[Cite as *King v. Aultman Health Found.*, 2009-Ohio-6277.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRIANNE KING

Plaintiff-Appellant

-vs-

AULTMAN HEALTH FOUNDATION, et al.

Defendants-Appellees

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2009 CA 00116

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 02028
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 30, 2009

APPEARANCES:

For Plaintiff-Appellant

KATHERINE C. HART SMITH
HART SMITH LAW OFFICE
1110 Key Building
159 South Main Street
Akron, Ohio 44308

For Defendants-Appellees

BRUCE HEAREY
ELLEN TOTH
KRISTIN ULRICH SOMICH
OGLETREE, DEAKINS, NASH,
4130 Key Tower, 127 Public Square
Cleveland, Ohio 44114-1304

Wise, J.

{¶1} Plaintiff-Appellant Brianne King appeals the April 10, 2009, judgment entry of the Stark County Court of Common Pleas granting summary judgment in favor of Defendants-Appellees Aultman Health Foundation, Aultman Hospital, Linda Griggs, Patricia Russell and David Dine on Appellant's claims of disability discrimination and false imprisonment.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On May 22, 2002, Appellant Brianne King began her employment with Appellee Aultman as a nurse aide. A nurse aide assists in providing patient care under the direction of a registered nurse and performs tasks such as assisting in the admission, discharge and transfer of patients, changing bed linens, bathing patients and providing general patient care.

{¶3} Appellant began working at Aultman on the Memorial 4 East floor. Her 2002 Performance Evaluation by her supervisor Unit Director Karen Chirumbulo notes that she had six (6) attendance occurrences in 2002 and that she needed to improve her attendance.

{¶4} In March of 2003, Aultman granted Appellant's request for a medical leave of absence for surgery. Appellant was off work from March 24, 2003 until May 5, 2003.

{¶5} On October 26, 2003, Appellant transferred to the Memorial 5 North floor. Her 2003 Performance Evaluation by her supervisor Unit Director Dine notes that her attendance "needs improvement."

{¶6} In February 2004, Appellant received a written warning relating to her attendance. This warning was signed by Appellant and Mr. Dine. Despite this warning,

Appellant again called off work on May 9, 2004 and May 12, 2004, and was suspended for three days as a result.

{¶7} On May 14, 2004, Aultman gave Appellant an undated written warning that if she called off work during the next four months her employment would be terminated.

{¶8} In May, 2004, Appellant was hospitalized at Aultman for an infection.

{¶9} In June, 2004, Appellant requested, and was granted, a medical leave of absence until August, 2004, for surgery.

{¶10} Appellant's 2004 Performance Evaluation again stated that Appellant needed to work on her attendance.

{¶11} In 2005, Appellant requested, and was granted, a medical leave of absence from February 27 until May 16, again for surgery.

{¶12} For the first time, in October of 2005, Appellant submitted a medical certification seeking intermittent leave under the federal Family and Medical Leave Act ("FMLA") for headaches and endometriosis, which was granted. The FMLA certifications from her physician, Robert Sliman, M.D., referred to intermittent leave being necessary in full-day increments.

{¶13} Appellant's 2005 Performance Review again warned her she needed to work on attendance.

{¶14} In March, 2006, Aultman gave Appellant a verbal warning for tardiness.

{¶15} In August, 2006, Appellant received another written warning for tardiness.

{¶16} In September, 2006, Aultman suspended Appellant for twenty-four (24) work hours (at least two full shifts) without pay for tardiness, and placed her on a six-month probationary period for her tardiness.

{¶17} Appellant's 2006 Performance Evaluation stated that her attendance was improving but she needed to get to work on time consistently.

{¶18} Appellant called off work again on January 9, 2007 and February 8, 2007.

{¶19} On March 19, 2007, Aultman gave Appellant a written "last chance" suspension for tardiness because she came to work late on February 24, March 2, March 15, and March 19, 2007.

{¶20} Appellant signed the March 19, 2007 suspension document, which stated:

{¶21} “This memo is to inform Brianne King that she is being suspended for tardiness. Brianne was suspended on September 26th of 2006 for tardiness and put on a 6 month probationary period. Since then, it was brought to my attention that Brianne came in late on February 24th (start time 10:00 am and didn't show up until 10:30 am), March 2nd (start time 6:00 am and came in at 6:15 am), March 15th (start time 6:00 am and came in at 6:15 am) and on March 19th (start time 6:00 am and came in at 8:00 am). I've talked to Brianne in the past regarding the importance of showing up to work on time and the effects it has on the unit. Since this is an ongoing issue with Brianne she will be suspended for a total of four 12 hour shifts starting March 20th, 2007 (3/20, 3/24, 3/25, and 3/29), and taken off of her 12 hours shifts beginning with the May 13th schedule. Brianne's probation will be extended until July 19th, 2007. If Brianne is late at all during that time she will be terminated.”

{¶22} On April 12, 2007, Appellant was again late for work.

{¶23} On April 15, 2007, Mr. Dine left Memorial 5 North as Unit Director and became a staff nurse in medical intensive care. At that time, Linda Griggs stepped in as Interim Unit Director and became Appellant's supervisor.

{¶24} During the week of April 21, 2007, Interim Unit Director Griggs and Nicole Gemma, Clinical Associate Vice President and Ms. Griggs' direct supervisor, met with Appellant. At this time, Ms. Griggs warned Appellant her employment would be terminated if she was late to work again.

{¶25} Appellant's name was on the surgical division spreadsheet for May 8, 2007, for Memorial 5 North but she failed to show at work for her scheduled shift at 6:00 a.m. Several of the nurses on duty tried to contact her multiple times, but she did not answer. When Ms. Griggs arrived at work, she also called Appellant, leaving a voicemail message. After receiving the messages, Appellant called the Unit at approximately 10:30 a.m. stating that she forgot she was scheduled to work. She admitted she checked her schedule after hearing the messages on her cellular phone and realized she had volunteered to pick up the shift, but had forgotten. At that time, Appellant offered to come in; however, Ms. Griggs told her that Aultman had already found another staff member to cover the shift.

{¶26} Ms. Griggs asked Appellant to meet with her on May 9, 2007, in Ms. Gemma's office. Ms. Griggs asked Patty Russell, the Unit Director for another floor, to sit in on the meeting with Appellant. At this meeting, Ms. Griggs discussed Appellant's attendance problems and her prior warnings. Ms. Griggs then offered Appellant the option of resigning her employment with Aultman or being terminated. Appellant asked to take the resignation and termination forms home to consider; however, Ms. Griggs

informed Appellant that she needed to decide whether she would resign or not before she left the hospital. Plaintiff-Appellant opted to resign, effective that day, May 9, 2007.

{¶27} On April 25, 2008, Plaintiff-Appellant Brianne King filed a Complaint with the Stark County Court of Common Pleas, alleging (1) discrimination based on disability under R.C. §§ 4112.02 and 4112.99 against Defendants-Appellees Aultman Health Foundation, Aultman Hospital, David Dine, Patricia Russell and Linda Griggs; (2) false imprisonment against Defendants-Appellees Aultman Health Foundation, Aultman Hospital, Patricia Russell and Linda Griggs; (3) invasion of privacy against Dr. Robert Sliman and Defendants-Appellees Aultman Health Foundation, Aultman Hospital and David Dine; and (4) breach of confidentiality against Dr. Sliman and Defendants-Appellees Aultman Health Foundation and Aultman Hospital.

{¶28} On May 16, 2008, Dr. Sliman filed an Answer and on May 22, 2008, he filed a Motion to Dismiss.

{¶29} By Judgment Entry filed June 25, 2008, Dr. Sliman's Motion to Dismiss was denied.

{¶30} On June 27, 2008, Defendants-Appellees answered.

{¶31} On January 7, 2009, Plaintiff-Appellant dismissed Dr. Sliman from the case.

{¶32} On February 20, 2009, Defendants-Appellees filed a Motion for Summary Judgment on all of Plaintiff-Appellant's claims.

{¶33} On March 18, 2009, Plaintiff-Appellant filed an Opposition to Defendants-Appellees' Motion for Summary Judgment.

{¶34} On March 25, 2009, Defendants-Appellees filed a Reply Brief in Support of Motion for Summary Judgment.

{¶35} On April 10, 2009, the trial court issued a Judgment Entry granting Defendants-Appellees' Motion for Summary Judgment on all claims.[1]

{¶36} It is from this decision Appellant now appeals, assigning the following errors for review.

ASSIGNMENTS OF ERROR

{¶37} "I. THE TRIAL COURT ERRED BY GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF-APPELLANT'S CLAIM FOR DISABILITY DISCRIMINATION.

{¶38} "II. THE TRIAL COURT ERRED BY GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF-APPELLANT'S CLAIM FOR FALSE IMPRISONMENT."

Summary Judgment Standard

{¶39} We review Appellant's Assignments of Error pursuant to the standard set forth in Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶40} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it

[1] In response to Defendants-Appellees' Motion for Summary Judgment, Plaintiff-Appellant conceded that she was unable to rebut Defendants-Appellees' arguments on her invasion of privacy and breach of confidentiality claims. The Court granted Defendants-Appellees' Motion for Summary Judgment on those two claims and Plaintiff-Appellant has not appealed the lower court's Judgment Entry as to those two claims.

appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327."

{¶41} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

I.

{¶42} In her first assignment of error, Appellant argues that the trial court erred in granting summary judgment as to her claim of disability discrimination. We disagree.

{¶43} In the case sub judice, Appellant brought her claim of disability discrimination pursuant to Ohio civil rights law, set forth in Chapter 41 of the Ohio Revised Code. The Supreme Court of Ohio has held that discrimination cases brought in state courts should be construed in accordance with federal guidelines and requirements. *Barker v. Scovill, Inc*. (1983), 6 Ohio St.3d 146, 147.

{¶44} R.C. §4112.02(A) sets forth the applicable discrimination provision in employment under the Ohio Civil Rights Act, and states:

{¶45} "It shall be an unlawful discriminatory practice * * * [f]or any employer, because of the race, color, religion, sex, 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."

{¶46} In order to survive a summary judgment on a statutory claim for disability-discrimination pursuant to R.C. § 4112.02(A), Appellant must set forth a prima facia case of disability discrimination by showing (1) that she was disabled, (2) that her employer took adverse employment action motivated at least in part by her disability, and (3) that she, even with her disability, can safely and substantially perform the essential functions of her job with or without reasonable accommodation. See *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569.

{¶47} Appellant claims that her disability is her permanent inability to reproduce or bear children.

{¶48} The Supreme Court has held reproduction to be a major life activity, *Bragdon v. Abbott,* 524 U.S. 624, 638, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). Likewise, it has been held that infertility is a disability under the Act that could significantly limit the major life activity of reproduction. *See LaPorta v. Wal-Mart Stores, Inc.,* 163 F.Supp.2d 758, 766 (W.D.Mich.2001).

{¶49} In *LaPorta* and *Bragnon,* however, the disability of infertility was directly linked to the plaintiff's limitation of the major life activity of reproduction. In the instant case there is no evidence that Appellant was interested in or actively trying to conceive. Likewise, there is no evidence that she was in any way discriminated against based on her inability to reproduce. This was not a case where Appellant was refused time to seek infertility treatments or denied time to pursue adoption related activities. Appellant never requested any time off directly related to her inability to reproduce. The only

evidence of time off actually requested by Appellant was for her surgeries, which was provided to her by Appellee.

{¶50} Even assuming, *arguendo,* that Appellant could establish a *prima facia* claim for ADA discrimination, Appellee has offered a legitimate non-discriminatory reason for Appellant's termination - Appellant's tardiness and poor work history. Appellant was chronically tardy to or absent from work and was given numerous reprimands and warnings concerning her tardiness and absenteeism.

{¶51} Appellant has asserted that her inability to come to work in a timely fashion was caused by pain, nausea, fatigue, depression, and the continuing effects of her hysterectomy on her ability to care for herself. However, when Appellant was confronted by her supervisors about being tardy, Appellant did not ask for an accommodation for a disability, but rather offered various other reasons for her lack of punctuality. The undisputed evidence shows Appellant was not terminated for her claimed disability, but rather for tardiness and poor work history. Appellant was terminated due to a well-documented, poor attendance record.

{¶52} Accordingly, we overrule Appellant's first Assignment of Error.

II.

{¶53} In her second assignment of error, Appellant argues that there are genuine issues of material fact that preclude summary judgment in favor of Appellees on her claim for false imprisonment. We disagree.

{¶54} The tort of false imprisonment arises when one is confined intentionally, for any appreciable time, against his will and without lawful justification. *Feliciano v. Kreiger* (1977), 50 Ohio St.2d 69, 71; *Mullins v. Rinks, Inc.* (1971), 27 Ohio App.2d 45,

56. In an action for false imprisonment, the plaintiff need only demonstrate that he or she was deprived of their liberty. The presumption then arises that the restraint was unlawful, and it is incumbent on the defendant to show legal justification. *Isaiah v. Great Atlantic & Pacific Tea Co.* (1959), 111 Ohio App. 537.

{¶55} Where a plaintiff does not offer proof of confinement, the cause of action fails as a matter of law. *Witcher v. Fairlawn* (1996), 113 Ohio App.3d 214, 217. There is no confinement when a person voluntarily appears at a premise and is free to leave. *Walden v. General Mills Restaurant Group, Inc.* (1986), 31 Ohio App.3d 11, 15. Mere submission to verbal direction in the absence of force or threat of force does not constitute confinement or detention. *Branan v. Mac Tools,* Franklin App. No. 03AP-1096, 2004-Ohio-5574, at ¶ 32; *Condo v. B & R Tire Co.* (May 29, 1996), Mahoning App. No. 95 C.A. 166. Further, " 'there is no false imprisonment where an employer interviewing an employee declines to terminate the interview if no force or threat of force is used, and false imprisonment may not be predicated on a person's unfounded belief that he was restrained.' " *Branan,* at ¶ 32, quoting *Kinney v. Ohio Dept. of Admin. Serv.* (Aug 30, 1988), Franklin App. No. 88AP-27.

{¶56} The determination of whether Appellant was falsely imprisoned presents a mixed question of law and fact: a legal question arises as to what facts state a claim for false imprisonment, and the question of whether those facts existed is for the trier of fact. *Bronaugh v. Harding Hosp., Inc.* (1967), 12 Ohio App.2d 110, 120.

{¶57} We must consider Appellant's allegations in the context of other undisputed facts. In the case before us, the meeting took place in an office in the hospital. After entering the office, Appellant was seated in a chair closest to the door,

with Ms. Griggs and Ms. Russell across from her. Appellant did not allege that the office room door was locked, nor did Appellant dispute Appellee's testimony that the door was not locked. Both Griggs and Russell remained seated throughout the meeting and they made no attempt to obstruct Appellant's path to the door. At no time did Appellant attempt to leave the office. Appellant has not alleged that either Griggs or Russell threatened to physically prevent her from leaving the room. In fact, Appellant alleged that she was told that once she signed the resignation she could leave. Lastly, it is undisputed that Appellant signed the resignation and immediately left the room.

{¶58} Viewing Appellant's allegations in the context of these undisputed facts, we conclude that Appellees are entitled to judgment as a matter of law. Appellant's allegations establish only that she submitted to the verbal direction of her supervisor to remain in the room. A termination meeting, particularly one where there are allegations of misconduct by the employee, is likely to be tense and potentially contentious. We recognize that an employee may not feel completely free to walk out of a meeting with his or her supervisor under these circumstances. Nevertheless, Appellant's allegations establish only that she submitted to the verbal direction of her supervisor during what was obviously a stressful and uncomfortable meeting. Although Appellant may have felt intimidated by Grigg's demeanor and tone, Appellant has not presented evidence that she was confined by force or threat of force. Construing the evidence in the light most favorable to Appellant, and making reasonable inferences in her favor, we conclude that Appellant has failed to set forth a sufficient factual basis for a claim of false imprisonment against Appellees.

{¶59} Appellant's second Assignment of Error is overruled.

{¶60} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE

/S/ SHEILA G. FARMER

/S/ WILLIAM B. HOFFMAN

JUDGES

JWW/d 1112

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRIANNE KING	:	
	:	
Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
AULTMAN HEALTH FOUNDATION, et al.	:	
	:	
Appellees	:	Case No. 2009 CA 00116

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

/s/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES