[Cite as *Dove v. Ohio Dept. of Rehab. & Corr.*, 2022-Ohio-4836.]

IN THE COURT OF CLAIMS OF OHIO

KIMBERLY DOVE Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2019-00969JD Magistrate Robert Van Schoyck DECISION OF THE MAGISTRATE

{¶1} Plaintiff was formerly employed with defendant as a chaplain at Lebanon Correctional Institution (LeCI). As set forth in her amended complaint, plaintiff raises claims of assault and battery arising from a September 20, 2018 incident involving defendant's employee, Marva Allen, who at the time was a deputy warden at LeCI. Plaintiff also claims that defendant subsequently discriminated against her on account of a disability in violation of the Americans with Disabilities Act (ADA) and R.C. Chapter 4112 by denying her request for an accommodation in the form of transferring Allen or herself to a different facility. While the amended complaint also requested that the court determine whether Allen is entitled to personal immunity under R.C. 9.86, plaintiff withdrew the request at the beginning of trial.

{¶2} The case was tried before the magistrate. For the reasons stated below, judgment is recommended in favor of defendant.

Summary of Testimony

{¶3} Plaintiff testified that her first association with defendant was as a volunteer, first at Warren Correctional Institution in 2006 and later Dayton Correctional Institution. Plaintiff testified that she went on to serve as a chaplain at Dayton Correctional Institution on a contract basis from 2012 to 2016, at which time she was hired as an employee of defendant to serve as a chaplain at LeCI. Plaintiff identified Defendant's Exhibit K as the position description for her role at LeCI, which was part of a collective bargaining unit.

{¶4} Plaintiff testified that she had good working relations with Warden Tom Schweitzer and Deputy Warden Robert Welch, who was her supervisor, when she began working at LeCI and received positive performance reviews. But in 2017, plaintiff stated, the dynamic changed when Allen replaced Welch as her supervisor. According to plaintiff, Allen was "very mean" to her and their relationship was "bad". Plaintiff described how, after an incident where Allen berated her over the color of an ink pen she used, she told the warden she was going to resign, but after being reassured that she was doing a good job and that the warden would talk to Allen about her behavior toward plaintiff, she chose not to resign. The next day, plaintiff stated, Allen confronted her in her office and said she knew plaintiff had talked to the warden and she advised plaintiff that "people that try to get me, get got."

{¶5} Regarding the incident that gave rise to this lawsuit, plaintiff testified that Allen and Shelby Kirby, a corrections officer who was temporarily serving as a chaplain, were meeting in plaintiff's office to discuss a banquet the prison was holding that weekend to recognize volunteers. Plaintiff stated that when an alarm went off because of an inmate disturbance, Allen left the room momentarily and upon returning said that OC (oleoresin capsicum) or pepper spray had been deployed. Plaintiff explained that, having never seen pepper spray used, she walked out of the room and went to look through a window into the hallway to see the cloud of spray, but then she heard someone say "don't do that to her", which caused her to fear being harmed (potentially by an inmate), and Allen then put her hands on plaintiff and said "you want to see?" and apparently opened the door into the contaminated hallway. Plaintiff stated that she tried to back away but Allen prevented her and did not let go until Kirby came over. Plaintiff recalled feeling a burning sensation in her throat from the pepper spray. According to plaintiff, not knowing how to respond and not wanting to show weakness given that there were inmate porters working in the area, she went over to Allen and threw her hands up and said "this is how you train me?" because they had just discussed how she had no training about pepper spray and thus wanted to go look into the hallway and see it. When asked about a security camera video recording of the incident, which lacked any audio, plaintiff denied that she was laughing, explaining instead that she was choking.

{¶6} After the meeting concluded, plaintiff spoke with Kirby about the incident and they prayed together, according to plaintiff. The next morning, plaintiff stated, she broke down emotionally and Kirby told her she needed to file an Incident Report and showed her how to do so. Plaintiff identified Exhibit 4 as the Incident Report she submitted that day.

{¶7} While at LeCI for the volunteers' banquet that weekend, plaintiff stated, she met with Chae Harris, who had recently become the new warden, and informed him of the incident. Plaintiff recalled that after Harris reviewed a video of the incident, he assured her that it would not happen again on his watch. On Monday, plaintiff stated, Harris told her that Allen would no longer supervise her and instead she would be supervised by another deputy warden, and he also told her that he had ordered Allen to stay out of the chapel area and to stay away from her. Plaintiff testified that when she returned to the chapel, however, she saw in the logbook that Allen had visited the area while she was talking to Harris; as plaintiff explained, the logbooks are kept to record when staff members enter and exit certain areas of the prison. Also that day, plaintiff stated, she noticed that the inmates were not being as friendly to her as usual, and she understood from one of them that Allen told them plaintiff was taking some of their privileges away.

{¶8} On Tuesday, plaintiff stated, she went to speak with the head of human resources at LeCI, Chris Brown, and Allen briefly stopped by, and when she returned to the chapel she heard from another chaplain that Allen had been there but she did not see Allen's name in the logbook. As plaintiff left work on Tuesday, the front entry officer told her that Allen's car was parked near plaintiff's and told her to wait until Allen left. Plaintiff testified that when she came to work on Wednesday, she told Brown what had happened the evening before when she was leaving and Brown stated that he and Harris were aware and had already told Allen to use a designated deputy warden parking spot rather than parking in the general staff or visitation area. Plaintiff testified that she had no confidence that Harris and Brown could keep her safe from Allen.

{¶9} On Thursday, after some corrections officers told her that they watched the video of the incident with Allen, plaintiff testified that she felt overwhelmed and that Allen "was trying to get me." Plaintiff stated that she then called the Employee Assistance Program hotline that was posted on the wall, explained what she was going through, and

decided she needed to take leave from her job. Plaintiff testified that the next day, Friday, September 28, 2018, she began a period of disability leave (also referred to by several witnesses as 'medical leave') and had a phone call with Brown in which she "talked about the inability for them to keep her away from me and I just couldn't do it."

{¶10} Brown remained plaintiff's point of contact while she was out on leave and they spoke often, in her recollection. Plaintiff testified that Brown discussed how to apply for disability leave benefits and instructed her to see a specific therapist to evaluate her in regard to her application, which was approved. Plaintiff stated that she also saw a psychiatrist of her own choice, Dr. Chole Mullen, beginning on November 13, 2018, and Dr. Mullen diagnosed her with major depression and acute stress disorder and filled out forms in support of plaintiff's disability leave indicating that she was unable to work. (Plaintiff's Exhibit 13; Defendant's Exhibit L.) Plaintiff testified that she had told Dr. Mullen that LeCI was not going to move Allen.

{¶11} In spite of Dr. Mullen's statement that plaintiff was unable to work, plaintiff testified that over the course of several telephone conversations with Brown while she was out on disability leave, she told Brown that she could perform the job of chaplain, just not at the same prison as Allen. Plaintiff testified that she told Brown "You guys can move her or move me, please" and that she "always talked to him about moving Allen". As plaintiff recalled, Brown told her that Allen was not going to be moved but that if plaintiff would return to work Brown would "get me out of there", although he did not give specifics.

{¶12} Plaintiff testified that in December 2018 she applied for vacant chaplain positions with defendant's Northeast Reintegration Center in Cleveland and Franklin Medical Center in Columbus. Plaintiff stated that it appeared Northeast Reintegration Center had some interest in hiring her, but when she called Brown to let him know he said that she could not be hired there because she was out on disability leave and she would need to first return to work at LeCI. After hearing this, plaintiff stated, she did not pursue any other positions with defendant for the time being.

{¶13} Plaintiff testified that she received a letter in the mail from defendant informing her that there would be a hearing on January 8, 2019, which she could attend, to determine whether she would be subject to an involuntary disability separation based on her continued inability to work. (Plaintiff's Exhibit 11; Defendant's Exhibit B.) While

the letter was dated December 28, 2018, plaintiff stated that she did not receive it until the day before the hearing. Plaintiff admitted that the letter was correct in noting that Dr. Mullen stated in writing that plaintiff was unable to perform her job duties and would be unable to do so until at least April 1, 2019. According to plaintiff's testimony, though, she could have returned to work in January 2019 if she were not working with Allen. Plaintiff recounted calling Brown to ask about the nature of the hearing and if she needed an attorney, and he called her back and said that Warden Harris intended to go forward with the hearing as scheduled and would implement the involuntary disability separation. Plaintiff recalled Brown explaining the process and how this was something that happens to employees out on extended disability leave, and that she would have two years to return to employment. Plaintiff stated that she did not attend the hearing nor appeal the warden's decision to separate her, and she acknowledged that she never applied to the warden for reinstatement as she could have up through September 28, 2020, being two years from the time that she went out on leave. Plaintiff stated that at some point after she was separated from employment, she was directed to refer any questions about her remaining disability leave benefits to another employee of defendant, Lesley Anderson.

{¶14} Plaintiff testified that Dr. Mullen completed additional paperwork in March 2019 associated with her disability leave benefits. (Defendant's Exhibit W.) Plaintiff acknowledged that Dr. Mullen wrote "she cannot work at this time" and "cannot perform her job responsibilities at this time" and estimated that plaintiff would not be able to work until June 1, 2019, but again plaintiff testified that she could have worked in a facility where Allen was not present.

{¶15} In May 2019, plaintiff stated, she received a notice that her disability leave benefits were expiring, so she began looking for other positions. Plaintiff testified that she accepted a contractor position as a chaplain at London Correctional Institution in October 2019, and although she was capable of performing the duties of a chaplain at that time, she quit after just one day on the job because it was a long commute from her home and she did not want to relocate for a contractor position, which did not have the certainty of continued employment. Plaintiff testified that she interviewed for a chaplain position at Chillicothe Correctional Institution in the fall of 2019 but was not selected. Plaintiff described applying for prison chaplain positions in other states and eventually working as

a customer service representative for American Airlines for a time, until she took a job with the Department of Youth Services as a chaplain at the Indian River Juvenile Correctional Facility, beginning December 6, 2021.

{¶16} Chae Harris testified that he has worked for defendant since 1994 and became Warden of LeCI on September 3, 2018. Harris testified that during the weekend following the incident between Allen and plaintiff, which occurred Thursday, September 20, 2018, plaintiff told him what happened while they were at a banquet for prison volunteers. Harris testified that after leaving the banquet he immediately reviewed security camera video of the incident to investigate.

{¶17} Describing the incident, Harris explained that corrections officers had responded to an inmate fight in the dining hall and deployed pepper spray using a fogger device. Harris stated that the pepper spray was one of the stronger types used in the prison system, causing a burning in the throat, tearing, and watery eyes, and is designed to take the fight out of the inmates sprayed. Harris identified Defendant's Exhibit U as a composite video of three cameras, with two cameras showing the dining hall area outside of the chapel hallway and another camera showing the chapel hallway; there is no audio. After viewing the video, Harris testified, he directed plaintiff to prepare an Incident Report. Harris testified that when he watched the video of the incident, he initially thought the interaction between plaintiff and Allen was horseplay because he thought plaintiff laughed, but he changed his mind after learning more about plaintiff's point of view, as described in the Incident Report that she prepared, and he came to consider the episode an act of workplace violence. Harris testified that by Monday he told Allen to stay away from the chapel area and from plaintiff. Harris recalled plaintiff subsequently telling him that she heard Allen had nevertheless been in the chapel.

{¶18} Harris explained that Chris Brown, the LeCI personnel director, would have been plaintiff's point of contact to discuss her ensuing leave of absence and potential return. Harris, like plaintiff, identified various paperwork she submitted in support of her disability leave. Harris stated that while he does not specifically know whether plaintiff's disability leave was related to the incident with Allen, he was told that plaintiff would not return to work at LeCI if Allen still worked there; he was unaware of plaintiff requesting a transfer or other accommodation, which he said would have been directed toward human

resources rather than him. Harris testified that staff cannot transfer positions when on a leave of absence, but that plaintiff could have bid on another position.

{¶19} Harris identified the Notice of Involuntary Disability Separation that was sent to plaintiff to notify her of the hearing at which it was determined she would be separated. (Plaintiff's Exhibit 11; Defendant's Exhibit B.) The notice also informed plaintiff of her right to request reinstatement within two years from the date she was no longer in an active work status, and Harris stated that any such request would have been directed to him as warden but plaintiff did not do so. Harris stated that if plaintiff had requested reinstatement, it would have been to return to her job as a chaplain at LeCI. Regarding plaintiff's brief stint as a contract chaplain at London Correctional Institution, Harris did not think she needed to seek his approval to work in that position, since it was a contract position and at a different institution. He further testified that when plaintiff applied for a position at Chillicothe Correctional Institution in the fall of 2019, the officials there would not have needed to consult him in order to hire plaintiff.

{¶20} Harris testified that LeCI conducted a formal investigation into the incident and he identified Plaintiff's Exhibits 5 and 6 as investigative reports. Harris also testified he had been aware of another investigation into Allen before he became warden based on allegations by an employee, Mona Smith, of Allen having a management style characterized as harassing or disrespectful. The investigation into Allen's incident with plaintiff concluded with Allen receiving a two-day working, paid suspension effective March 4, 2019, Harris stated. (Plaintiff's Exhibit 15.) Harris further stated that, for unrelated reasons, Allen was demoted from her deputy warden position in March 2021. (Plaintiff's Exhibit 16.)

{¶21} Shelly Kirby testified that she worked as a corrections officer at LeCI from 2012 until May 2021, at which time she became a chaplain at Warren Correctional Institution; she had worked as a temporary chaplain at times at LeCI. On September 20, 2018, Kirby was working as a temporary chaplain and was present for the incident between Allen and plaintiff, she stated. In an Incident Report that Kirby prepared, she wrote that Allen opened the door into the hallway, took plaintiff by the shoulders, and directed her out the door; after Kirby told her to stop, Allen let go of plaintiff. (Plaintiff's Exhibit 8.) Kirby testified that plaintiff did not ask or consent to be pushed or exposed to

the pepper spray. During her testimony, Kirby watched the video of the incident and identified herself, plaintiff, and Allen.

{¶22} John Tate testified that he has worked for defendant for about 20 years, currently as chaplain at the Northeast Reintegration Center. Tate explained that when he applied for that position via a lateral transfer in December 2018, he was one of the most senior chaplains in the department, and due to the seniority system that governs the hiring process he assumed he would get the job. Tate was asked, hypothetically, whether he would have withdrawn his application if someone from department management or the union had asked him to allow plaintiff to apply for and receive the position and he stated that he would have done so. Tate added, though, that he has never heard of any such arrangement, and he stated that he does not know whether this sort of arrangement would interfere with union members' rights. Tate also stated that he was then moving to Cleveland, where the Northeast Reintegration Center is located, to care for his mother.

{¶23} Plaintiff submitted the testimony of Dr. Chole Mullen, M.D. via deposition.[1] Dr. Mullen is a board-certified psychiatrist, licensed in Ohio. She testified that plaintiff was a patient of hers from November 13, 2018, until May 2019. She identified Plaintiff's Exhibit 21 as records of plaintiff's treatment with her. On November 13, 2018, Dr. Mullen diagnosed plaintiff with major depression and acute stress disorder related to the incident with Allen. (Although Dr. Mullen identified acute stress disorder as a diagnosis in some of the documentation she completed, at other times she referred to post-traumatic stress disorder (PTSD) and in her testimony she said they are substantially the same diagnosis.) Dr. Mullen noted plaintiff had trouble sleeping, low appetite, cried almost every day, was sad and depressed, agitated, and not enjoying life. She also noted the depression was moderate because it was affecting her biologic functions of sleep and appetite, and the acute stress disorder manifested in nightmares, anxiety, a higher startle response, fear, and intrusive thoughts.

{¶24} Dr. Mullen testified regarding several psychiatric progress notes which show that plaintiff was still diagnosed with major depression and acute stress disorder through

[1] The objections in the deposition transcript at pages 6, 12, 15, 22, and 24 are OVERRULED; the objection at page 36 is SUSTAINED.

May 7, 2019. According to Dr. Mullen, plaintiff told her that defendant would not allow her to come back to work with a different supervisor, and Dr. Mullen supported her not returning to work at LeCI under Allen. Dr. Mullen explained that the symptoms of PTSD can lessen over time, but if a victim is exposed to their perpetrator again or to another trauma, the symptoms can return or worsen.

{¶25} Dr. Mullen thought that if plaintiff stayed in treatment with her and continued with her therapist, she would have been able to function and go back to a job, but she could not return to working under Allen because that would be a trigger. Dr. Mullen explained that when she wrote on the leave certification forms that plaintiff was not able to return to work at that time, she understood plaintiff would continue to be under Allen's supervision, but she felt that if plaintiff could have worked somewhere else, away from Allen, then she could have gone back to work. Dr. Mullen later testified that even if Allen were not plaintiff's supervisor, plaintiff could not have returned to work if she would be exposed to Allen, as even seeing Allen could trigger plaintiff's symptoms.

{¶26} During cross-examination, Dr. Mullen testified that she did not conclude plaintiff was unable—due to her major depression and PTSD—to engage in other activities outside of her work at LeCI, including serving as an associate pastor at a church, taking classes for clinical pastoral counseling, or volunteering to run at least two therapy groups, although she allowed that perhaps plaintiff would have been unable to perform such activities for three or four weeks after they first met, when plaintiff was not functioning well.

{¶27} Lesley Anderson testified that she works for defendant as a Regional Off Work Benefits Coordinator, overseeing benefits and disability claims for several institutions, including LeCI. Anderson explained that an involuntary disability separation occurs when an employee runs out of Family and Medical Leave Act (FMLA) leave or will be on an extended leave (i.e. more than four months). The employee can still receive any remaining disability leave benefits and can request to return to work within two years from when they went out on leave, and they may appeal the separation, Anderson explained. Putting an employee on involuntary disability separation allows the institution to fill that position, Anderson stated, and is at the warden's discretion.

{¶28} Anderson testified that she prepared the letter notifying plaintiff of her involuntary disability separation hearing (Plaintiff's Exhibit 11; Defendant's Exhibit B) and oversaw the administration of plaintiff's remaining disability leave benefits after her separation, which occurred because she ran out of FMLA leave and was going to be off for an extended amount of time. Anderson testified that the Ohio Administrative Code spells out much of the process for involuntary disability separation.

{¶29} Anderson stated that in order to return to work, an employee has to write a letter to the warden of the institution and include a return-to-work excuse from the physician who took them off of work, but plaintiff did not do so. Anderson could not recall anyone ever being denied reinstatement. When reinstated from an involuntary disability separation, the person returns to the same position they held prior to leaving, Anderson explained, and if that position has already been filled, another position will be created to accommodate the returning employee.

{¶30} Anderson testified that she is not involved with ADA accommodations and had no knowledge of plaintiff requesting any accommodations, nor did she have any indication more generally that plaintiff wanted to work for defendant again, whether at LeCI or another institution. According to Anderson, plaintiff would have needed a release from a physician saying she could work again without restrictions if she had sought a different position with defendant while on involuntary disability separation status. She also explained that when an employee is on involuntary disability separation, they lose their seniority for purposes of applying for another position within the department.

{¶31} Sherri Pennington testified that she is a hiring manager for defendant and posts the vacant positions and directs applications to the personnel directors within the institutions. She testified about her familiarity with the SEIU 1199 collective bargaining agreement and identified the portions addressing disability leave, seniority, and vacancies. Pennington said she has never known of a scenario where the requirements of a collective bargaining agreement were bypassed to move someone into a vacant position. Pennington explained that when two bargaining unit employees apply for the same position, the more senior employee gets the job unless the junior employee can show that they are much more qualified. The state must first fill vacancies with bargaining unit applicants who work in the agency where the vacancy exists, she stated, and

vacancies are then filled with bargaining unit applicants from other agencies. If the vacancy is still not filled, then the job may be awarded to a non-union internal employee, and lastly by hiring an external candidate, she explained. According to Pennington, an involuntary disability separated individual identified in personnel records as having been terminated is considered an external candidate because they are not currently employed by the state. The personnel director for the institution makes the decision whether to post an opening internally or externally, based on the anticipated applicant pool, she stated, but typically there is enough internal interest in positions that defendant does not need to post them externally.

{¶32} Regarding the opening for the chaplain position at Chillicothe Correctional Institution in 2019, which was awarded to an applicant working as a chaplain under contract at the time, Pennington explained that if a contractor chaplain and an involuntary disability separated former chaplain both applied, they would both be considered external candidates and defendant could hire either candidate without violating seniority rules under the CBA. However, she clarified that she does not know all the specific rules regarding involuntary disability separation.

{¶33} Annette Chambers-Smith, defendant's Director since 2019, testified about her experience and career in the corrections field, beginning as a clerk with defendant in 1993. Chambers-Smith described how, on her first official day as Director, she made the decision to discipline Deputy Warden Marva Allen with a two-day working, paid suspension for her actions in the September 20, 2018 incident with plaintiff, and she identified the written disciplinary notice issued to Allen. (Plaintiff's Exhibit 15; Defendant's Exhibit G.) She stated that when making her decision she had a packet of information and watched a video of the incident, and while she did not go through the entire investigative report, she understood the conclusions. She knew Allen was considered to have been dishonest during the investigation, she stated, but was not aware Allen had been ordered to stay away from plaintiff nor whether Allen complied. Her impression from the video was that Allen's behavior was horseplay, but she understood that while Allen had a playful look, plaintiff did not and plaintiff did not consent to the touching. She explained how, in her view, Allen's behavior was not bullying, which should not happen in a prison environment because it can make the victim-employee appear weak. Still, she

described seeing this as a serious incident that warranted discipline to punish and correct Allen's behavior, but after weighing her options, she felt it was not serious enough to revoke Allen's unclassified status or, going a step further, to revoke her unclassified status and transfer her to another institution.

{¶34} Chambers-Smith described how making a disciplinary decision for a deputy warden is not easy and involves looking at both the totality of the circumstances and the ladder of discipline, as well as the higher expectations she has for a deputy warden. She explained that she was only aware of one other time a deputy warden touched a staff member, and it was in self-defense. Chambers-Smith explained that the exempt, unclassified nature of the deputy warden position means that they can be removed with the stroke of a pen, but while removing a deputy warden is simple, it is not so easy to replace them. She stated that a deputy warden needs a certain level of experience, training, knowledge, and education, and she explained how and why defendant also tries to maintain diversity among the leading officials at each institution. The pool of candidates for deputy warden positions is not large, meaning that deputy warden positions sometimes take many months to fill, according to Chambers-Smith. And LeCI is one of the more complex institutions operated by defendant, she explained.

{¶35} Chambers-Smith also testified about a separate disciplinary decision she made on March 22, 2021, this time revoking Allen's unclassified appointment as deputy warden and demoting her back to her last classified position at a different institution. Chambers-Smith related that she made this decision after visiting LeCI—at a time when the warden had been away for several months—and finding it to be filthy, seeing pornography posted on most of the inmates' windows, and learning of a problem with inmate access to the law library. According to Chambers-Smith, while demoting Allen was not a decision she took lightly, from what she witnessed during the visit and from discussions with other officials at LeCI, she concluded that Allen was not a good team player, and at the same time she returned the person who had been serving as acting warden back to a deputy warden position.

{¶36} Chambers-Smith was asked several questions about requests for disability accommodations, and among other things said defendant has a form for employees to make such requests and defendant has a policy, a committee, and a process to evaluate

them. Proposed accommodations are either approved, denied, or modified through that process, Chambers-Smith stated. She testified that she thinks there should be some level of privacy about ADA requests and she typically does not know about them and does not get involved unless they require a creative solution, such as creating a new position.

{¶37} Chambers-Smith testified that one institution cannot decide to simply transfer an employee to another institution, for an ADA accommodation or otherwise. From her experience with union relations, including being a member of a union in her first few jobs with defendant, the union takes collective bargaining rights very seriously and if defendant does not follow the hiring process properly under the collective bargaining agreement, a successful grievance follows. When asked about reaching out to the union about having a more senior applicant for a position withdraw his or her application so that a less senior applicant could get the job, Chambers-Smith testified that the union is primarily concerned with seniority and always protects its members, and she would not do something like that because she could think of no circumstances in which the union would engage in conversation about skipping someone's seniority rights.

{¶38} Regarding involuntary disability separations, Chambers-Smith stated that she was not involved in the decision to impose that on plaintiff. She did state, however, that it is a priority to minimize any vacant chaplain positions. She stated that when an involuntary disability separation occurs, the individual is no longer an employee, but if they want to return, are cleared by their doctor, and timely request to be reinstated they can return to work. Apart from that reinstatement process, an individual who has received an involuntary disability separation is treated like an external candidate if applying for a position, she stated.

Analysis

I. Assault and Battery

{¶39} In Count I of the amended complaint, plaintiff asserts claims of assault and battery. "To prove assault under Ohio law, plaintiff must show that the defendant willfully threatened or attempted to harm or touch the plaintiff offensively in a manner that reasonably placed the plaintiff in fear of the contact." *Miller v. Ohio Dept. of Rehab. &*

Corr., 10th Dist. Franklin No. 12AP-12, 2012-Ohio-3382, ¶ 11. "Battery is an intentional contact with another that is harmful or offensive." *Stafford v. Clever Investigations, Inc.*, 10th Dist. Franklin No. 06AP-1204, 2007-Ohio-5086, ¶ 9.

{¶40} The magistrate finds that after plaintiff went to look through a window into the hallway outside her office to see a cloud of pepper spray that had been dispersed to quell an inmate disturbance, Allen approached her from behind as if to put hands on her, and even though plaintiff did not see Allen, Allen's conduct led Kirby to exclaim "don't do that to her", which reasonably placed plaintiff in fear of some offensive physical contact. Allen then opened the door to the hallway and intentionally put her hands on plaintiff's back in a harmful or offensive manner to expose plaintiff to the pepper spray and prevent plaintiff from retreating away from the doorway. Though it appears to have been more in the nature of thoughtless horseplay than a malicious attack, Allen's conduct nevertheless constituted both assault and battery. From the video, it appears plaintiff was exposed to the hallway for approximately five seconds.

{¶41} "Generally, an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of *respondeat superior* * * *." *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438, 628 N.E.2d 46 (1994). "It is well-established that in order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of employment." *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991). "Moreover, where the tort is intentional, * * * the behavior giving rise to the tort must be 'calculated to facilitate or promote the business for which the servant was employed * * *.'" *Id.*, quoting *Little Miami RR. Co. v. Wetmore*, 19 Ohio St. 110, 132 (1869).

{¶42} The parties are in agreement that Allen's assault and battery upon plaintiff were not calculated to facilitate or promote defendant's business and fell outside the scope of employment. Plaintiff argues, however, that defendant is liable under the theory that it ratified Allen's actions. To that end, courts have held that "[a]n employer can also be held liable for an employee's intentional acts when the employer ratifies that action, making the action its own." *Hudson v. Flores*, 3d Dist. Allen No. 1-15-42, 2016-Ohio-253, ¶ 21; *see also Dorsey v. Morris*, 82 Ohio App.3d 176, 179, 611 N.E.2d 509 (9th Dist.1992). "Ratification generally occurs when the employer with full knowledge of the facts, acts in

a manner that manifests an intention to approve the unauthorized act of the agent-employee." *Clifford v. Licking Baptist Church*, 5th Dist. Licking No. 09 CA 0082, 2010-Ohio-1464, ¶ 66, citing *Bailey v. Midwestern Ent., Inc.*, 103 Ohio App.3d 181, 185, 658 N.E.2d 1120 (10th Dist.1995). "The continued employment of an individual who committed an intentional tort is not, in and of itself, enough to show ratification by an employer." *Jackson v. Hogeback*, 12th Dist. Butler No. CA2013-10-187, 2014-Ohio-2578, ¶ 27.

{¶43} Upon learning of the incident from plaintiff, Warden Harris almost immediately looked into the matter and reviewed security camera footage. Harris promptly removed Allen as plaintiff's supervisor, directed Allen to stay away from plaintiff, and assured plaintiff that nothing like this would happen again on his watch. Harris opened a formal investigation which concluded that Allen acted inappropriately. Director Chambers-Smith reviewed the matter, including watching the video, and after considering her options and several factors that she discussed in her testimony, she made the decision to discipline Allen with a two-day working, paid suspension.

{¶44} While the magistrate recognizes that plaintiff views the discipline as inadequate, it was apparent from the testimony of Warden Harris and Director Chambers-Smith that they took the matter seriously and it simply cannot be said from the evidence presented that defendant manifested an intention to approve of Allen's tortious conduct as to support plaintiff's theory of ratification. (On the basis of mootness the magistrate declines to address defendant's arguments that "ratification of an employee's behavior is only relevant for claims of punitive damages, which are not at issue in this case" and that plaintiff's assault and battery claims must be analyzed as employer intentional torts under R.C. 2745.01.)

{¶45} Finally, while plaintiff chiefly argues for liability on the claims of assault and battery under the theory of ratification, it is also alleged in the amended complaint that "the Department knew before the September 20 incident of Deputy Warden Allen's abusiveness towards Ms. Dove and took no actions to protect her." (Amended Complaint, ¶ 26.) However, although plaintiff described Allen as having an ineffective management style and being verbally abusive prior to the incident, there was no suggestion that Allen had been physically abusive or made any real threat of physical harm toward plaintiff,

much less that plaintiff reported any such conduct. The evidence admitted at trial does not credibly demonstrate that defendant knew or should have known of Allen having any propensity for the type of behavior she engaged in during the incident in question.

{¶46} Accordingly, plaintiff has not proven her claims of assault and battery.

II. Disability Discrimination

{¶47} In Count II of the amended complaint, plaintiff asserts claims of disability discrimination in violation of the ADA and R.C. 4112.01, et seq. Specifically, plaintiff claims that her "request to return to work at the prison if Deputy Warden Allen was transferred to another facility, or, alternatively, if Plaintiff were transferred to another facility within the Department, constituted a request for a reasonable accommodation" and that "Defendant's rejection of Plaintiff's request for a reasonable accommodation violated the ADA and O.R.C. Chapter 4112." (Amended Complaint, ¶ 32-33.)

{¶48} Revised Code 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice [f]or any employer, because of * * * disability * * * 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 other matter directly or indirectly related to employment." Similarly, "[t]he ADA prohibits employment discrimination against a 'qualified individual on the basis of disability.'" *Gearhart v. E.I. DuPont de Nemours & Co.*, 833 Fed.Appx. 416, 421 (6th Cir.2020), quoting 42 U.S.C. 12112(a). "Given the similarity between the ADA 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 v. Rekau & Rekau, Inc.*, 10th Dist. Franklin No. 09AP-32, 2009-Ohio-4974, ¶ 32.

{¶49} "Employees can prove discrimination in two ways, either directly or indirectly, and each has its own test." *Blanchet v. Charter Communications, LLC*, 27 F.4th 1221, 1227 (6th Cir.2022). "Since failure to accommodate is expressly listed in the Act's definition of disability discrimination, *see* 42 U.S.C. § 12112(b)(5)(A), 'claims *premised* upon an employer's failure to offer a reasonable accommodation necessarily involve direct evidence (the failure to accommodate) of discrimination.'" *Id.*, quoting *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir.2007). The direct evidence

framework under which plaintiff's failure to accommodate claim is analyzed requires her to "establish that (1) she 'is disabled,' and (2) that she is '"otherwise qualified" for the position despite . . . her disability: (a) without accommodation from the employer; (b) with an alleged "essential" job requirement eliminated; or (c) with a proposed reasonable accommodation.'" *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 417 (6th Cir.2021), quoting *Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409, 417 (6th Cir.2020), quoting *Kleiber* at 869. "In turn, '[the employer] bears the burden of "proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon" [the employer].'" *Id*. at 417-418, quoting *Fisher* at 417, quoting *Kleiber* at 869.

{¶50} The magistrate finds that plaintiff was diagnosed with major depression and acute stress disorder. (Plaintiff's Ex. L; Defendant's Ex. 13.) Defendant, in its post-trial brief, takes the position that plaintiff was indeed disabled and the court will thus assume for purposes of this analysis that plaintiff's major depression and acute stress disorder rendered her disabled within the meaning of the ADA and R.C. Chapter 4112, satisfying the first element of her claim.

{¶51} For the second element, plaintiff argues that with a proposed reasonable accommodation she was 'otherwise qualified' for the position of chaplain despite her disability.

{¶52} Defendant argues, among other things, that plaintiff was "completely disabled and unable to perform any of her job duties." As evidence, defendant points to the medical documentation in which Dr. Mullen stated that plaintiff was unable to perform her job duties. Dr. Mullen submitted this documentation in support of plaintiff's claim for disability leave benefits. "An application for disability is not 'conclusive evidence that an individual is completely incapable of working.'" *Hargett v. Jefferson Cty. Bd. of Ed.*, 6th Cir. No. 17-5368, 2017 U.S. App. LEXIS 21799, *10 (Oct. 27, 2017), quoting *Stallings v. Detroit Pub. Schools*, 658 Fed.Appx. 221, 226 (6th Cir.2016); *see also Benaugh v. Ohio Civ. Rights Comm.*, 278 Fed.Appx. 501, 512-513 (6th Cir.2008) ("an individual's claim for disability benefits does not inherently conflict with a claim for damages for failure to reasonably accommodate her disability."). On the other hand, "'a plaintiff's sworn assertion in an application for disability benefits that she is, for example, "unable to work"

will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation.'" *Stallings* at 226, quoting *Cleveland v. Policy Mgt. Sys. Corp.*, 526 U.S. 795, 806, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999).

{¶53} The magistrate finds that when Dr. Mullen completed the paperwork for plaintiff to receive disability leave benefits and stated that plaintiff was unable to return to work, she did so with the understanding that plaintiff had no option but to return to work at LeCI and that Allen would be present in the workplace, even if she no longer supervised plaintiff. Although she did not explain this in the documentation that she prepared, Dr. Mullen's testimony, together with plaintiff's testimony about her ability to work as a chaplain so long as she was not in the same workplace as Allen, sufficiently established that plaintiff was not completely disabled and unable to work.

{¶54} While the documentation plaintiff submitted for her disability leave benefits does not negate her claim of disability discrimination, she still "bears the initial burden of suggesting an accommodation and showing that the accommodation is objectively reasonable." *Nighswander v. Henderson*, 172 F.Supp.2d 951, 963 (N.D.Ohio 2001).

{¶55} According to defendant, plaintiff "never requested an accommodation", let alone one that is objectively reasonable. (Defendant's Post-trial Brief, p. 3.) "The Sixth Circuit Court of Appeals has "generally given plaintiffs some flexibility in how they request an accommodation." *Mobley v. Miami Valley Hosp.*, 603 Fed.Appx. 405, 413 (6th Cir.2015). "The ADA does not require that any talismanic language be used in a request for reasonable accommodation." *White v. Honda of Am. Mfg., Inc.*, 191 F.Supp.2d 933, 950 (S.D.Ohio 2002). "Although a plaintiff need not use the word 'accommodate' or 'disability,' at a minimum he must 'make it clear from the context that [the request] is being made in order to conform with existing medical restrictions.'" *Deister v. Auto Club Ins. Assn.*, 647 Fed.Appx. 652, 657 (6th Cir.2016), quoting *Leeds v. Potter*, 249 Fed.Appx. 442, 449 (6th Cir.2007). "A plaintiff's own requests, whether written or oral, can satisfy this element." *King v. Steward Trumbull Mem. Hosp., Inc.*, 30 4th 551, 564 (6th Cir.2022).

{¶56} Based upon plaintiff's uncontroverted testimony, the magistrate finds that after going on disability leave plaintiff told Brown over the telephone that because of her disabling conditions she could not do her job in the same workplace as Allen, but she could return to work if Allen were not in the workplace, and she consequently wanted

defendant to either transfer Allen or herself out of LeCI so that she could return to work. It is apparent that Brown, who was the head of human resources at LeCI and plaintiff's point of contact for her disability leave benefits, knew of her disability. It also appears more likely than not that Brown knew of plaintiff's desire for an accommodation, through one or more oral requests that she made to have herself or Allen transferred to another institution. Accordingly, the greater weight of the evidence demonstrates that plaintiff made a request for accommodation.

{¶57} Examining the reasonableness of plaintiff's request for accommodation, "[r]easonable accommodations consist of '[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position . . . is customarily performed, that enable an individual with a disability . . . to perform the essential functions of that position.'" *Obnamia v. Shinseki*, 569 Fed.Appx. 443, 445 (6th Cir.2014), quoting 29 C.F.R. 1630.2(o)(ii). An ADA plaintiff has the burden of "showing 'that the accommodation is reasonable in the sense both of efficacious and of proportional to costs.'" *Keith v. Cty. of Oakland*, 703 F.3d 918, 927 (6th Cir.2013), quoting *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir.1996).

{¶58} "A 'reasonable accommodation' under the ADA may include 'reassignment to a vacant position.'" *Gearhart*, 833 Fed.Appx. at 425, quoting 42 U.S.C. 12111(9)(B). "However, the ADA does not require an employer to 'waive legitimate, non-discriminatory employment policies[,] displace other employees' rights to be considered in order to accommodate the disabled individual,' or 'create new jobs . . . in order to accommodate a disabled individual.'" *Id.*, quoting *Burns v. Coca-Cola Ents., Inc.*, 222 F.3d 247, 257 (6th Cir.2000). Similarly, "there is no requirement that an employer violate a collective bargaining agreement * * * in order to return a disabled employee to work." *Henschel v. Clare Cty. Rd. Comm.*, 737 F.3d 1017, 1025 (6th Cir.2013); *see also Rector v. Ohio Bur. of Workers' Comp.*, 10th Dist. Franklin No. 09AP-812, 2010-Ohio-2104, ¶ 16, quoting *Woodruff v. School Bd. of Seminole Cty.*, 304 Fed. Appx. 795, 801 (11th Cir.2008) ("'An employer is not required to grant an employee a transfer to a different position if such a transfer violates a collective bargaining agreement because such an accommodation is not reasonable.'"). More particularly, "the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of

other employees." *Eckles v. Conrail*, 94 F.3d 1041, 1051 (7th Cir.1996); *see also Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1307 (11th Cir.2000) ("an accommodation that contravenes the seniority rights of other employees under a collective bargaining agreement is unreasonable as a matter of law.").

{¶59} According to plaintiff, there were two vacant positions to which she could have been transferred as to constitute a reasonable accommodation. Because chaplain positions could only be filled under the terms of the collective bargaining agreement, however, defendant could not simply transfer plaintiff into another chaplain job, and consistent with that, Brown told plaintiff that defendant would not simply move her to another chaplain job elsewhere.

{¶60} Regardless, the first position that plaintiff argues she could have been transferred to is the chaplain job at the Northeast Reintegration Center that was filled by John Tate. That position could only be filled under the terms of a collective bargaining agreement. Under the terms of that agreement, Tate had a right to the job because he had the most seniority of any applicant. Plaintiff contends that defendant was obligated to ask Tate to sacrifice his rights and withdraw his application for the position to facilitate plaintiff obtaining the position. If defendant had done so, however, it would have interfered with the collective bargaining agreement rights that entitled Tate to the position. Accordingly, this would not have been a reasonable accommodation. Even if it were assumed for the sake of argument that this somehow would have been reasonable, while Tate's testimony did not lack in credibility the magistrate finds his testimony that he hypothetically would have withdrawn his application to have been speculative. Tate, as one of the most senior chaplains in the department, understood he was likely to obtain the position at the Northeast Reintegration Center, which is a lower security facility for female offenders and is located in Cleveland, where Tate wished to relocate so that he could care for his ailing mother.

{¶61} Plaintiff also argues that transferring her in October 2019 to the vacant chaplain position at Chillicothe Correctional Institution would have been a reasonable accommodation. Plaintiff's employment with defendant ended on January 18, 2019, however, through the involuntary disability separation. When plaintiff commenced this lawsuit on September 18, 2019, it had been several months since her employment ended

and it was before she interviewed for the chaplain position at Chillicothe Correctional Institution. It was not established that plaintiff was in communication with LeCI management or any departmental officials by the time the position became available at Chillicothe Correctional Institution; to the contrary, Warden Harris did not know plaintiff applied for the position. The warden at Chillicothe Correctional Institution, who was the appointing authority for the vacancy and filled it with an individual who was already working there as a contract chaplain, was not involved with any request for accommodation that plaintiff made to LeCI management several months earlier.

{¶62} It appears that not until well after plaintiff's employment ended did the vacancy open up at Chillicothe Correctional Institution. Notwithstanding that the position had to be filled according to a collective bargaining agreement that did not allow defendant to simply transfer or reassign plaintiff to a position outside of the collective bargaining process, "[t]he ADA 'does not require an employer to reassign an employee to a position that is not vacant.'" *Arthur v. Am. Showa, Inc.*, 625 Fed.Appx. 704, 710 (6th Cir.2015), quoting *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir.1997). Here, plaintiff has not demonstrated that the position at Chillicothe Correctional Institution was vacant or anticipated in the near future to become vacant while she was still employed with defendant.

{¶63} Plaintiff argues that if not for her involuntary disability separation on January 18, 2019, she would have retained her seniority and—by the terms of the collective bargaining agreement—been entitled to the position at Chillicothe Correctional Institution in October 2019. But plaintiff had been off work for close to four months at the time of the involuntary disability separation and was expected to be out much longer according to the documentation submitted by her doctor, it is a priority for defendant to keep chaplain positions filled, defendant effected the involuntary disability separation pursuant to the Administrative Code, and plaintiff did not appeal the separation nor otherwise request to retain her employment longer. "Moreover, 'employers simply are not required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future.'" *Thompson v. E.I. DuPont deNemours & Co.*, 70 Fed.Appx. 332, 337 (6th Cir.2003), quoting *Monette*, 90 F.3d at 1187.

{¶64} While plaintiff pleaded her claims of disability discrimination as a failure to accommodate and the parties tried the claims as such, assuming for the sake of argument that defendant's decision not to award plaintiff—who had not been employed with defendant for several months—the position at Chillicothe Correctional Institution could be analyzed on a failure to hire theory (*see Arthur* at 709, fn. 3, citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 48-52, 124 S.Ct. 513, 157 L.Ed.2d 357 (2003) ("the Supreme Court has determined that an employer's failure to rehire is potentially actionable under the ADA")), plaintiff would still not be entitled to relief. Plaintiff bears the ultimate burden of persuasion in this employment discrimination claim. *Nelson v. Univ. of Cincinnati*, 2017-Ohio-514, 75 N.E.3d 1304, ¶ 36 (10th Dist.). There is no credible evidence that disability discrimination was the reason plaintiff was not hired for the position at Chillicothe Correctional Institution.

{¶65} As stated above, in lieu of being transferred herself, plaintiff requested that Allen be transferred out of LeCI. There is a presumption that a request to change supervisors is unreasonable, *see Cardenas-Meade v. Pfizer, Inc.*, 510 Fed.Appx. 367, 372 (6th Cir.2013), but in this case plaintiff had already changed supervisors. Plaintiff's request went one step further and sought to have Allen wholly removed from LeCI. As plaintiff acknowledges in her post-trial brief, transfers requested so that a plaintiff will not be required to work with certain people are, at minimum, disfavored. *See Coulson v. Goodyear Tire & Rubber Co.*, 31 Fed.Appx. 851, 858 (6th Cir.2002); *Alsept v. Honda of Am. Mfg., Inc.*, S.D.Ohio No. 3:11-cv-395, 2013 U.S. Dist. LEXIS 77530, *25 (June 3, 2013).

{¶66} Here, before plaintiff requested any accommodation, Warden Harris already transferred supervision of plaintiff to another deputy warden, ordered Allen to have no contact with plaintiff, and ordered Allen to park her vehicle in a designated parking spot away from where plaintiff parked. In regard to transferring Allen out of LeCI as plaintiff later requested, the testimony of Director Chambers-Smith established the difficulty in removing a member of an institution's senior leadership, including a deputy warden like Allen, especially at a higher security, complex operation such as LeCI. There is a limited pool of candidates with the appropriate experience, training, education, and knowledge for such positions, and defendant is committed to having a diverse leadership team at

each institution. Though a deputy warden may easily be removed, they are not easily replaced. The fact that Allen was later removed from her deputy warden position at LeCI for unrelated reasons did not diminish Chambers-Smith's testimony as to the difficulty of replacing a deputy warden at LeCI, and it resulted not from a transfer but from a demotion to a former position.

{¶67} Moreover, there is no credible evidence of there being a vacant position at Allen's level to which she could have been transferred. The evidence instead, as plaintiff recalled Brown telling her, is that defendant had nowhere to move Allen.

{¶68} Considering all the circumstances, plaintiff does not overcome the presumption against the requested transfer and fails to show that transferring her former supervisor with whom she was to have no contact to some unidentified position at another correctional institution somewhere in the state of Ohio was a reasonable accommodation. "When an employee does not propose a reasonable accommodation, his or her failure-to-accommodate claim must fail." *Anderson v. Bright Horizons Children's Ctrs., L.L.C.*, 10th Dist. Franklin No. 20AP-291, 2022-Ohio-1031, ¶ 69.

{¶69} Accordingly, plaintiff has not proven her claims of disability discrimination.

Conclusion

{¶70} Based on the foregoing, the magistrate finds that plaintiff did not prove her claims by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant. All pending motions are DENIED as moot.

{¶71} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

ROBERT VAN SCHOYCK
Magistrate

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