IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Michael Yost	Court of Appeals No. E-14-011
Appellant	Trial Court No. 2013-CV-0292
v.	
City of Sandusky, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: March 6, 2015

* * * * *

Caryn M. Groedel, Lori M. Griffin and Chastity Christy,
for appellant.

Marc A. Fishel and Paul Bernhart, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant Michael Yost appeals the February 24, 2014 judgment of the Erie County Court of Common Pleas which granted summary judgment in favor of appellees, City of Sandusky and Michael Meinzer, in an employment discrimination and retaliation action. Because we agree that no genuine issues of material fact remain, we affirm.

{¶ 2} Appellant was employed as a firefighter with the Sandusky Fire Department from 1976, until his retirement in 2011. In 1991, he was promoted to battalion chief whose purpose it was to coordinate fire department activities, generate reports, and supervise the maintenance and upkeep of the facilities and buildings. After 2007, he reported to then Assistant Fire Chief, Paul Ricci.

{¶ 3} In 2005, appellant informed Sandusky Fire Chief Michael Meinzer and others that he was suffering from Parkinson's disease (he had been diagnosed in 2004.) Appellant assured his co-workers that he could perform his job duties. He agreed to keep Chief Meinzer apprised of any medication changes or side effects and any worsening symptoms.

{¶ 4} Following appellant's disclosure, Assistant Chief Ricci conducted internet research on Parkinson's disease and contacted the Michael J. Fox Foundation and the National Parkinson's Foundation. Ricci stated that he made the inquiries because he did not know much about the condition. In 2008, Assistant Chief Ricci began to observe some changes in appellant's gait and noticed that his hand tremors had increased. Ricci also noticed that, though not uncommon in other firefighters, appellant was taking naps where he had not previously. According to Ricci, he was asked by Sandusky's Director of Administrative Services, Warrenette Parthemore, to document any changes or concerns with appellant's job performance. Assistant Chief Ricci documented approximately two dozen between 2008 and 2011, via written notes which he eventually computerized.

{¶ 5} On July 3, 2008, Ricci sent a letter to Chief Meinzer expressing his concerns with appellant's ability to perform his work duties. Assistant Chief Ricci stated that he had observed in appellant a "slower than usual gait, increased hand tremors, tiredness and slowed response to questions and conversation" and apparent forgetfulness. Ricci recommended that appellant be placed on administrative leave pending a physical examination.

{¶ 6} Chief Meinzer forwarded the letter to Parthemore who referred appellant to his treating neurologist, Dr. Michael Leslie. In the October 6, 2008 letter to Leslie, Parthemore set forth Ricci's observations and requested that appellant be examined to determine whether appellant had a disability, what impact the disability had on appellant's daily life, whether appellant was able to perform his job functions and, if not, what, if any accommodations could be made. In response, Dr. Leslie concluded that appellant should have no difficulty performing the functions of his position but noted that "due to Mr. Yost's condition, fluctuations in his abilities may fluctuate."

{¶ 7} On April 2, 2009, Assistant Chief Ricci wrote a second letter to Chief Meinzer expressing concern over appellant's "deteriorating" condition and doubts about the thoroughness of Dr. Leslie's physical examination. Specifically, Ricci questioned whether the evaluation was based on the job performance requirements set forth in the National Fire Protection Association ("NFPA") standards. Ricci mistakenly believed that appellant had been seen by a general practitioner, not a neurologist. Ricci noted that, as a

battalion chief, appellant was required to be "mobile" on an incident scene and monitor the activities of firefighters.

{¶ 8} Sandusky firefighters are required to undergo a multi-step annual physical. Corporate Health Center, a program of Firelands Regional Medical Center, conducts blood work, a urinalysis, a hearing test, vision test, spirometry test, stress test, takes vitals, and gathers health data from the employee. An in-station fitness evaluation is conducted and consists of sit-ups, push-ups, a body fat analysis, sit and reach test, and a cardiovascular step test.

{¶ 9} Similarly, the return-to-work, or fitness for duty evaluations, were conducted following an injury or illness and employees were evaluated for hand strength, leg strength, bending, and flexibility. Once cleared by a physician, internally the employee would then perform the Firefighter Combat Challenge consisting of eight stations in the fire station. The stations included stair climbing, hose lifting, dummy dragging, and forcible entry (swinging a sledgehammer.)

{¶ 10} Following Ricci's second letter, Chief Meinzer sent a letter to Parthemore with the concerns expressed by Ricci and others and Meinzer's personal observations. On April 13, 2009, Parthemore sent a medical authorization form to Corporate Health physician Dr. David Grayson requesting that appellant be examined under the same guidelines as Dr. Leslie's examination—whether appellant had a disability and, if so, the effect on his ability to perform his job. The request also included a copy of the NFPA standards.

{¶ 11} On April 14, 2009, Dr. Grayson found that appellant was "medically qualified" to perform his job with the following restrictions: "no fall hazards activities" and "no confined space entry." Dr. Grayson recommended further neurologic testing at the Cleveland Clinic.

{¶ 12} Based upon Dr. Grayson's report, in May 2009, the city placed appellant on light duty pending the resolution of his fitness for duty. Pursuant to the collective bargaining agreement, appellant had the option of taking accrued sick leave in lieu of light duty; appellant chose the sick leave option. Appellant was then examined by Dr. Patrick Sweeney who determined that appellant was able to perform his job duties without restrictions. In August 2009, appellant was returned to full duty.

{¶ 13} Prior to the above chain of events and looking to reduce costs, the city had been considering eliminating the battalion chief position and returning the two chiefs, appellant and Benny Higgenbotham, to the next highest rank of captain. In 2010, the positions were eliminated and appellant and Higgenbotham appealed to the Ohio Civil Service Commission. Ultimately, the commission found that the city properly abolished the positions due to lack of funds. Appellant and Higgenbotham were offered settlements which would allow them to retire; Higgenbotham took the settlement and appellant chose to be bumped to captain.

{¶ 14} On May 18, 2010, appellant had his annual physical at Corporate Health. In a letter dated May 27, 2010, Dr. Bryan Kuns, of Corporate Health, determined that after examining appellant, he was "unable to perform the duties of Captain for the

Sandusky Fire Department." Specifically, Kuns, relying on the NFPA standards found that appellant "as a firefighter with Parkinson's disease with a tremor" would be unable to perform various firefighter job tasks. (These findings will be discussed in detail below.)

{¶ 15} Similarly, Dr. Patrick Sweeney in a May 19, 2010 letter to the city, agreed with Dr. Kuns stating that appellant's condition had changed "considerably" in the past year and that he felt that it was not safe for appellant to continue as a firefighter. Following the reports, the city allowed appellant to take sick leave until his 2011 retirement.

{¶ 16} On November 18, 2009, during the course of the above events, appellant commenced an action in the Erie County Court of Common Pleas against appellees alleging "regarded as disabled" disability discrimination and retaliation for engaging in a protected activity. The case proceeded through discovery and the filing of dispositive motions.

{¶ 17} On October 11, 2012, appellees filed a motion for sanctions and motion for attorney fees arguing that appellant's counsel failed to attend the October 10, 2012 deposition of Dr. David Grayson which was scheduled by appellant. According to appellees, they had filed a motion for a protective order and to quash the subpoena which the trial court had denied on October 9, and sent email notifications to the parties. In addition, appellees' counsel discovered that Dr. Grayson had never been properly served with the subpoena. Appellees' counsel alleged his belief that appellant's counsel knew

that the deposition was not going forward and that counsel drove nearly three hours each way to attend the deposition.

{¶ 18} While the motion was pending, appellant's counsel filed an untimely opposition to appellees' motion for summary judgment. Appellees filed a motion to strike which was granted on October 16, 2012, and journalized on October 31. On October 18, 2012, appellant filed a voluntary notice of dismissal without prejudice. The same day, the trial court granted appellees' motion for sanctions in the amount of $1,660. The court also found that appellant owed $500 as sanctions to the court. Interestingly, appellant filed a motion for reconsideration of the sanctions award in the refiled case arguing that the trial court lacked jurisdiction to rule on the motion; the motion was denied on December 26, 2013.

{¶ 19} Appellant commenced this action on April 19, 2013, again raising the "regarded as disabled" disability discrimination claim, retaliation, and age discrimination (appellant did not pursue the age discrimination claim.) With the discovery completed in the prior action, appellees filed their motion for summary judgment on September 19, 2013. Appellant's opposition was filed on November 12, 2013. On February 24, 2014, the trial court granted appellees' motion finding that appellant had failed to raise an issue of fact to dispute the medical examinations which found him unfit for duty. The court found that appellees' reliance on the recommendations of the physicians prevented the claim that they engaged in an unlawful discriminatory practice. The court further found that the city did not retaliate against appellant for pursuing legal action where appellant

was offered to retire at the rank of battalion chief when the positions were eliminated; appellant chose reassignment and then was forced to retire at the rank of captain. This appeal followed.

{¶ 20} Appellant raises four assignments of error for the court's consideration:

> 1. The trial court erred by granting summary judgment in favor of defendants-appellees on plaintiff-appellant's "regarded as disabled" disability discrimination claim.
>
> 2. The trial court erred in granting summary judgment in favor of defendants-appellees on plaintiff-appellant's retaliation claim.
>
> 3. The trial court abused its discretion by imposing discovery sanctions without a hearing.
>
> 4. The trial court abused its discretion by imposing an unreasonable attorney fee sanction.

{¶ 21} We first note that in reviewing a ruling on a motion for summary judgment, this court must apply the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Summary judgment will be granted when there remains no genuine issue as to any material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). Further, we review de novo all the evidence and arguments presented in appellees' motion for summary judgment and appellant's opposition.

{¶ 22} In his first assignment of error, appellant argues that the trial court erroneously awarded summary judgment in favor of appellees as to his claim that appellees "regarded" him as being disabled and that, as a result, he suffered an adverse employment action. Specifically, appellant contends that despite being qualified for his position he was subjected to undue scrutiny including being required to undergo five physical examinations in short succession, he was placed on leave twice and not given back pay, he was denied overtime, and was assigned light duty dissimilar to that assigned to others.

{¶ 23} R.C. 4112.02, the Ohio Civil Rights Act, prohibits disability discrimination and provides that it is an unlawful discriminatory practice:

> For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment. R.C. 4112.02(A).

{¶ 24} An employee is considered "disabled" where he or she has

> 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*. (Emphasis added.) R.C. 4112.01(A)(13).

{¶ 25} In order to establish a prima facie case of disability discrimination, a plaintiff must establish:

> (1) that he was [disabled or regarded as disabled], (2) that an adverse employment action was taken by an employer, at least in part, because the individual was [disabled], and (3) that the person, though [disabled], can safely and substantially perform the essential functions of the job in question. *DeBolt v. Eastman Kodak Co.*, 146 Ohio App.3d 474, 2001-Ohio-3996, 766 N.E.2d 1040, ¶ 39 (10th Dist.), citing *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 571, 697 N.E.2d 204 (1998).

{¶ 26} The third prong above is the focus of this action. Appellant has consistently maintained that during all times relevant herein, he was able to perform the essential job functions of battalion chief. Conversely, appellees maintain that through consistent documentation and physical examinations they demonstrated that appellant's condition had deteriorated to the point that he could no longer safely perform his duties.

{¶ 27} To start, according to the city of Sandusky, the position of battalion chief requires, in addition to administrative duties, the ability to work under pressure or in dangerous situations, to keep physically fit, to use fire-fighting equipment, and the job's

physical demands include "climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling, seeing, hearing, [and] smelling."

{¶ 28} Appellant argues that the physical exams that he was subjected to failed to properly test his abilities to perform the above functions and, thus, were a faulty basis to place him on administrative leave and, ultimately, force him to retire. Appellant further argues that the Ohio guidelines for firefighter fitness for duty, which includes observing the individual perform various tasks, was not followed.

{¶ 29} As set forth above, in April 2009, Dr. Grayson from Corporate Health found that appellant could perform the job without fall hazards or confined space entry. Because these activities are included in the battalion chief job description, appellant was offered the option of light duty or sick leave. Appellant was cleared for duty after his additional testing in Cleveland (which was ordered by Dr. Grayson). Thereafter, in May 2010, Dr. Kuns, also of Corporate Health, found that under the NFPA (which the state guidelines mirror), appellant was unable to perform the essential functions of performing fire-fighting tasks including wearing a breathing apparatus, climbing six or more flights of stairs, wearing heavy, insulated protective gear, searching, finding and rescue dragging, dragging water-filled hoses, climbing ladders and operating from heights, and unpredictable physical exertion.

{¶ 30} Also contained in the state and NFPA guidelines is a section which specifically states:

> Parkinson's and other diseases *with functionally significant tremor or abnormal gait* or balance compromise the member's ability to safely perform essential job tasks 1, 2, 4, 6, 7, 8, and 9, and the physician shall report the applicable job limitations to the fire department. (Emphasis added.)

{¶ 31} Dr. Kuns' findings were corroborated by Dr. Sweeney who stated, "I do not feel it is safe for him to continue to function in his position as fireman."

{¶ 32} Reviewing the chain of events, including his placement on leave and eventual retirement, we cannot find that appellant has created a prima facie showing of "regarded as disabled" disability discrimination. As noted by appellant's neurologist, Dr. Leslie, in November 2008, "fluctuations in his abilities may fluctuate" and the disorder is progressive in nature. It was entirely reasonable to find changes in appellant's abilities within a span of six months to a year. This also supported a close monitoring of appellant's functioning, including physical examinations. Appellant's first assignment of error is not well-taken.

{¶ 33} In appellant's second assignment of error, he argues that the trial court erroneously granted summary judgment in favor of appellees on his retaliation claim. To establish a prima facie case of retaliation, an employee must show that (1) he engaged in protected activity; (2) his employer knew he engaged in protected activity; (3) his employer subsequently took an adverse employment action; and (4) the adverse employment action causally related to the protected activity. *Ladd v. Grand Trunk W.*

RR., Inc., 552 F.3d 495, 502 (6th Cir.2009). Upon establishing "a prima facie case, the burden of production then shifts to the employer to 'articulate a legitimate, nondiscriminatory reason for its actions.'" *Morris v. Oldham Cty. Fiscal Ct.,* 201 F.3d 784, 793 (6th Cir.2000), quoting *McDonnell Douglas v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Thereafter, the burden shifts back to the employee to demonstrate that the "'proffered reason was not the true reason for the employment decision.'" *Id.,* quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). *See also Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174; R.C. 4112.02(I).

{¶ 34} In our analysis of appellant's first assignment of error we specifically found that there were valid reasons for placing appellant on leave and, eventually, seeking his retirement. As to the change of rank from battalion chief to captain, it was ultimately found that the department change was justified due to a lack of funds. Further, appellant was not the only individual affected. Appellant's second assignment of error is not well-taken.

{¶ 35} Appellant's third and fourth assignments of error assert that the trial court abused its discretion when it awarded appellees' motion for sanctions without first conducting a hearing. Appellant also takes issue with the monetary amount of the sanctions. We initially note that a trial court has great latitude in resolving discovery abuses with the proper sanctions. *Peters v. Angel's Path, L.L.C.*, 6th Dist. Erie No. E-06-059, 2007-Ohio-7103, ¶ 16, citing *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254,

256, 662 N.E.2d 1 (1996). In deciding whether a court abuses such discretion, a reviewing court must determine whether the imposition of sanctions was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 36} As set forth above, on October 11, 2012, appellees filed a motion for sanctions. A hearing was scheduled for October 19, 2012, but on October 18, 2012, appellant filed a notice of voluntary dismissal. In the court below, appellant argued that the trial court lacked jurisdiction to impose discovery sanctions because the case had been voluntarily dismissed. More than a year later and in a different case, appellant wished to have the court reverse its decision. Upon review, we cannot say that the court erred when it sanctioned appellant. Appellant's third and fourth assignments of error are not well-taken.

{¶ 37} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _______________________________
JUDGE

Thomas J. Osowik, J. _______________________________
JUDGE

James D. Jensen, J. _______________________________
CONCUR. JUDGE

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