[Cite as *Combs v. Ohio Atty. Gen.*, 2002-Ohio-4143.]

IN THE COURT OF CLAIMS OF OHIO

CATHY COMBS	:	
Plaintiff	:	CASE NO. 2000-12068
v.	:	DECISION
ATTORNEY GENERAL OF OHIO	:	Judge J. Warren Bettis
Defendant	:	

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{¶1} Plaintiff filed this action against defendant alleging "notice of administrative appeal," handicap discrimination,[1] retaliation and political discrimination. Both the notice of administrative appeal and the claim of political retaliation were dismissed prior to the trial. The remaining claims were tried to the court on the issue of liability.

{¶2} Plaintiff was employed by defendant as an investigator for the Victims of Crime Program (VOC) from August 26, 1991, until her termination on August 25, 2000. During her employment, but arising outside the scope and course of her job responsibilities, plaintiff was injured in an automobile accident which was caused by an intoxicated driver. She subsequently filed a VOC claim. The claim was opposed by defendant and was litigated for many years. Ultimately, plaintiff was granted a VOC award. She contends that

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[1] Although plaintiff's complaint alleges "handicap" discrimination, that term has been changed to "disability" in the version of R.C. 4112.01, et. seq., which was in effect at the time of trial. The term handicap has therefore been replaced by the term disability throughout this decision.

as a result of the injuries she sustained she is a qualified "disabled" person, as that term is defined in R.C. 4112.01(A)(13), and that her disability was the basis for her termination. Plaintiff also contends that defendant fired her in retaliation for pursuing her VOC claim.

{¶3} Defendant has denied liability and argues that plaintiff's termination was based upon legitimate, nondiscriminatory reasons.

{¶4} As relevant here, R.C. 4112.02(A) makes it an unlawful discriminatory practice "[f]or any employer, because of the *** disability *** of any person, *** 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."

{¶5} To establish a prima facie case of disability discrimination pursuant to R.C. 4112.02, plaintiff must demonstrate: 1) that she was disabled; 2) that an adverse employment action was taken by defendant, at least in part, because she was disabled; and, 3) that plaintiff, though disabled, could have safely and substantially performed the essential functions of her job. See *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 1998-Ohio-410.

{¶6} In the present case, plaintiff maintains that she suffered from severe migraine headaches and jaw tremors as a result of the 1992 automobile accident, and that some of her symptoms worsened over time. Plaintiff testified that her headaches tended to occur in the morning and were so intense that at times she had to stop her vehicle and vomit on the way to work. She stated that she was sensitive to light and sound and would sometimes have to leave work early because of that condition. Plaintiff further related that she had undergone a variety of treatment methods for her migraines, including treatment at Cleveland Clinic, botox

injections and participation in migraine studies.

{¶7} In February 1995, plaintiff's treating neurologist recommended that she take a one-month leave of absence from her work. Plaintiff subsequently took such leave without pay. However, by August 1995, she began experiencing the headaches again; she then took a disability leave of absence from August 5, 1995, to March 6, 1996. After plaintiff returned to work, she continued to suffer from migraines and jaw tremors. The episodes were sporadic and unpredictable. Plaintiff stated that at times she was totally unable to function and could only lie in bed until the condition passed. Consequently, she began taking more time off from work. By May 12, 1999, plaintiff was again on disability leave. She returned from that leave in May 2000. However, upon the advice of her physician, plaintiff returned on only a part-time basis. She stated that her physician recommended that she gradually work up to a full eight-hour day. By August 13, 2000, she returned to full-time status.

{¶8} Although plaintiff returned to full-time status on August 13, 2000, she had been notified as of August 3rd that her use of e-mail and the internet during working hours was under investigation. On August 16th, a pre-disciplinary hearing was conducted regarding those issues. On August 25, 2000, plaintiff was terminated.

{¶9} As a threshold issue, defendant asserts that plaintiff cannot prove the first element of her prima facie case. Specifically, defendant contends that plaintiff's impairments do not constitute a disability for the purposes of a discrimination claim. Both state and federal case law can be applied in making this determination. *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196.

{¶10} Pursuant to R.C. 4112.01(A)(13), a disability 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."

{¶11} Similarly, the Americans with Disabilities Act (ADA), Section 12102(2), Title 42, U.S. Code defines "disability" with regard to an individual as:

{¶12} "(A)[A] physical or mental impairment that substantially limits one or more of the major life activities of such individual;

{¶13} "(B)[A] record of such an impairment; or

{¶14} "(C)[B]eing regarded as having such an impairment."

{¶15} In this case, the court has found no authority that is directly on point with regard to a condition such that plaintiff has described. By way of comparison, depression has been recognized as a disability under R.C. 4112.02, depending on the circumstances of the case. See, e.g., *Shaver v. Wolske & Blue* (2000), 138 Ohio App.3d 653; *Hayes v. Cleveland Pneumatic Co.* (1993), 92 Ohio App.3d 36, 42. Whereas, in *Murphy v. United Parcel Service* (1999), 527 U.S. 516, an employee with high blood pressure was not considered disabled under Title I of the ADA.

{¶16} Ultimately, the question whether a particular condition qualifies as a disability under either state or federal law must be determined on a case-by-case basis. See *Albertsons, Inc. v. Kirkingburg* (1999), 527 U.S. 555. Further, it has been held that "the determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather of the effect of that impairment on the life of the individual." *Bragdon v. Abbott*, 524 U.S. at 641-642 (declining to consider whether HIV infection is a per se disability

under the ADA).

{¶17} In concentrating on the individual rather than the disease, the Supreme Court of the United States has focused on the statutory requirement that a disability must "substantially limi[t] one or more major life activities."[2] See *Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams*, 2002 U.S. Lexis 400. In *Toyota*, the court held that carpal tunnel syndrome, which interfered with an employee's ability to perform repetitive work with arms and hands extended at or above shoulder level, did not qualify as a disability because there was no substantial limitation of activities that are of central importance to daily life. As examples, the court cited the performing of household chores, bathing and the brushing of one's teeth. Id. In addition, the court emphasized that the alleged disability must be permanent or long-term.

{¶18} In the instant case, plaintiff testified that she was totally unable to function at times. Her episodes were also characterized as "sporadic" and "unpredictable." Plaintiff did not state whether she was unable to attend to her daily needs. There was no discussion as to how she managed during her periods of disability, and there was little or no medical evidence to support her testimony. While expert medical testimony is not required, it has been held that it would be the "better practice" where many forms of a disease exist and some forms are less pernicious than others. *Hood v. Diamond Products, Inc.*, 74 Ohio St.3d 298, 303, 1996-Ohio-259. In the court's view, this case is an example of the type where medical testimony would have been a better means of proof, inasmuch as the extent and severity of impairment from

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[2] That terminology is used in both R.C. 4112.01(A) (13) and Section 12102 (2) of the ADA.

migraines is extremely difficult for a lay person to judge.

{¶19} Nevertheless, even if plaintiff had supporting medical evidence, the court is not persuaded that the condition substantially limited her major life activities. Plaintiff's inability to go to work, to arrive timely, or to stay for a full eight-hour shift are not alone indicative of disability. Likewise, the fact that she was granted disability leave is not alone determinative. As stated in *Toyota*, supra, "manual tasks unique to any particular job are not necessarily important parts of most people's lives. As a result, occupation-specific tasks may have only limited relevance ***." Here, plaintiff's work primarily consisted of using a telephone, a computer and a facsimile machine to contact crime victims, obtain investigative reports and verify various aspects of victims' claims. Based upon the totality of the evidence and the aforementioned case law, the court concludes that plaintiff has failed to establish a prima facie case of disability discrimination under either state or federal law and as such, her claim must fail.

{¶20} Notwithstanding this determination, the court notes that according to the ADA the term "discriminate" includes a failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an *** employee ***." Section 12112(b)(5)(A), Title 42, U.S.Code. *Pfost v. Ohio State Attorney General* (Apr. 20, 1999), Franklin App. 98-AP-690, citing Section 1630.9, Title 29, C.F.R. Although it may be necessary for an employer to interact with a disabled employee to determine an appropriate reasonable accommodation, "in general *** it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed." Id.

{¶21} Plaintiff has claimed that because her migraines tended

to occur in the morning she had difficulty getting to work on time. As a result, she requested, and received, an adjustment of her hours, which allowed her to work from 7:30 a.m. to 4:30 p.m. When she was still unable to arrive at work on time, she was allowed to adjust her hours to arrive at 9:00 a.m. and leave at 6:00 p.m. However, when she subsequently requested a change to work from 10:00 a.m. to 7:00 p.m., defendant refused. Plaintiff contends that defendant was inflexible and that the later hours would have benefitted both parties by allowing her to obtain information from police officers and detectives who worked evening shifts. The court disagrees. Defendant allowed two adjustments to plaintiff's working hours. When that did not resolve the problem with plaintiff's tardiness, defendant was justified in refusing the third request. Moreover, defendant established that it would not have been able to accommodate the third request, even if it had been willing, because individuals in plaintiff's employment position were not permitted in the office unsupervised after 6:00 p.m. Plaintiff also admitted that defendant made other accommodations when requested, such as providing a non-glare computer screen and window blinds to darken her working area. Accordingly, the court finds that plaintiff's claim of discrimination on this basis also fails.

{¶22} Even if plaintiff had established a prima facie case, defendant set forth a legitimate, nondiscriminatory reason for the action taken. *Plumbers & Steamfitters Joint Apprenticeship Commt.*, supra. Indeed, defendant's evidence has established that plaintiff's repeated tardiness, absences from work and unauthorized use of e-mail and the internet were valid reasons for her termination.

{¶23} With regard to tardiness, the evidence shows that plaintiff failed to report to work on time on 14 of the 25 days

between May 19, 1997, and June 20, 1997. Her starting times ranged from 45 minutes to four hours late. At times, plaintiff failed to call her supervisor to give notice that she would be late. Other times, she would call but then fail to report at the expected time. On 38 of 103 days between September 8, 1997, and January 30, 1998, she failed to report to work on time. Although plaintiff would work overtime to make up for her tardiness, defendant's written Policies and Procedures Manual not only specifically requires that employees report to work on schedule, but also specifically prohibits habitual absences or tardiness. In addition, plaintiff's overall attendance record from February 1995 to May 2000 is replete with absences. According to Plaintiff's Exhibit 8, she missed approximately 480 hours of work during that time period, not including her approved leaves of absence.

{¶24} Although plaintiff has argued that defendant's attention to her time and attendance was harassment, or that it was part of defendant's discrimination against her for her disability, the court finds no evidence to support such arguments. Moreover, numerous cases have held that "the adverse effect of a handicap on job performance is just cause for dismissal." See, e.g., *Harris v. Ohio Bur. of Emp. Serv.* (1990) 51 Ohio St.3d 37; *Cleveland Civil Serv. Comm. v. Ohio Civil Rights Comm.* (1991), 57 Ohio St.3d 62. In *Hayes v. Cleveland Pneumatic Co.*(1993) 92 Ohio App.3d 36, the court held that "factors such as chronic unexcused absences which adversely affect job performance" may serve as a basis for discharge that is "not unreasonable under the anti-handicap discrimination law." See paragraph one of the syllabus.

{¶25} Moreover, plaintiff was not otherwise a model employee. On January 23, 1995, she received a verbal reprimand that is memorialized in Defendant's Exhibit E, which states that from August 15, 1994, to January 20, 1995, twenty-nine of her written

reports had to be returned to her due to improper grammar, spelling errors and general lack of proof reading. The reprimand further states that plaintiff had met the minimum number of monthly case completions (60) only once in the previous five months and only twice in the previous two years. Plaintiff had also submitted false reports about the number of cases that she had pending for more than 90 days; in one instance she reported zero when she had had 18, in another she reported one when she had 38. On February 6, 1998, plaintiff received a written reprimand for failure of good behavior. In November 1998, she was suspended for three days for making a disrespectful and derogatory remark about an assistant attorney general, which was contained in correspondence sent to a law enforcement officer.

{¶26} Finally, there is the issue of personal use of e-mail and the internet during working hours. Plaintiff claimed that she did not know that there was a policy prohibiting such computer use, or if she did know, that the policy was so ambiguous that she could not have known that she was in violation of it. The court is not persuaded by either argument. The evidence clearly demonstrates that defendant had a written policy, that plaintiff received it, and that she signed a form stating that she had read, reviewed and understood it. (Defendant's Exhibits A, B, C and D.) The court does not find the policies to be either vague or ambiguous. The examples submitted of plaintiff's e-mail (Defendant's Exhibits J through V) clearly violate the prohibition against sexually oriented messages or usages that "could potentially embarrass the state." The testimony regarding plaintiff's internet "surf-time" also establishes abuse of state resources.

{¶27} Based upon the forgoing, the court finds that defendant had ample legitimate reasons for plaintiff's termination. Further, plaintiff failed to prove that defendant's stated reasons were a

mere pretext for discrimination.

{¶28} Plaintiff's next cause of action alleges that she was discharged in retaliation for pursuing her VOC claim. Again, plaintiff has the burden of proving a prima facie case before defendant must present any evidence that the adverse action against her was taken for legitimate, nondiscriminatory reasons. See, e.g., *Neal v. Hamilton County* (1993), 87 Ohio App.3d 670; *Briner v. National City Bank* (Feb. 17, 1994), Cuyahoga App. No. 64610.

{¶29} In order for plaintiff to support this claim under either R.C. 4112.02(I) or federal law she must prove that: 1) she engaged in a protected activity under federal or Ohio law; 2) she was the subject of adverse employment action; and, 3) there was a causal link between her protected activity and the adverse action of her employer. *Cooper v. City of North Olmsted* (6th Cir. 1986), 795 F.2d 1265, 1272.

{¶30} In this case, plaintiff failed to produce sufficient evidence to show a causal connection between her pursuit of the VOC claim and termination of her employment. While defendant did oppose the claim, she had legal grounds to do so. At the time plaintiff's claim was filed, accidents caused by drunk drivers were not considered a compensable for of "criminally injurious conduct." Moreover, plaintiff sought reimbursement for her time off, but she was unable to document whether all of it was related to injuries sustained in her automobile accident. When she finally did obtain such documentation, her claim was approved, and she was granted an award, albeit after her termination. In short, she was not treated any differently than any other similarly situated victim. Therefore, plaintiff has not established a prima facie case of retaliatory discharge.

{¶31} For the foregoing reasons, judgment shall be rendered in favor of defendant.

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J. WARREN BETTIS
Judge

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