

[Cite as *Tibbs v. Ernst Ents.*, 2009-Ohio-3042.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

ALBERT E. TIBBS, SR.	:	
	:	Appellate Case No. 22850
Plaintiff-Appellant	:	
	:	Trial Court Case No. 07-CV-8029
v.	:	
	:	
ERNST ENTERPRISES, INC.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

.....
OPINION

Rendered on the 19th day of June, 2009.

.....
CHRIS BECK, Atty. Reg. #0081844, and DON BREZINE, Atty. Reg. #0018477,
Brezine Law Offices, 188 West Hubble Avenue, Fairborn, Ohio 45324
Attorney for Plaintiff-Appellant

.....
JOSEPH W. BORCHELT, Atty. Reg. #00705387, Reminger Co., L.P.A., 525 Vine
Street, Suite 1700, Cincinnati, Ohio 45202
Attorney for Defendant-Appellee

.....
FAIN, J.

{¶ 1} Plaintiff-appellant Albert Tibbs appeals from a summary judgment rendered against him on his claim for disability discrimination filed against his former employer Ernst Enterprises, Inc. Tibbs contends that the record reveals the existence of a genuine issue of material fact with regard to his claims.

{¶ 2} We conclude that the evidentiary material in the record, construed most

favorably to Tibbs, fails to demonstrate any genuine issue of material fact, and that Ernst is entitled to judgment as a matter of law. Accordingly, the judgment of the trial court is affirmed.

I

{¶ 3} Tibbs was employed by Ernst as a commercial truck driver from March, 1999, through August, 2006. In May, 1999, Tibbs suffered a heart attack, following which he underwent a procedure to have a defibrillator implanted into his chest. Tibbs returned to work in September, 1999.

{¶ 4} On August 17, 2006, Tibbs underwent a procedure to replace a wire in the defibrillator. On August 25, 2007, Ernst informed Tibbs, by letter, that having the defibrillator disqualified him from driving commercial vehicles under the authority of the Federal Motor Carrier Safety Regulations, as set forth a 49 C.F.R. §391.41 et seq. The letter went on to state that Ernst was terminating Tibbs's employment because it had no other "positions available that do not require a commercial driver's license."

{¶ 5} Tibbs contacted his union, which helped him negotiate an agreement with Ernst whereby Ernst withdrew the termination, placed Tibbs on inactive duty and paid him short-term disability benefits for a period of six months. Upon the expiration of the six months, Tibbs's employment was terminated.

{¶ 6} In December of 2006, Tibbs filed a disability discrimination claim against Ernst with the Ohio Civil Rights and Equal Opportunity Commission (Commission). The Commission issued a finding of "no probable cause" to believe that Ernst "engaged in an unlawful discriminatory practice under R.C. 4112.02(A) or (I)" based upon the finding that Tibbs's heart condition and the insertion of the defibrillator rendered him "physically

unable to maintain a valid commercial driver's license under Federal Law." Tibbs also filed a claim with the U.S. Equal Employment Opportunity Commission, which denied his claim based upon its acceptance of the State Commission's findings. There is no indication in the record that Tibbs took any appeal from the decisions of either commission.

{¶ 7} On September 25, 2007, Tibbs filed this action, alleging disability discrimination in violation of R.C. Chapter 4112. Ernst filed a motion for summary judgment, contending that Tibbs failed to establish a prima facie case of discrimination. Specifically, Ernst argued that Tibbs failed to demonstrate that he was disabled or that he was otherwise qualified to perform the essential functions of his job. In response, Tibbs admitted that he is not disabled, but argued that Ernst regarded him as disabled, due to the implantation of the defibrillator. He further argued that, given the fact that he currently had a commercial driver's license and that his doctor had certified him as being able to have such a license, he was clearly able to perform the essential functions of his job.

{¶ 8} The trial court rendered summary judgment against Tibbs on July 9, 2008. In doing so, the trial court determined that Tibbs had failed to demonstrate that he was disabled or that he was able to perform the essential functions of his job. The trial court further found that Ernst had a legitimate, nondiscriminatory reason for the termination of employment. Finally, the trial court held that "to the extent that [Tibbs] has asserted claims under the Americans with Disability Act ('ADA'), such claims are barred by the statute of limitations."

{¶ 9} From the summary judgment rendered against him, Tibbs appeals.

II

{¶ 10} Tibbs's First Assignment of Error states as follows:

{¶ 11} THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT FINDING THAT APPELLANT MISSED THE 90 DAY EEOC FILING DEADLINE.”

{¶ 12} Tibbs contends that the trial court erred in rendering summary judgment against him based on the statute of limitations.

{¶ 13} In its summary judgment, the trial court stated:

{¶ 14} “To the extent that [Tibbs] has asserted claims under the Americans with Disabilities Act ('ADA'), such claims are barred by the statute of limitations. Plaintiff received his 'right to sue' letter from the EEOC on June 18, 2007, past the ninety (90) day limitations period under the ADA.”

{¶ 15} Tibbs argues that this statement “would have been true had [he] filed his claims under the ADA section of Title VII.” He then notes that his civil action alleged a violation of R.C. Chapter 4112, not the ADA. He further cites *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St. 3d 281, in which the Ohio Supreme Court held that the statute of limitations for a claim brought pursuant to R.C. Chapter 4112 is six years.

{¶ 16} The trial court did not rule that Tibbs's R.C. Chapter 4112 claims are time-barred. Instead, the trial court clearly stated that any claims Tibbs intended to raise under the ADA were time-barred, a fact that Tibbs does not dispute. Therefore, his argument in this regard is without merit.

{¶ 17} The First Assignment of Error is overruled.

III

{¶ 18} Tibbs's Second and Third assignments of error provide as follows:

{¶ 19} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FINDING THAT NO MATERIAL ISSUE EXISTED FOR TRIAL WHEN APPELLANT HAD A VALID COMMERCIAL DRIVERS LICENSE AND MEDICAL CERTIFICATION EVEN AFTER HE WAS TERMINATED.

{¶ 20} "THE TRIAL COURT ERRED IN FINDING THAT AN EMPLOYER WAS NOT MOTIVATED SUBSTANTIALLY BY A (MISTAKEN) REGARD OF AN EMPLOYEE DRIVER AS IMPAIRED FOR DRIVING WHEN THE EMPLOYER KNEW EMPLOYEE WAS FULLY CERTIFIED AT THE TIME OF FIRING AND COULD NOT BE DECERTIFIED WITHOUT A MEDICAL DIAGNOSIS OF ACTUAL IMPAIRMENT, WHICH DIAGNOSIS WAS NOT IN HAND AT THE TIME OF FIRING AND WAS NOT FORTHCOMING BECAUSE EMPLOYEE WAS NOT INDEED IMPAIRED, THOUGH EMPLOYER REGARDED HIM TO BE IMPAIRED, AND ONLY BY REGARDING HIM AS IMPAIRED COULD REASONABLY ENTERTAIN THE MISTAKEN THOUGHT THAT EMPLOYEE WAS SUBJECT TO LOSING HIS FULL CERTIFICATION AS A DRIVER."

{¶ 21} Tibbs contends that the trial court erred in rendering summary judgment against him on his discrimination claim.

{¶ 22} The Ohio Civil Rights Act, as codified at R.C. 4112.02(A), prohibits discrimination in employment on the basis of a disability. In order to establish a prima facie case of disability discrimination under R.C. 4112.02, a plaintiff must show that: (1)

the employee was disabled; (2) that the employer took adverse employment action against the employee, which was caused, at least in part, by the employee's disability; and that (3) despite the disability, the employee can safely and substantially perform the essential functions of the job, with or without a reasonable accommodation. *Sheridan v. Jackson Twp. Div. Fire*, Franklin App. No. 08AP-771, 2009-Ohio-1267, ¶ 5. The failure to establish any one of these elements is fatal to a disability discrimination claim. *Rongers v. Univ. Hosps. of Cleveland, Inc.*, Cuyahoga App. No. 91669, 2009-Ohio-2137, ¶9. If a plaintiff can establish a prima facie case of discrimination, the employer must offer evidence of a legitimate, nondiscriminatory reason for the termination, after which the plaintiff has the burden of proving that those reasons were a pretext for discrimination. *Hood v. Diamond Prods.* (1996), 74 Ohio St.3d 298, 302.

{¶ 23} Ernst, in its motion for summary judgment claimed that Tibbs failed to show that he was disabled or that he could safely and substantially perform the essential functions of his job. Conversely, Tibbs does not claim to be disabled; instead, he argues that Ernst “regarded him as disabled.” He further argues that his employment was terminated despite the fact that he could perform the essential functions of his job. Because we find it dispositive, we turn to the issue of whether a genuine issue of fact exists with regard to the third element – whether Tibbs can safely and substantially perform the essential functions of his job.

{¶ 24} “It is well-established that a person who seeks the protections of R.C. 4112.02(A) must establish that he or she can safely perform the essential functions of the job.” *Jurczak v. J & R Schugel Trucking Co.*, Franklin App. No. 03AP-451, 2003-Ohio-7039, ¶ 27. Tibbs does not deny that driving a commercial motor vehicle is an

essential function of his job with Ernst. Nor does he deny that Ernst is a motor carrier involved in the transportation of cement via commercial motor vehicles involved in interstate commerce, and that Ernst is thus bound by the provisions of the Federal Motor Carrier Safety Regulations codified at 49 C.F.R. §391 et seq.

{¶ 25} Pursuant to those regulations, a commercial motor vehicle operator cannot operate a commercial motor vehicle unless qualified to do so. 49 C.F.R. §391.11(a). Further, a motor carrier cannot require or permit such a driver to operate a commercial motor vehicle unless he is qualified to do so. 49 C.F.R. §391.11(a) and §391.15(A). A person is qualified to operate a commercial motor vehicle if he is physically qualified to drive and, as pertains to this case, has no current clinical diagnosis of any cardiovascular disease “of a variety known to be accompanied by syncope.” 49 C.F.R. §391.11(b)(4); §391.41(b)(4).¹ The medical guidelines accompanying the medical examination portion of these regulations indicate that a driver with a defibrillator is disqualified from driving due to the risk of syncope associated with such devices. 49 C.F.R. §391.43. Likewise, R.C. 4506.01(G)(3) states that “disqualification” for purposes of commercial drivers’ licensing means that a person is not qualified, under the terms of 49 C.F.R. 391, to operate a commercial motor vehicle.

{¶ 26} Tibbs does not deny that having a defibrillator is a disqualifying condition under the above-cited regulations. Instead, he claims that Ernst’s adherence to these regulations cannot be used to overcome his claim of discrimination. Specifically, he argues that the fact that he held a valid license and medical certification which did not

¹ Syncope means fainting or the loss of consciousness. Webster’s Ninth New Collegiate Dictionary (1990), 445, 1197.

expire until January 2007 – four months after his termination – renders summary judgment inappropriate because it indicates that he was able to safely and substantially perform the essential functions of his job. The trial court disagreed, stating:

{¶ 27} “[A] medical certificate indicating that [Tibbs] was qualified to hold a license does not supercede [sic] [Ernst’s] responsibility to follow federal law. Simply because a physician had deemed him, rightly or wrongly, to be qualified does not permit [Ernst] to knowingly violate federal regulations by continuing to employ [Tibbs] as a commercial driver.”

{¶ 28} We agree. We note that the evidence in the record indicates that Tibbs’s doctor was unaware of the above-cited regulations. Moreover, the evidence supports a finding that upon learning of the regulation, the doctor contacted the Ohio Department of Public Safety and stated that as of August 2006 – the date of the defibrillator implantation – Tibbs no longer qualified for commercial vehicle licensure.

{¶ 29} Tibbs also contends that there is evidence to support a finding that he could fulfill the requirements of his job by obtaining a waiver of the federal regulations, thereby rendering summary judgment inappropriate.

{¶ 30} Tibbs is correct in his assertion that Ohio regulations permit a waiver to be obtained in certain circumstances. Specifically O.A.C. 4901:2-5-04 permits the provisional certification of a commercial motor vehicle operator who cannot be medically certified under 49 C.F.R. 391.41, if a doctor finds that the individual can “safely operate certain commercial motor vehicles under certain limited conditions.” However, the provisional waiver only applies to intrastate driving; it does not apply to interstate driving. *Id.* Tibbs failed to present any evidence to support a finding that he had applied for an

Ohio waiver, or, more importantly, that he was eligible for an Ohio waiver.

{¶ 31} “A trial court may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor.” *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760. “We review summary judgment decisions de novo, which means that we apply the same standards as the trial court.” *GNFH, Inc. v. W. Am. Ins. Co .*, 172 Ohio App.3d 127, 133, 2007-Ohio-2722, at ¶ 16.

{¶ 32} A review of the evidence in this case leads us to conclude that the trial court did not err in rendering summary judgment against Tibbs, because, even when the evidence is viewed in a light most favorable to Tibbs, it is clear that he could not perform the essential function of his job as a commercial truck driver, in view of the federal regulation precluding the driving of trucks by persons with implanted electronic defibrillators. Therefore, the Second and Third assignments of error are overruled.

IV

{¶ 33} All of Tibbs’s assignments of error being overruled, the judgment of the trial court is affirmed.

.....

BROGAN and FRENCH, JJ., concur.

(Hon. Judith L. French, from the Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

Copies mailed to:

Chris Beck
Don Brezine
Joseph W. Borchelt
Hon. Barbara P. Gorman