

[Cite as *Niles v. Natl. Vendor Servs., Inc.*, 2010-Ohio-4610.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

William Niles,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 10AP-128
v.	:	(C.P.C. No. 07CVH08-10598)
	:	
National Vendor Services, Inc.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

---

D E C I S I O N

Rendered on September 28, 2010

---

*Demers & Adams, LLC, and Sharon Cason-Adams, for appellant.*

*Dinsmore & Shohl LLP, Michael S. Glassman, and Kelly L. Kauffman, for appellee.*

---

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, William Niles ("Niles"), appeals from a decision of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, National Vendor Services, Inc. ("NVS").

{¶2} Niles initiated this action with a complaint alleging violations by his former employer, NVS, of the Ohio Civil Rights Act, R.C. 4112.02 et seq., and the Family Medical Leave Act ("FMLA"), 29 U.S.C. 2917.

{¶3} NVS is a retail service company that for the period at issue provided stocking and merchandising services under contract with Lowe's Companies, Inc., the parent company of the well-known home improvement and hardware chain. NVS employees, commonly referred to as merchandisers in the industry and specifically titled as "service managers" by NVS, managed stock, arranged display products, and maintained signage according to written instructions provided by Lowe's. Niles began working for NVS as a service manager in October 2003, principally attending to the outdoor power equipment section of Lowe's stores.

{¶4} The complaint alleges that Niles took an approved medical leave from November 10, 2005 until January 21, 2006, because he had been diagnosed with hypertrophic cardiomyopathy of the left ventricle. On November 14, 2005, Niles received a surgically implanted defibrillator and pacemaker for this condition. The complaint further alleges that Niles was released by his physician to return to work on or about January 21, 2006, subject to his physician imposing a permanent lifting restriction prohibiting Niles from lifting more than 10 to 15 pounds with his left (non-dominant) arm, with no corresponding restriction on his right arm.

{¶5} NVS formally terminated Niles on January 30, 2006 when NVS requested and received from Niles confirmation that the lifting restriction was permanent. NVS deemed that this physical restriction prevented Niles from performing the essential functions of his position.

{¶6} Count 1 of the complaint alleges that Niles, due to the above-described heart condition and other pre-existing ailments, was an individual with a disability as defined under R.C. 4112.01, and NVS committed unlawful discrimination when it failed to discuss an accommodation with Niles that would potentially allow him to return to work with his medical restrictions.

{¶7} Count 2 of the complaint alleges that NVS violated the FMLA because, upon his return from leave, Niles was entitled to be restored to his former position or one with equivalent pay, benefits, and other terms and conditions of employment. The complaint further alleges that NVS terminated Niles in retaliation for taking his statutorily-entitled leave under the FMLA.

{¶8} The trial court granted NVS's motion for summary judgment. The trial court found that Niles had failed to establish his prima facie claim for disability discrimination because he had not rebutted NVS's evidence that his lifting restrictions prevented him from performing the essential functions of his former position. The trial court also found that Niles had not presented evidence that NVS had refused to discuss an accommodation to allow Niles to work, nor that Niles had even sufficiently requested such an accommodation. Although these grounds sufficiently supported summary judgment on the R.C. Chapter 4112 claims, the court specifically declined to rely on the additional proposed ground that Niles had failed to preserve a genuine issue of material fact on the question of whether he was a disabled person as defined in the statute.

{¶9} With respect to the FMLA claim, the trial court found that his re-hire rights under the FMLA were ineffective because Niles was unable to perform the essential

functions of his position due to his physical condition, and the FMLA does not guarantee re-hire rights to a different position from the one from which leave was taken.

{¶10} Niles has timely appealed and brings the following four assignments of error:

1. The trial court erred in determining that Appellant William Niles failed to provide evidence that NVS violated his rights under the FMLA. Specifically, the trial court erroneously determined that Niles' physical condition left him unable to perform an essential function of (his) position and therefore, his FMLA claim failed as a matter of law.

2. The trial court erred in determining that Appellant Niles failed to establish a prima facie case of disability discrimination and that he failed to produce evidence that Apelles's [sic] nondiscriminatory reason for termination was a pretext for unlawful discrimination.

3. The trial court erroneously concluded that Appellant Niles failed to ask for a reasonable accommodation and therefore, Appellee's duty to participate in an interactive (accommodation) process never arose.

4. The trial court erred in sustaining Appellee's Motion for summary judgment on all counts.

{¶11} We initially note this matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the non-moving party has no evidence to prove its

case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Rather, the moving party must point to some evidence that affirmatively demonstrates that the non-moving party has no evidence to support his or her claims. *Id.*

{¶12} An appellate court's review of summary judgment is *de novo*. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Soc. Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶13} Appellant's first assignment of error asserts that the trial court erred in concluding that there remained no genuine issue of material fact on the question of whether Niles was physically unable to perform the essential functions of his former position with NVS. The FMLA grants eligible employees with a "serious health condition" the right to take as much as 12 weeks of unpaid leave in a 12-month period. 29 U.S.C. 2612(a)(1). An employee who takes such leave "shall be entitled, on return from such leave \* \* \* to be restored by the employer to the position of employment held by the employee when the leave commenced[,], or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. 2614(a)(1). In enforcement of these leave rights, 29 U.S.C. 2615(a)(1) and (2) make it unlawful for "any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" under the FMLA, or to "discharge or any other

manner discriminate against any individual for opposing any practice made unlawful" by the FMLA.

{¶14} The United States Court of Appeals for the Sixth Circuit accordingly recognizes two distinct theories for recovery under the FMLA: the "entitlement" or "interference" theory drawn from 29 U.S.C. 2615(a)(1), and a "retaliation" or "discrimination" theory based on 29 U.S.C. 2615(a)(2). *Hoge v. Honda of Am. Mfg., Inc.* (C.A.6, 2004), 384 F.3d 238, 244. In the present appeal, Niles argues under the interference theory. In order to make such a claim, Niles must establish that (1) he was an eligible employee, (2) NVS is a covered employer, (3) he was entitled to leave under the FMLA, (4) he gave NVS notice of his intent to take leave, and (5) NVS denied his right to be restored to the same position or a comparable one. *Id.*; *Cavin v. Honda of Am. Mfg., Inc.* (C.A.6, 2003), 346 F.3d 713, 719.

{¶15} Applicable regulations further define the conditions under which the right to reinstatement under 29 U.S.C. 2614(a)(1) can be exercised: "If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition \* \* \*, the employee has no right to restoration to another position under the FMLA." 29 C.F.R. 825.216(c) (formerly codified at 29 C.F.R. 825.214(b)). Thus, if the employee is unable to perform the essential functions of the position or a comparable one when FMLA leave expires, the employee is not entitled to reinstatement. *Reynolds v. Phillips & Temro Industries, Inc.* (C.A.8, 1999), 195 F.3d 411, 414; *Green v. Alcan Aluminum Corp.* (C.A.6, 1999), 198 F.3d 245 (table, slip opinion at 2).

{¶16} In the present case the question is whether Niles was capable of performing, despite his lifting restrictions, the essential functions of his former position. NVS asserts that the evidence before the trial court in support of summary judgment was undisputed and that Niles could no longer perform the essential functions of his job. Mark Phipps, a former district manager for NVS, testified that the service manager position held by Niles would regularly require lifting objects into shelving bays or moving them about, and that the job guidelines required asking for assistance for heavier objects. Phipps defined "heavy" as objects in excess of 40 or 45 pounds. (Phipps depo., 55.) In the outdoor power equipment area serviced by Niles, many of the stocked items would weigh 40 pounds, and the lifting requirements of the position were anywhere from 10 to 40 pounds with most stocked products averaging 20 or 25 pounds. (Phipps depo., 84.) The position regularly required "down stocking," or moving new inventory down from upper shelves to lower shelves to replenish sold inventory. This would require manipulating stock items while using a ladder. (Phipps depo., 85-86.)

{¶17} Joseph Guzewicz, who at the time in question was regional manager for NVS, the position above district manager, also testified regarding Niles' job duties as a service manager. The job required lifting, handling, re-arranging, pushing, and pulling various items in the outdoor power equipment section of Lowe's, many of these weighing more than 45 pounds. (Guzewicz depo., 43.) Even the lighter items might be located on a top shelf where they could only be reached with two hands, trapped beneath or behind heavier items that must be moved for access. (Guzewicz depo., 81-82.) Gas or electric mowers would be stocked both at ground level in boxes and presented in a display above eye level, where the service manager would be required to place and maintain the

display. (Guzewicz depo., 86-87.) In Guzewicz's experience, a person with a ten-pound lifting restriction on one arm would have difficulty manipulating stock, even those items weighing 45 pounds or less, without putting more than ten pounds strain on the restricted arm even when using both hands. (Guzewicz depo., 43.)

{¶18} Joanne Hamsher, a former human resources manager for NVS, also gave deposition testimony about the job requirements of service manager. Her testimony, although not based upon her own practical experience with the job, unlike that of Guzewicz and Phipps, paralleled their testimony regarding the requirements and capacities necessary for the position.

{¶19} NVS also relied in opposing summary judgment upon the various aspects of Niles' own deposition testimony, which largely corroborated that of the NVS witnesses with respect to the weight and types of items to be handled in the outdoor power equipment section of Lowe's. NVS also points to Niles' own application for social security disability benefits ("SSDB"), apparently filed more or less contemporaneously with his period of FMLA leave. NVS points out that in his application for SSDB, Niles describes himself as disabled and unable to perform any work at all.

{¶20} While in many aspects of Niles' own deposition he agrees with the specific burdens and requirements of the service manager job, on appeal he points to several conclusory statements in his deposition (Niles depo., 273-74) and affidavit (Niles aff., ¶6) in which he simply states that he could in fact perform the required job functions and manipulate the stock as needed.

{¶21} Ordinarily, internal contradictions presented in a party's materials offered in opposition of summary judgment would not eliminate a genuine issue of material fact if

some of that evidence sufficiently rebutted the evidence presented in support of summary judgment. The internal conflicts or inconsistencies in the evidence available would go to the weight of that evidence as considered by the trier of fact, rather than neutralizing it for summary judgment purposes.

{¶22} Here, however, Niles relies upon conclusory general statements in his deposition testimony regarding his ability to perform the work required of him in his former position. These conclusory statements are generally specifically contradicted by his own admissions regarding the weight, type, bulk, and relative inaccessibility as much of the stock to which he would be required to move and manipulate for display as a service manager. "Generally, a party's unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact. Otherwise, a party could avoid summary judgment under all circumstances solely by simply submitting such a self-serving affidavit containing nothing more than bare contradictions of the evidence offered by the moving party." *Bell v. Beightler*, 10th Dist. No. 02AP-569, 2003-Ohio-88, ¶33. While *Bell* goes on to point out that "there may be aspects to the facts of any given case upon which the non-moving party may be uniquely qualified to offer testimony," and certainly Niles' knowledge of his job qualifies him to describe both the nature of the work and his ability to perform it specifically, the statements relied upon in opposition to summary judgment in essence are conclusory assumptions about his ability to perform the work that in fact fly in the face of his specific statements regarding the physical demands of the job and his own significant physical limitations. In the context of this case, we find that Niles has failed to present sufficient evidence in opposition to summary judgment to establish a material

issue of fact regarding his ability to perform his former job. For these reasons, there remains no genuine issue of material fact as to Niles' ability to perform essential functions of his job with NVS, and the trial court properly granted summary judgment in favor of NVS on Niles' FMLA claim. Niles' first assignment of error is overruled.

{¶23} Niles' second and third assignments of error assert that the trial court erred when it found that there did not remain a genuine issue of material fact with respect to the various aspects of Niles' claim for disability discrimination under R.C. 4112.02 and 4112.99. These will be addressed together.

{¶24} Ohio law prohibits employment discrimination on the basis of disability, which is defined as "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." R.C. 4112.01(A)(13). The term "physical or mental impairment" as defined under R.C. 4112.01(A)(16)(a) includes "any physiological disorder or condition \* \* \* affecting one or more of the following body systems: \* \* \* cardiovascular; \* \* \* reproductive." Niles asserts that he suffers from a defect of the cardiovascular system because he is subject to the condition hypertrophic cardiomyopathy and, as a result of some of his recent treatment and surgery, he has been rendered sexually impotent.

{¶25} The trial court granted summary judgment on Niles' R.C. Chapter 4112 claim solely on the basis that Niles had failed to request a reasonable accommodation to his known disability. The trial court specifically found that there remained a genuine issue

of material fact on the question of whether Niles was "disabled" as the term is defined by relevant Ohio law.

{¶26} To establish a prima facie case of disability discrimination under R.C. 4112.02, a plaintiff must demonstrate (1) that he was disabled; (2) that his employer took an adverse employment action against him at least partially based upon the disability; and (3) that the plaintiff could safely and substantially perform the essential functions of his job despite his disability. *Hood v. Diamond Prods., Inc.*, 74 Ohio St.3d 298, 302, 1996-Ohio-259; *Pinchot v. Mahoning Cty. Sheriff's Dept.*, 164 Ohio App.3d 718, 722, 2005-Ohio-6593. Ohio's statute is modeled after the federal Americans With Disabilities Act ("ADA"), and Ohio courts will "look to the ADA and its interpretation by federal courts for guidance in interpreting the Ohio statute." *Pinchot* at 722; see also *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 573, 1998-Ohio-410. Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to establish a non-discriminatory ground for the adverse job action. The burden then shifts back to the plaintiff to establish that the employer's stated reason was merely a pretext to cover unlawful discrimination. *Hood* at 302.

{¶27} A plaintiff who has established that he is disabled for R.C. 4112.02 purposes may further establish a discrimination claim by showing that the employer has declined to make a reasonable accommodation to known disabilities if such accommodation would not cause undue hardship on the employer. " 'The disabled individual bears the initial burden of proposing an accommodation and showing that [the] accommodation is objectively reasonable.' " *McDonald v. Ford Motor Co.* (N.D. Ohio

2002), 208 F.Supp.2d 837, 842, quoting *Vande Zande v. State of Wisconsin Dept. of Admin.* (C.A.7, 1995), 44 F.3d 538.

{¶28} We find that the trial court correctly concluded that Niles failed to request a reasonable accommodation in the present case. Niles principally argues on appeal that the circumstances of his discharge effectively precluded any possibility of his making such a request because of the pace at which NVS proceeded in its termination process. The trial court acknowledged as much in its decision, noting that "[n]o doubt, the pace of the process that led to Niles' discharge stunned him." (Trial court decision, R. 83-85, at 13.) The undisputed evidence is that once NVS learned of Niles' 10-to-15-pound left-arm lifting restriction, a supervisor inquired of Niles whether the restriction was permanent. From the time Niles returned the call and left a voicemail confirming the permanent restriction, an exchange of e-mails between NVS managers had led to Niles' termination by the end of the same day.

{¶29} We agree with the trial court, however, that this rapid sequence of events on the final day of Niles' employment with NVS does not represent the sole chronological period in which Niles could have requested an accommodation. Niles was aware of his lifting restriction for a substantial period before this, and necessarily was aware of the physical demands of his former job. The clear burden lies with an employee to request accommodation. *Monette v. Electronic Data Sys. Corp.* (C.A.6, 1996), 90 F.3d 1173, 1183. Niles did not sufficiently articulate such a request either before he informed his employer that the lifting restrictions were permanent nor in the brief period between the employer's request for information on this issue and his eventual termination.

{¶30} Niles also argues on appeal that the act of informing his employer of his medical lifting restriction constituted a request for accommodation. He also asserts that the request for accommodation is conceded in the deposition testimony of Joanne Hamsher. Unfortunately, the cited portion of that testimony does not concede more than the bare fact that Niles reported his lifting restrictions and requested to return to work. (Hamsher depo., 47.) A request for accommodation must be "sufficiently direct and specific" to give notice to the employer of the need for an accommodation and the potential reasonable accommodations that would overcome the employee's limitations. *Reed LePage Bakeries, Inc.* (C.A.1, 2001), 244 F.3d 254, 261; see also *Hagan v. Anderson Cty. Fiscal Court* (E.D.Ky. 2000), 105 F.Supp.2d 612, 617. A bare communication describing Niles' lifting restriction did not constitute a "direct and specific" request for accommodation.

{¶31} NVS further argues that, even if the accommodation issue were not a basis for summary judgment, Niles' R.C. 4112.02 discrimination claim must fail because he has failed to introduce sufficient evidence to establish a genuine issue of material fact on the question of whether he is disabled for purposes of such a claim. While the trial court specifically found that there remained a genuine issue of material fact on this question that precluded summary judgment, our de novo review calls for us to examine the evidence to see if this ground could have supported summary judgment for NVS.

{¶32} With respect to Niles' assertion that his sexual impotence constitutes a disability to support his claim, NVS correctly points out that there is no evidence in the record that NVS was in any way aware of this purported disability at the time of termination. Since the disability must be known to the employer at the time of an adverse

job action (the second element of the *Hood* test), this physical condition cannot support his R.C. 4112.02 claim.

{¶33} Niles argues as an alternative source of disability that his hypertrophic cardiomyopathy is a physical 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; \* \* \* or being regarded as having a physical or mental impairment." R.C. 4112.01(A)(13). At various points in his deposition, Niles testified that his heart condition caused tightness in his chest, heart palpitations, and pain. (Niles depo., 280-83, 285-86.) He argues that breathing and cardiovascular function are major life activities, relying on *Bukta v. J.C.Penney Co., Inc.* (N.D.Ohio 2004), 359 F.Supp.2d 649, 664, for this proposition.

{¶34} NVS counters by arguing that merely having a significant medical condition, even a serious one that presents an admitted risk of sudden cardiac arrest and death, does not qualify for a disability under R.C. Chapter 4112. NVS argues that Ohio law requires that the conditions significantly affect the way the plaintiff lives his life on a daily basis, citing *McGlone* at 572.

{¶35} We agree with the trial court and find that Niles has introduced sufficient evidence to establish a genuine issue of material fact on the question of whether his heart condition substantially limits him in one or more of his major life activities. Niles has described the limitation placed upon his daily activities by his recurring heart issues, a condition of which his employer was substantially aware since Niles had just completed his 12-week leave of absence required by implantation of his defibrillator. We find that

the trial court did not err in concluding that there remained a genuine issue of material fact on this question.

{¶36} Finally, we turn to the third element of the *Hood* test, which requires that the plaintiff be able to "safely and substantially perform the essential functions of the job in question." *Hood* at 302; see also *Burns v. Coca-Cola Ents.* (C.A.6, 2000), 222 F.3d 247, 256. This standard parallels that relied upon in the FMLA claim, and for the same reasons we find that there remains no genuine issue of material fact on this point. His medical limitations prevented Niles from safely and substantially performing the work required by his former position. In conjunction with our conclusion above that Niles failed to request an accommodation from his employer that would allow him to perform the physical demands of his job despite his lifting limitations, the failure to meet the third prong of the *Hood* test in establishing Niles' prima facie case supports summary judgment in favor of his former employer on his R.C. Chapter 4112 claim. Niles' second and third assignments of error are overruled.

{¶37} Niles' fourth assignment of error presents a restatement of arguments raised in his first three assignments of error, and is overruled on the same grounds.

{¶38} In conclusion, the four assignments of error brought by appellant, William Niles, are overruled, and the judgment of the Franklin County Court of Common Pleas granting summary judgment for appellee National Vendor Services, Inc. is affirmed.

*Judgment affirmed.*

KLATT and FRENCH, JJ., concur.

---