[Cite as *Eifert v. Sample Machining, Inc.*, 2009-Ohio-6012.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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JERRY EIFERT Plaintiff-Appellant	:	C.A. CASE NO. 23123
vs.	:	T.C. CASE NO. 07-CV-10702
	:	
SAMPLE MACHINING, INC. Defendant-Appellee	:	(Civil Appeal From Common Pleas Court)

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O P I N I O N

Rendered on the 13th day of November, 2009.

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GRADY, J.

{¶ 1} Plaintiff, Jerry Eifert, appeals from a summary judgment in favor of Defendant, Sample Machining, Inc., d.b.a. Bitec ("Bitec"), on Eifert's employment discrimination claim.

{¶ 2} Bitec is a Dayton company of approximately 32 employees

that provides manufacturing, machining, and parts-processing services to the aerospace industry. Eifert began working as a polisher at Bitec on April 23, 2004. A polisher is required to set up, operate, or tend grinding and related tools that remove excess material or burrs from surfaces, sharpen edges or corners, and buff or polish custom components. A polisher also will soak parts in a hot cleaning compound or use an abrasive or wire brush to remove scale, rust, scratches, burrs, and dirt.

{¶ 3} In November of 2006, Eifert injured his neck in an automobile accident. He began seeing a physician for neck pain, but did not take any leave from work immediately following his accident. In December of 2006, Eifert turned his head at work and felt a "pop" in his neck. He began experiencing problems with his neck and hands. After an MRI, Eifert underwent an anterior cervical discectomy to correct herniated C5 and C6 disks in March of 2007. As a result of his neck surgery, Eifert was off from work from March 12, 2007 to June 25, 2007. He received short-term disability benefits through June 20, 2007, and long-term disability benefits from June 21, 2007 through June 24, 2007.

{¶ 4} On June 25, 2007, Eifert returned to work at Bitec, subject to a list of medical restrictions from his physician. Eifert was told to not lift over 20 pounds or perform any repetitive bending, lifting, or turning. According to Eifert, after he

returned to work, he was assigned certain tasks that violated these medical restrictions.

{¶ 5} In late July of 2007, Eifert met with Beverly Bleicher, President of Bitec, and Katrina McCawley, Bitec's Human Resources Manager. Eifert informed them that he was in constant pain. He also reported his pain to his physical therapist. Bleicher informed Eifert that he could not return to work until his medical restrictions were lifted.

{¶ 6} On September 4, 2007, Eifert's physician ordered him to remain on the previous restrictions regarding lifting, turning, and bending. Because Eifert remained on medical restrictions, Bitec did not allow Eifert to return to work. Eifert received short-term disability benefit payments from August 4, 2007 through October 31, 2007.

{¶ 7} On November 2, 2007, McCawley informed Eifert that his employment with Bitec terminated effective October 31, 2007, because he had been on short-term disability for the maximum amount of time allowed under Bitec's contract with its insurance carrier. Eifert was transferred to long-term disability following his termination.

{¶ 8} On December 21, 2007, Eifert commenced an action against Bitec, alleging disability discrimination in violation of R.C. Chapter 4112 and wrongful discharge in violation of public policy.

Bitec moved for summary judgment on all claims. While the motion for summary judgment was pending, Eifert voluntarily dismissed his public policy claim. (Dkt. 32.) On November 10, 2008, the trial court granted summary judgment for Bitec on Eifert's disability discrimination claim. Eifert filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 9} "THE TRIAL COURT ERRED BY DETERMINING THAT APPELLANT'S IMPAIRMENT OF A MAJOR LIFE ACTIVITY WAS NOT SUBSTANTIALLY LIMITING."

{¶ 10} When reviewing a trial court's grant of summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. Of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St.2d 116, 119-20. Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

{¶ 11} "The appropriateness of rendering a summary judgment hinges upon the tripartite demonstration: (1) that there is no genuine issue as to any material fact; (2) that the moving party

is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Inc.* (1978), 54 Ohio St.2d 64, 66. See also Civ. R. 56(C).

{¶ 12} R.C. 4112.02(A) states that it shall be unlawful 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."

{¶ 13} To state a prima facie case of disability discrimination under R.C. 4112.02, the party seeking relief must establish (1) that he 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, could safely and substantially perform the essential functions of the job in question. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569, 571; R.C. 4112.02.

{¶ 14} A disability, as defined by R.C. 4112.01(A)(13), is a "physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for

one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment."

{¶ 15} When determining whether an individual is substantially limited in performing a major life activity, courts examine: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. *Canady v. Rekau & Rekau, Inc.*, Franklin App. No. 09AP-32, 2009-Ohio-4974, at _33; 29 C.F.R. 1630.2(j)(2)(i)-(iii).

{¶ 16} In order for an impairment to be substantially limiting, the impairment must prevent or severely restrict the individual from doing activities that are of central importance to most people's daily lives and the impairment's impact must also be permanent or long term. *Toyota Motor Mfg., Kentucky, Inc. v. Williams* (2002), 534 U.S. 184, 198, 122 S.Ct. 681.[1] Temporary

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[1] "Given the similarity between the [Americans with Disabilities Act] and Ohio disability discrimination law, Ohio courts look to regulations and cases interpreting the federal act when deciding cases including both federal and state disability discrimination claims." *Canady,* at _32, citing *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 573, 1998-Ohio-410.

impairments, with little or no long-term or permanent impact, are usually not disabilities. *Novak v. MetroHealth Med. Ctr.* (6th Cir. 2007), 503 F.3d 572, 582, quoting 29 C.F.R. Pt. 1630, App. Sec. 1630.2(j). "Thus, a back injury that only temporarily causes pain and limits a person's activities is not a substantially limiting physical impairment." *Canady*, at _33 (citations omitted).

{¶ 17} The trial court concluded that lifting is a major life activity. Dkt. 46, p. 7, citing 29 C.F.R. Part 1630 App. The trial court then found that Eifert failed to put forth sufficient evidence to create a genuine issue of material fact regarding whether he was substantially limited in performing a major life activity. In order to determine whether the trial court erred in granting summary judgment, we must consider whether the parties met their respective burdens under Civ.R. 56.

{¶ 18} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence

to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶ 19} In its motion for summary judgment, Bitec argued that Eifert was not disabled because his medical restrictions were temporary in nature, as evidenced by Eifert's deposition testimony that he was released to work without restrictions by his physician in March of 2008. Bitec also cited Eifert's deposition testimony that he could perform the essential duties of his job at Bitec despite his injury and the constant pain arising from that injury. This evidence is sufficient to carry Bitec's initial burden under *Dresher* to show that Eifert is now not substantially limited in performing a major life activity.

{¶ 20} In his memorandum in opposition to Bitec's motion for summary judgment, Eifert submitted an affidavit to support his contention that he was substantially limited in the major life activity of lifting. In particular, at paragraph five of his

affidavit (Dkt. 31), Eifert states:

{¶ 21} "As a result of the automobile accident, I sustained physical injuries that substantially limit my ability to perform certain manual tasks, particularly lifting. Even today, my arms still go numb when lifting objects. Lifting is a difficult task, and I must be careful when lifting certain objects, as the object may suddenly drop. I also experience sharp pains from my neck through my shoulders and into my arms. These pains also affect my ability to lift. I also experience frequent pain between my shoulder blades, which creates further difficulties lifting."

{¶ 22} A jury could reasonably conclude, based on Eifert's affidavit, that although he could perform the essential duties of his job at Bitec, he is substantially impaired in performing the major life activity of lifting. A jury could also reasonably conclude that, despite the fact that his medical restrictions were removed in March of 2008, Eifert continues to suffer from sharp pains and numbness that substantially limit him from performing that major life activity. That conflicting evidence presents a genuine issue of material fact. Therefore, summary judgment is not appropriate. *Huberty v. Esber Beverage Co.* (July 3, 2000), Stark App. No. 1999CA00346.

{¶ 23} The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

{¶ 24} "THE TRIAL COURT ERRED BY DETERMINING THAT APPELLEE DID NOT PERCEIVE APPELLANT AS BEING UNABLE TO PERFORM A CLASS OF JOBS."

{¶ 25} In paragraph 14 of his complaint, Eifert alternatively alleged that he was disabled or perceived to be disabled. An "individual with a disability" includes "persons who have impairments that are not substantially limiting, but who are regarded by their employers as substantially limiting." *Kocsis v. Multi-Care Management, Inc.* (6th Cir. 1996), 97 F.3d 876, 884. There are three ways that a plaintiff can show that he is "regarded as" having a disability: (1) the individual may have an impairment which is not substantially limiting but is perceived by the employer as constituting a substantially limiting impairment; (2) the individual may have an impairment that is only substantially limiting because of the attitudes of others towards the impairment; or (3) the individual may have no impairment at all but is regarded by the employer as having a substantially limiting impairment. 29 C.F.R. _ 1630.2(l); *Green v. Rosemont Industries, Inc.* (W.D. Ohio 1998), 5 F. Supp.2d 568.

{¶ 26} The trial court found that there was no evidence of a perception by Bitec that Eifert's physical impairment substantially limited one or more major life activities. The trial court stated:

{¶ 27} "The evidence taken in the light most favorable to Mr.

Eifert shows that Bitec found Mr. Eifert to be unable to perform the tasks of his specific job without pain. There is no evidence regarding the degree of impairment perceived by Bitec, and there is no evidence that Bitec perceived that Mr. Eifert's condition substantially limited one or more major life activities. Evidence that an employer would not permit his employee to return to work with restrictions is not evidence, by itself, that a 'defendant regarded [him] as having an impairment that substantially limited a major life activity. At most, defendant regarded plaintiff as having an injury that temporarily interfered with [his] ability to perform all the functions' of his job. *Maloney [v. Barberton Citizens Hosp.* (1996), 109 Ohio App.3d 372], supra." (Dkt. 46, p. 16.)

{¶ 28} We agree with the trial court that an employer's refusal to permit an employee to return to work while on medical restrictions does not, by itself, establish that the employer regarded the employee as having an impairment that substantially limits a major life activity. At the same time, however, we must keep in mind that the question of whether an employer regards an employee as substantially limited in a major life activity involves the state of mind of the employer. That question is one rarely susceptible to resolution at the summary judgment stage. *Ross v. Campbell Soup Co.* (6th Cir. 2001), 237 F.3d 701, 706. As the

Ross court explained:

{¶ 29} "Proving that an employee is regarded as disabled in the major life activity of working takes a plaintiff to the farthest reaches of the ADA. It is a question embedded almost entirely in the employer's subjective state of mind. Thus, proving the case becomes extraordinarily difficult. Not only must a plaintiff demonstrate that an employer thought he was disabled, he must also show that the employer thought that his disability would prevent him from performing a broad class of jobs. As it is safe to assume employers do not regularly consider the panoply of other jobs their employees could perform, and certainly do not often create direct evidence of such considerations, the plaintiff's task becomes even more difficult. Yet the drafters of the ADA and its subsequent interpretive regulations clearly intended that plaintiffs who are mistakenly regarded as being unable to work have a cause of action under the statute." 237 F.3d at 709.

{¶ 30} In her affidavit supporting Bitec's motion for summary judgment, Beicher stated that "[t]he ending of Jerry Eifert's employment had absolutely nothing to do with his performance. The sole reason for the cessation of his employment was due to the fact that he was unable to return to work without any restrictions, and was receiving and was eligible to receive long-term disability benefits." Bleicher Affidavit, _5. At her

deposition, Bleicher testified that until Eifert was completely off his medical restrictions, he would not be able to fully perform his job duties. Bleicher Depo., p. 53. She could not, however, identify what specific job duties he was unable to perform. Id. at 54. Further, she testified that Bitec was concerned about Eifert's health. Id. at 56-57.

{¶ 31} It is undisputed that Bitec was aware of both Eifert's medical restrictions regarding lifting and his physical pain and that Bitec perceived Eifert to be limited in his ability to perform the tasks required in his position at Bitec. Further, Bitec believed that Eifert's limitations were significant enough to terminate his employment and qualify him for long-term disability. At the same time, Beicher unequivocally stated that the termination of Eifert's employment had nothing to do with his actual job performance. Keeping in mind that the employer's state of mind is one rarely susceptible to resolution at the summary judgment stage, *Ross,* we believe these facts create a genuine issue of material fact as to whether Bitec regarded Eifert as disabled. See *Wysong v. Dow Chem. Co.* (6th Cir. 2007), 503 F.3d 441, 452. Therefore, Bitec's motion for summary judgment should have been denied.

{¶ 32} The second assignment of error is sustained. The judgment of the trial court will be reversed and the cause remanded

for further proceedings consistent with this opinion.

DONOVAN, P.J. and FAIN, J., concur.

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