bind the state by acts beyond their authority. *See Drake v. Med. College of Ohio,* 120 Ohio App.3d 493, 496, (10th Dist.1997); *Marbury v. Central State Univ.,* 10th Dist. Franklin No. 00AP-597, 2000 Ohio App. LEXIS 5815 (Dec. 14, 2000). The evidence shows that plaintiff was aware of the 180-day probationary period required by the union contract and referred to in the letter that she signed in February 2014. Even assuming that Anderson, did, in fact, make an unambiguous promise that plaintiff would not have to serve a probationary period, "[m]istaken advice or opinions of a governmental agent do not give rise to a claim based on promissory estoppel." *Drake, supra,* citing *Halluer v. Emigh,* 81 Ohio App.3d 312, 318, (9th Dist.1992); *see also Anderson v. Ohio Univ.,* 10th Dist. Franklin No. 08AP-154, 2008-Ohio-4901, (noting that estoppel generally does not apply against the state or its agencies). Furthermore, "an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms." *Ed Schory & Sons, Inc., v. Soc. Nat'l. Bank*, 75 Ohio St.3d 433, 440, citing *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265 (1988). Inasmuch as plaintiff's employment was subject to the written union contract for SEIU/District 1199

employees, any promises by Anderson or Turner would not give rise to a claim of promissory estoppel. Accordingly, even construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that plaintiff's claim of promissory estoppel fails as a matter of law, and defendant is entitled to summary judgment.

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). 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).

{¶20} 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). "If the plaintiff establishes a prima facie case, then the burden of production shifts to the employer to present evidence of 'a legitimate, nondiscriminatory reason' for the employer's rejection of the employee." *Williams v. City of Akron,* 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 12. "If the employer meets its burden of production, 'the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Id.* at ¶ 14, quoting *Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248, 253 (1981). "To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir.2000). 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)." *Knepper v. Ohio State Univ.,* 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 12. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra,* at 253.

{¶21} Plaintiff asserts that she was diagnosed with bipolar disorder in her early twenties. (Plaintiff's deposition, p. 27.) Plaintiff testified that Jill Moore, the head of personnel at MDC, asked plaintiff about taking disability leave during her employment at ACI, and asked her to submit to another background check to make sure nothing would

disqualify plaintiff from working with people who suffered from mental illness. (Plaintiff's Deposition, p. 68.) Plaintiff alleges that the personnel at MDC did not want her to work there because of her history of bipolar disorder.

{¶22} Defendant filed the affidavit of Nancy Banks, who states that during plaintiff's employment at MDC, plaintiff never asked about any kind of leave under the Family Medical Leave Act, or any kind of work accommodation based on a disability, and that plaintiff never communicated to her in any way that she had a bipolar condition or any other kind of disability. (Affidavit of Banks, attached to defendant's motion.) Furthermore, Banks avers that she was neither aware or perceived that plaintiff had any kind of disability. (*Id*.)

{¶23} In addition, defendant filed the affidavit of Jill Moore, who averred that during her employment at MDC, plaintiff never asked for any kind of FMLA leave, or work accommodation that would allow her to perform her job duties. In addition, plaintiff never communicated to her in any way that she had a bipolar condition or any other kind of disability. Moore also averred that she was not aware of and did not perceive plaintiff as having any kind of disability. (Affidavit of Moore, paragraph 7.)

{¶24} During her deposition, plaintiff was questioned about her request for disability leave that occurred in April 2013. Defendant presented an application for disability leave benefits, which was completed by plaintiff's therapist, Carol Patrick, Ph.D. on April 16, 2013, wherein she requests temporary disability leave until May 16, 2013. (Defendant's Exhibit J.) Assuming for purposes of argument that this documentation was in her personnel file when she transferred to MDC, plaintiff could arguably state a prima facie claim of disability discrimination. However, the burden of production shifts to defendant to state a legitimate, non-discriminatory reason for plaintiff's discharge. In Banks' affidavit, she states as follows:

{¶25} "Plaintiff was removed during her probationary period for the reasons identified by defendant in this position statement. In summary, during the time of

plaintiff's employment [at MDC] she was uncooperative during training; demonstrated substandard nursing knowledge when interacting with the Center's Physician Administrator, experienced tardiness and unapproved leave; and was directly insubordinate toward her supervisor." (Affidavit of Banks, paragraph 6, Ex. C., MDC position statement page 4.)

{¶26} Once the employer articulates some legitimate, nondiscriminatory reason for the adverse employment action, the burden again shifts to plaintiff to show that the proffered reason was not the true reason for the adverse employment action. Plaintiff has pointed to no evidence, other than her own self-serving assertions, to show that the reasons proffered by defendant have no basis in fact, did not actually motivate her termination, or were insufficient to warrant her termination. Accordingly, even construing the evidence most strongly in plaintiff's favor, no issues of material fact exist, and defendant is entitled to summary judgment as a matter of law on plaintiff's claim of disability discrimination. Accordingly, judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

[Cite as *Roberson v. Ohio Dept. of Dev. Disabilities*, 2017-Ohio-7541.]

LASHANTA ROBERSON Plaintiff v. OHIO DEPARTMENT OF DEVELOPMENTAL DISABILITIES Defendant	Case No. 2016-00372 Judge Patrick M. McGrath Magistrate Holly True Shaver JUDGMENT ENTRY

{¶27} 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. 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:

Francis J. Landry
1090 West South Boundary Street
Suite 500
Perrysburg, Ohio 43551

Eric A. Walker
Stacy L. Hannan
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Filed August 16, 2017
Sent to S.C. Reporter 9/11/17