[Cite as *Ogilbee v. Bd. of Edn. of Dayton Pub. Schools,* 2010-Ohio-1913.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

VIRGINIA OGILBEE	:	
	:	Appellate Case No. 23432
Plaintiff-Appellant	:	
	:	Trial Court Case No. 2007-CV-6540
v.	:	
	:	(Civil Appeal from
BOARD OF EDUCATION OF	:	Common Pleas Court)
DAYTON PUBLIC SCHOOLS	:	
	:	
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 30th day of April, 2010.

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BROGAN, J.

{¶ 1} Before us is Virginia Ogilbee's appeal of a trial court's decision granting summary judgment to the Board of Education of Dayton Public Schools (DPS) on its immunity defense based on the Political Subdivision and Tort Liability Act (PSTLA).

Ogilbee contends that the PSTLA does not apply to her claims of disability discrimination. We agree that the PSTLA does not apply to Ogilbee's claims. But we conclude that Ogilbee fails to establish a prima facie case for disability discrimination. Summary judgment is proper, therefore, and we will affirm.

I

{¶ 2} Ogilbee claims to suffer from a condition called "multiple chemical sensitivity" (MCS), an allergy, she explains, to certain fragrances commonly found in perfume, cologne, and scented lotion. Ogilbee says that exposure to strong fragrances or prolonged exposure to fragrances causes her migraine headaches. The headaches, she says, severely impair her cognitive ability and her ability to breath, sleep, and walk. They also impair her ability to work, often forcing her home on sick leave. Because of the allergy, says Ogilbee, it is critical that the fragrances in her working environment be kept to a minimum–preferably, none.

{¶ 3} Ogilbee worked for DPS as a clerical assistant. She began in September 2001 at the Roosevelt Center, where her allergy was rarely a problem. A year later, DPS moved her to its Administration Building to provide clerical assistance to the administrators. Once there, wafting fragrances immediately began to irritate Ogilbee's allergy. When she complained to her union (the Ohio Association of Public School Employees), it told her that their hands were tied because her condition was merely a personal problem. Ogilbee then complained to Ed Sweetnich, DPS's Executive Director of Human Resources, and she suggested several accommodations, such as, using an empty office that was free from

fragrances, using some other such empty space, or using an empty office at a nearby school. Sweetnich did not think that any of these solutions was reasonable. He thought that moving Ogilbee to her own office would put her too far away from the administrators to whom she provided clerical support. Sweetnich tried to accommodate her allergy by giving her an air purifier and a fan; however, Ogilbee says neither helped.

{¶ 4} In May 2004, Ogilbee complained to the Equal Employment Opportunities Commission (EEOC). In her complaint, she alleged that, since October 2003, DPS had denied her a reasonable accommodation for her allergy, which allegation DPS refuted in a letter Sweetnich wrote to the EEOC:

{¶ 5} "Dayton Public Schools rejects the notion that we have not accommodated Ms. Ogilbee's alleged disability. The district did purchase an air purifier for her to use, but she refused to use [it] and did not provide a reason as to why. The district also paid for an outside contractor to reconfigure her work space in an attempt to accommodate her disability. Finally, our Director of Health Services worked with Ms. Ogilbee in attempting to identify possible causes for her headache. We also asked individual employees to change their perfume choice and these employees cooperated with these requests."

{¶ 6} Sweetnich's letter continues:

{¶ 7} "We did refuse a request to relocate her to a private office. We did not consider this request to be reasonable based on the physical distance from the administrators for whom she was to provide clerical support."

{¶ 8} Letter from Sweetnich to the EEOC of June 1, 2004.[1] In August 2004, DPS and the EEOC inked a Negotiated Settlement Agreement, in which DPS agreed "to make all possible efforts to provide the Charging Party [Ogilbee] with a reasonable accommodation for her allergies." Negotiated Settlement Agreement, August 24, 2004, Paragraph 3.B. A provision says, however, that "this Agreement does not constitute an admission by the Respondent [DPS] of any violation of Title VII or any other statute enforced by the EEOC." Id. at Paragraph 4.

{¶ 9} The month before the Agreement was signed, at Ogilbee's request, DPS transferred her to an open clerical-position at Patterson-Kennedy elementary school, where she worked in the front office. Sweetnich hoped that this working-environment would be less of a trigger for her allergy. For the next two school-years (2004 and 2005), before each year began, the principal there allowed Ogilbee to address the staff about her condition and to ask them to limit their use of perfumes, colognes, and scented lotion. Then, during the year, when Ogilbee thought a co-worker was overly fragranced she would complain to the principal, who would speak to the scented staff-member. As the 2005 school-year wore on, however, Ogilbee says that some staff members began dousing themselves in perfume, or cologne, simply because they knew it bothered her, and, when Ogilbee complained, the principal intervened less often.

{¶ 10} In September 2006 the situation came to a head. The principal did not allow Ogilbee to address the staff at the beginning of the school year. Also, Ogilbee had used up all her paid leave. On the 5th, Ogilbee asked her internist, who was

[1]Ogilbee says that DPS never hired a contractor to reconfigure her work space.

treating her condition (or at least the headaches), to write a note about her condition that she could give to the principal. The doctor wrote, "Ms. Ogilbee has continual migraine headaches and will periodically need to miss work for these. Her work space/environment needs to be free of perfumes and strong odors as these exacerbate her symptoms." Note by John E. Mauer, M.D. of September 5, 2006. Ogilbee gave the note to the principal. Around the 15th, Ogilbee received a letter from Sweetnich that said he was placing her on a one-year, unpaid medical leave-of-absence. After quoting Dr. Mauer's note, Sweetnich wrote,

{¶ 11} "You are asking for an accommodation under the Americans with Disabilities Act. After reviewing the circumstances, I am making the decision that this request is not reasonable and will be denied. You are a Secretary working in a reception area at a public school with over 800 students, 100+ employees, and the public who visit the school on a daily basis. There is no way that a scent-free environment can be guaranteed." Letter from Sweetnich to Ogilbee of September 15, 2006.[2]

{¶ 12} A year later, in September 2007, near the end of her leave of absence, Ogilbee called Sweetnich to tell him that she was returning to work. When Sweetnich asked her if the same restrictions still applied, Ogilbee said that her condition was the same. Sweetnich then told her that because of the continuing

[2]In October 2006, Ogilbee filed a second charge of discrimination with the EEOC. She alleged that DPS had discriminated against her for several reasons: because of her disability, in retaliation for filing the first EEOC charge, and for complaining that they were not providing an accommodation. She also alleged that DPS failed to comply with the terms of the 2004 settlement agreement. The following March, however, the EEOC dismissed her charge, finding no probable cause.

medical restrictions, and his inability to accommodate her allergy, she could not return. This was recounted by Sweetnich in a September 17, 2007 letter he wrote to Ogilbee. He concluded his letter by writing that she had the option of requesting a second one-year medical leave of absence, and he asked her to write him if she intended to pursue that option. (The record is not clear what Ogilbee decided or if she is still employed by DPS.)

{¶ 13} The month before she sought to return, August 2007, Ogilbee filed another complaint against DPS, this time in the Montgomery County Common Pleas Court. The complaint contains three claims for relief: disability discrimination, disability harassment, and civil assault. DPS filed a motion for summary judgment on all three claims based on its defense that under the PSTLA it was immune from liability. Alternatively, DPS argued that Ogilbee failed to establish a prima-facie case for any of the claims. The trial court agreed that DPS had immunity from the claims, so it sustained the summary-judgment motion. It is from this decision that Ogilbee has appealed.

II

{¶ 14} Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). Further, the evidence must be such that reasonable minds can conclude only against the non-moving party. Id. Summary judgment is proper "when the nonmoving party does not 'produce evidence on any issue for which that party bears the burden of production at trial.'" *State ex rel. Morley v. Lordi* (1995), 72 Ohio St. 3d 510, 513,

citing *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 269. We review summary-judgment decisions de novo. See *Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526, at ¶5 (Citation omitted).

{¶ 15} Ogilbee assigns three errors to the trial court's decision. First, she argues that the PSTLA does not apply to the discrimination claims. (She concedes that the Act applies to the assault claim.) Second, Ogilbee argues that summary judgment is improper on those claims because she points to enough evidence to establish a prima facie case. For the same reason, third, she argues that summary judgment is improper on her harassment claim. We will sustain the first assignment of error but overrule the second and third.

A. The PSTLA does not apply to Ogilbee's claims

{¶ 16} In the first assignment of error,[3] Ogilbee contends that, based on R.C. 2744.09(B), the PSTLA does not apply to employment-discrimination claims. We agree.

{¶ 17} Under the PSTLA, the general rule is that political subdivisions are not liable in damages for injury, death, or loss caused by them in connection with the execution of their functions. See R.C. 2744.02(A)(1). The PSTLA however does not apply to claims by an employee that relate to any matter that "arises out of the employment relationship." R.C. 2744.09(B). The trial court concluded that an

[3]"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT-APPELLEE BASED UPON POLITICAL SUBDIVISION IMMUNITY OF R.C. 2744.02(A)(1) WHEN PLAINTIFF-APPELLANT'S CIVIL RIGHTS CASE FALLS UNDER THE IMMUNITY EXCEPTION OF R.C. 2744.09(B)."

employment-discrimination claim does not "arise out of the employment relationship" because employment discrimination is an employer intentional tort, which falls outside the employment relationship. The question posed here, therefore, is whether an employer's act of discriminating against an employee because she has a disability "arises out of the employment relationship."

{¶ 18} Employment discrimination is a matter that "arises out of the employment relationship." We considered this question in the context of an age-discrimination case, *Gessner v. Union*, 159 Ohio App.3d 43, 2004-Ohio-5770. There, the employer also argued that the discrimination claim did not "arise out of the employment relationship" because it was an employer intentional tort. Rejecting that argument, we said that employment-discrimination claims are not employer intentional torts. Id. at ¶47. We found that claims against political-subdivision employers for state civil-rights violations were "routinely permitted" by Ohio courts. Id. We also pointed out that the Ohio Supreme Court in *Whitehall ex rel. Wolfe v. Ohio Civ. Rights Comm.* (1995), 74 Ohio St.3d 120, 123, applied R.C. 2744.09(B) to a plaintiff's unlawful discrimination charges, allowing the case against a political subdivision to proceed. Other Ohio court's have cited *Gessner* in support of similar conclusions under R.C. 2744.09(B). See *Nagel v. Horner*, 162 Ohio App.3d 221, 2005-Ohio-3574, at ¶20 (holding that claims for retaliation and hostile-work environment arise out of the employment relationship); *Henderhan v. Jackson Township Police Dept.*, Stark App. No. 2008-CA-00055, 2009-Ohio-949, at ¶38 (holding that the PSTLA does not apply to claims for gender-based discrimination, hostile-work environment, or retaliation).

{¶ 19} DPS acknowledges our holding in *Gessner* but urges us to revisit the issue. We decline the invitation to reconsider *Gessner*'s holding because we continue to think that it is correct.

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

B. Summary judgment on Ogilbee's disparate treatment claim is proper

{¶ 21} In the second assignment of error,[4] Ogilbee contends that summary judgment on her disability-discrimination claim should not be granted because she has presented evidence sufficient to meet her burden to establish a prima-facie case. We disagree, concluding that Ogilbee fails establish that she had a statutory "disability."

{¶ 22} Under R.C. 4112.02(A),[5] a prima facie case of disparate-treatment discrimination because of a disability has three elements: (1) the plaintiff-employee had a disability, (2) the defendant-employer took adverse employment action against the plaintiff-employee, at least in part, because of the disability, and (3) despite the disability the plaintiff-employee could safely perform the essential functions of the

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[4]"PLAINTIFF-APPELLANT HAVING ESTABLISHED ON THE RECORD ISSUES OF MATERIAL FACT REGARDING ALL ELEMENTS OF PROOF REQUIRED FOR HER DISABILITY DISCRIMINATION CLAIM AS SET FORTH IN THE MCDONNELL DOUGLAS BURDEN SHIFTING ANALYSIS, GRANT OF SUMMARY JUDGMENT TO DEFENDANT-APPELLEE IS REVERSIBLE ERROR."

[5]"It shall be an unlawful discriminatory practice * * * [f]or any employer, because of the race, color, religion, sex, military status, 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." R.C. 4112.02(A).

job. *Hood v. Diamond Prods., Inc.* (1996), 74 Ohio St.3d 298, at paragraph one of the syllabus. The first element is the focus here.

{¶ 23} "Disability," in this context, is a statutory term-of-art with three meanings. To establish a disability, the plaintiff-employee may show: (1) she had a physical or mental impairment that substantially limited at least one major life activity, (2) she had a record of such a physical or mental impairment, or (3) the defendant-employer regarded her as having such a physical or mental impairment. *Vickers v. Wren Industries, Inc.*, Montgomery App. No. 20914, 2005-Ohio-3656, at ¶35 ("The definition of disability requires that the impairment–real, recorded, or perceived–substantially limit[] a major life activity."); R.C. 4112.01(A)(13). Here, near the beginning of her argument in support of this assignment of error, Ogilbee says both that she was (and is) disabled and that DPS regarded her as disabled. She then proceeds to argue, however, only the latter meaning of disability. Accordingly, we will consider only whether DPS, specifically, Sweetnich, regarded Ogilbee as having a physical or mental impairment that substantially limited at least one of her major life activities.[6]

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[6]The ADA Amendments Act that went into effect on January 1, 2009, expanded the ADA's reach under the "regarded as" prong. The ADA now says, "An individual meets the requirements of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*." 42 U.S.C. 12102(3) (Emphasis added). Of course, the amendment became law after the events of this case occurred. The Sixth Circuit has held that "the ADA Amendments Act does not apply to pre-amendment conduct." *Milholland v. Sumner County Bd. of Educ.* (C.A.6, 2009), 569 F.3d 562, 567 (applying the former ADA and requiring the plaintiff to show that the defendant-employer regarded her as having a substantially limiting impairment). The court observed that "[o]ther courts that have addressed the issue

{¶ 24} According to the regulations implementing the Americans with Disabilities Act (ADA), which we may look to for guidance,[7] a plaintiff may satisfy the "regarded as" meaning of "disability" with any of three evidentiary showings: (1) the plaintiff has a "physical or mental impairment" that does not substantially limit a major life activity but the defendant treated the impairment as such, (2) the plaintiff has a "physical or mental impairment" that does substantially limit at least one major life activity but only as a result of the attitudes of others toward the impairment, or (3) the plaintiff does not have a "physical or mental impairment" but the defendant treated the plaintiff has having such an impairment that substantially limited at least one major life activity. Section 1630.2(l), Title 29, C.F.R. Here, Ogilbee does not say which showing she is trying to make, but, based on her argument, we conclude that it can only be the first. Ogilbee must show that she had a "physical or mental impairment" that substantially limited at least one of her major life activities. In our analysis, we will skip the impairment issue, for two reasons. First, Ogilbee does not argue that her claimed-condition qualifies as a "physical or mental impairment." (It seems like she thinks this point is self-evident.) And, second, we find that the substantially-limited question here is dispositive. We therefore will assume that Ogilbee's claimed condition qualifies as a "physical or mental impairment" and examine whether DPS treated it as substantially limiting a major life activity.

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have similarly held that the ADA Amendments Act does not apply retroactively." Id. We will look to the former ADA.

[7]See *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569, 573 ("We can look to regulations and cases interpreting the federal Act [ADA] for guidance in our interpretation of Ohio law.").

{¶ 25} Assuming that Ogilbee suffers from multiple chemical sensitivity (MCS), an allergy that when triggered causes migraine headaches, Ogilbee fails to present evidence that Sweetnich treated this condition substantially limiting a major life activity. Ogilbee asserts that Sweetnich must have thought the headaches limited her ability to work because he knew that she had used up all her paid leave time, but she offers not evidence of this. The ability to work is a statutorily-identified major life activity. See R.C. 4112.01(A)(13). To be substantially limited in the major life activity of working, a person must be "'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'" *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569, 573, quoting Section 1630.2(j)(3), Title 29, C.F.R. There is no evidence in the record that Sweetnich treated Ogilbee's condition as disqualifying her from a class of jobs or a wide range of jobs. Indeed, Ogilbee does not even assert that there is such evidence. Rather, the evidence, at most, supports the conclusion that Sweetnich treated the condition as disqualifying Ogilbee from only one particular job–being a secretary at Patterson-Kennedy elementary school. But "'*[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.*'" Id.

{¶ 26} Ogilbee's argument in support of the second assignment of error consists of, in her words, "seven indications" that Sweetnich regarded her as having a disability. These indications suggest however only that Sweetnich knew she had a medical problem. While lay people may think of an allergy as a disability, a

"disability" in this context is, as we discussed above, a technical term with a very specific meaning. Also, Ogilbee makes much of the fact that Sweetnich, and others, tried, unsuccessfully, to accommodate her allergy, which she argues shows he thought she was disabled. But simply because an employer tries to make an employee's working-environment more comfortable by attempting to accommodate a particular physical characteristic does not mean that he thinks the employee has a "disability." As the statute makes clear, not every physical or mental impairment qualifies as a "disability." From the evidence, it appears that Sweetnich considered Ogilbee to have an allergy, and he did all he thought reasonable to accommodate the allergy. No evidence suggests that Sweetnich treated the allergy as severely limited her ability to work. Ogilbee's naked assertions about Sweetnich's thoughts and motivations are not sufficient; she "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Scott v. Harris* (2007), 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686, quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* (1986), 475 U.S. 574, 586-587, 106 S.Ct. 1348, 89 L.Ed.2d 538.

{¶ 27} After DPS met its initial burden of pointing to evidence affirmatively showing that Ogilbee has no evidence that Sweetnich regarded her as having a disability, Ogilbee had the reciprocal burden to "set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). She fails to set forth any facts suggesting that Sweetnich treated her impairment as substantially limiting her ability to work.

{¶ 28} The second assignment of error is overruled.

C. Summary judgment on Ogilbee's disability-harassment claim is proper

{¶ 29} In the third assignment of error,[8] Ogilbee contends that summary judgment on her disability-harassment claim should not be granted because factual questions exist about whether Sweetnich's refusal to accommodate her in the way she requested created a hostile working-environment.

{¶ 30} Ogilbee fails to establish a claim of hostile-environment disability harassment. Among the prima-facie elements of this claim is that the harassment was based on a "disability." See *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, 176. Ogilbee failed in the second assignment of error to establish that she had a "disability"; she does no better here.

{¶ 31} The third assignment of error is overruled.

IV

{¶ 32} Although we sustained the first assignment of error, concluding that DPS does not enjoy political-subdivision immunity from Ogilbee's discrimination claims, we then overruled the second and third assignments of error because we concluded that summary judgment on the claims was proper as a matter of law. Accordingly, the trial court's judgment is Affirmed.

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[8] "PLAINTIFF-APPELLANT HAVING ESTABLISHED ON THE RECORD ISSUES OF MATERIAL FACT REGARDING ALL ELEMENTS OF PROOF REQUIRED FOR HER DISABILITY HARASSMENT CLAIM, GRANT OF SUMMARY JUDGMENT TO DEFENDANT-APPELLEE IS REVERSIBLE ERROR."

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DONOVAN, P.J., and GRADY, J., concur.

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