



**IN THE COURT OF COMMON PLEAS
Cuyahoga County, Ohio**

RONALD HITCH,)

Plaintiff,)

v.)

THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY, ET AL.,)

Defendants,)

CASE NO. CV 12- 788471

JUDGE PAMELA BARKER

Journal Entry:
Decision and Order on
Motions for Summary Judgment

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INTRODUCTION:

This matter is before the Court on the following Motions: Plaintiff Ronald Hitch (hereinafter "Plaintiff")'s Motion for Partial Summary Judgment (filed on 8/16/13), Defendant Kenneth Yager (hereinafter "Defendant Yager")'s Motion for Summary Judgment (filed 8/16/13), and Defendant Cleveland Electric Illuminating Company (hereinafter "Defendant CEI")'s Motion for Summary Judgment (filed 8/16/13). All parties filed Opposition Briefs and Replies in support of their Motions.

BRIEF FACTUAL BACKGROUND:

In this matter, Plaintiff was a thirty-five year employee of Defendant CEI, and was supervised by Defendant Yager.¹ After a series of incidents where the workplace restroom at the Brecksville office was soiled in Spring of 2010, the Defendants began

¹ Deposition of Ronald Hitch, p. 29.

an investigation to determine the identity of the party responsible.² After cameras were installed outside the restroom in question,³ the Defendants narrowed their focus to the Plaintiff as the responsible party.⁴ The Plaintiff eventually admitted having issues in the restroom on some of the occasions in question, and he advised he may suffer from Irritable Bowel Syndrome (Hereinafter "IBS").⁵ Ultimately, Plaintiff signed a release form, which permitted Defendants access to his medical records and also permitted Defendants access to the reports of the treating physicians or personnel who met with Plaintiff to analyze these incidents.⁶ Plaintiff maintains he was coerced or pressured into signing this release. Defendants counter that this waiver was properly executed and that at no time did Plaintiff express any wish to rescind this release. Defendants requested that if further incidents occur in the restroom that Plaintiff advise them and that he clean any resulting mess.⁷ Ultimately additional incidents occurred, and as a result, Plaintiff was terminated. Plaintiff's job performance was never at issue, however, with the Plaintiff receiving satisfactory evaluation four weeks before his termination.⁸ As a result of this termination, Plaintiff brought the present action, claiming disability discrimination, invasion of privacy, inducement to breach medical privacy, and intentional infliction of emotional distress.

Upon consideration of the arguments raised in the Parties Motions for Summary Judgment and the evidence provided, the Court finds as follows:

² Deposition of Wayne Ketchum, p. 43.

³ Deposition of Dennis Chack, pp.75-77; Deposition of Dennis Breetz, p. 27.

⁴ Deposition of Dennis Breetz, p. 37.

⁵ Deposition of Ronald Hitch, pp. 60-62, 65-66.

⁶ Deposition of Ronald Hitch, pp. 82-83; Deposition of Kenneth Yager, p. 58.

⁷ Deposition of Ronald Hitch, pp. 89-90.

⁸ Deposition of Kenneth Yager, p. 97-98.

STANDARD OF REVIEW:

Civ. R. 56(C) provides in relevant part as follows:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that: *** (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***." *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific

facts showing that there is a genuine issue for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

"Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials which directly negate its opponent's claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge 'that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. See, also, *Hodgkinson v. Dunlop Tire & Rubber Corp.* (1987), 38 Ohio App.3d 101, 526 N.E.2d 89." *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73. Given the above standard, the Court will analyze these claims by assessing the Parties' Motions separately.

PLAINTIFF RONALD HITCH'S PARTIAL MOTION FOR SUMMARY JUDGMENT:

On August 16, 2013, Plaintiff filed for Partial Summary Judgment on his claim for disability discrimination (Count 1) against the Defendants. In this motion, Plaintiff makes two main arguments in support of his Motion: 1) that Defendants undertook an unlawful medical investigation of the Defendants, and 2) that Plaintiff was only fired because of his medical disability, as his job performance was not affected.

COURT'S RULING: GENUINE ISSUES OF MATERIAL FACT EXIST

Plaintiff argues that Judgment is appropriate on his Motion as reasonable minds can only conclude that Plaintiff was terminated for disability. As to his first argument, Plaintiff did execute a signed waiver with Defendants when his medical issues were brought to their attention. Whether or not that waiver encompassed all of the activities

Defendants engaged in and whether or not that waiver was coerced/pressured are genuine issues of material fact. Given the above standard for Summary Judgment, and given the evidence provided by Defendants (including reports of the soiled restrooms, the fact that Plaintiff did not step forward initially report these issues, and the fact that these restroom incidents kept happening), this Court finds that genuine issues of material facts exist. As such, Plaintiff's Motion is denied.

DEFENDANTS MOTIONS FOR SUMMARY JUDGMENT:

Disability Discrimination Claim

Defendants CEI and Yager have similar arguments in their Motions for Summary Judgment. First, Defendants claim that Plaintiff cannot support his claim of disability discrimination under R.C. 4112.02(A)⁹. Plaintiff is required to prove in a disability discrimination case that: 1) he is disabled, 2) that Defendants took the adverse actions against him because of that disability, and 3) he could safely and substantially perform the essential functions of his job with or without a reasonable accommodation.¹⁰ Defendants further argue that Plaintiff fails to meet his threshold requirement, which is evidence that he is a "qualified individual with a disability".¹¹

Defendants point out that as the Plaintiff only suffers from IBS on limited occasions, this "intermittent IBS" does not qualify as a disability under the ADA. The cases cited by Defendants in their Motions to support this position, however, are not on

⁹ As both Plaintiff and Defendants note, federal case law interpreting the Americans with Disabilities Act may be used to interpret the Ohio Disability Statute, where the state and federal terms are consistent or where R.C. 4112 leave a term undefined. *See Scalia v. Aldi*, 2011-Ohio-6596 (9th Dist 2011).

¹⁰ *Weitzman v. ISG Cleveland Works Ry. Co.*, 2007-Ohio-2918 (Ohio Ct. App., Cuyahoga County June 14, 2007).

¹¹ A "qualified individual with a disability" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. Defendant CEI's Motion for Summary Judgment, P. 8.

point. Defendants point to *Britting v. Sec'y, VA*, 409 Fed. Appx. 566 (3d Cir. Pa. 2011), where summary judgment was granted against Plaintiff Britting, who also claimed to suffer from intermittent IBS. Despite this holding, the *Britting* case is not factually similar to the case before this court. First, Britting's dismissal was related to her failure to comply with the directives of her bosses in distributing her transcripts and in her poor work performance. There was ample evidence regarding her job performance to support a dismissal. Second, Britting's claim of intermittent IBS was subject to a narrow interpretation of the Americans with Disabilities Act, which has since been Amended in 2008:

At the time of Britting's HN22007 termination, the Americans with Disabilities Act (ADA) **was interpreted narrowly and the standard for determining whether an individual had a disability included consideration of whether the impairment had a permanent or long-term impact.** The ADA Amendments Act of 2008 (ADAAA), however, rejected this narrow interpretation and **reinstated the broad scope of protections available under the ADA.** P.L. 110-325, §§ 2 **[**5]** and 3, 122 Stat. 3553, 3556 (Sept. 25, 2008). In amending the ADA, Congress set forth several rules of construction governing the definition of disability, **including that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."** Id. § 3(4)(D), codified at 42 U.S.C. § 12102(4)(D).

Id. at 568¹². (emphasis added).

Additionally, the other case offered by Defendants, *Deeds v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 48341 (M.D. La. Apr. 5, 2012), similarly is a case that was also subject to the pre-Amendment ADA interpretation. Hence, neither case is applicable to Plaintiff's claims, which are subject to the broader interpretation of the

¹² As the amendment to the ADA is not retroactive, the broader interpretation of the ADA act was not applied in Britting's case.

ADA act, and would entertain Plaintiff's claim as "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."¹³

Even if this Court were to find that Plaintiff is disabled, Defendants further argue that he cannot demonstrate that the legitimate, non-discriminatory reason that CEI has proffered for his termination is pretextual. CEI argues that there is an honest belief that Plaintiff was fired for his insubordination and untruthfulness. Defendants also argue that they did not regard Plaintiff as disabled- but rather as untruthful and insubordinate for his concealment of the incidents in the restrooms. Finally, the Defendants contend that Plaintiff was not "harassed" because of any disability. Supervisor Yager was investigating the incidents in the restroom and as a result, was looking into the Plaintiff's behavior. In opposition, Plaintiff alleges that given his stellar job performance, it was clear he was targeted for his medical condition, which in no way impacted his ability to perform his job duties.

Court's Ruling: Disability Discrimination Claim

Given the above analysis, it is clear to the Court that genuine issues of material fact exist as to the Plaintiff's Disability Claim. As such, the Defendant's Motion is denied as to this Claim.

Invasion of Privacy and Inducement to Breach Medical Privacy

Defendants also argue that they are entitled to Judgment on Plaintiff's claim for invasion of privacy. Plaintiff argues that Dr. Timothy Newman's office sent his records out, which ended up being analyzed by other physicians for independent medical review. Additionally, Defendants argue for Judgment in their favor on the other related

¹³ 42 U.S.C. § 12102(4)(D).

claim: inducement to breach medical privacy. CEI argues that since Plaintiff signed the releases for disclosure of his medical records, there was no inducement, and Plaintiff never sought to rescind.

Court's Ruling on Invasion of Privacy and Inducement to Breach Medical Privacy

Given the about standard for Summary Judgment, and given the Court's previous ruling on Plaintiff's Motion for Partial Judgment on this Issue, this Court also finds that genuine issues of material facts exist. A question of fact remains as to whether the Defendants exceeded the scope of this waiver and whether Plaintiff willingly signed this form without any pressure from his employers. Defendants' Motions are denied as to these claims.

Intentional Infliction of Emotional Distress

Finally, Defendants argue that they are entitled to Judgment on Plaintiff's claim for Intentional Infliction of Emotional Distress as Plaintiff fails to present evidence that he suffered any "severe emotional distress".¹⁴ As Defendants correctly note, this distress must go beyond trifling mental disturbance or upset feelings. It must include evidence of medical treatment or care.¹⁵

Court's Ruling on Intentional Infliction of Emotional Distress

In opposition, Plaintiff notes the mental health experts he saw to deal with the issues both at the time of the detection of his conduct in the work place and after his employment was terminated. In support, Plaintiff's wife also offered testimony to

¹⁴ *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 78.

¹⁵ *Krause v. Case W. Reserve Univ.*, 1996 Ohio App. LEXIS 5784 (Ohio Ct. App., Cuyahoga County Dec. 19, 1996); *Knief v. Minnich* (1995), 103 Ohio App.3d 103.

describe the serious impact the termination and treatment had on her husband.¹⁶ Given the fact that some history of mental health treatment is documented here and given that a question of material fact that exists, the Defendants' Motion is denied as to this claim.¹⁷

THE FINDINGS OF THE COURT:

Given the above analysis, the Court finds that all of the Motions for Summary Judgment in this case are **DENIED**, as genuine issues of material fact exist.

IT IS SO ORDERED.

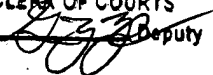


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¹⁶ Deposition of Mary Hitch, pp. 44, 54, 55, 58;

¹⁷ *Uebelacker v. Cincom Systems, Inc.*, 48 Ohio App. 3d 268 (Ohio Ct. App., Hamilton County 1988).