UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KRISTAN D. NELSON,

Plaintiff

v. **Case No. 1:11-cv–335-HJW**

CLERMONT COUNTY VETERANS SERVICE COMMISSION,

Defendant

ORDER

Pending is the defendant's "Motion for Summary Judgment' (doc. no. 128), which plaintiff opposes (doc. no. 149).[1] Defendant has filed proposed findings of fact and conclusions of law, which plaintiff has highlighted as true, false, or irrelevant (doc. no. 155). Having fully considered the record, including the parties' briefs, exhibits, and applicable authority, the Court will grant in part and deny in part for the following reasons:

I. Background

The alleged facts have been extensively set forth by the parties (doc. no. 155, "Proposed Findings of Fact") and need only be summarized here. In 2002, plaintiff began working as an administrative assistant for the Clermont County Veteran Service Commission ("VSC"), which has a small office with approximately 12 employees (doc. no. 155 at 1, ¶ A). In January of 2007, Mr. Dan

[1] **Plaintiff's response (totaling 204 pages) greatly exceeds the page limits under Local Rule 7.2(a)(3), which provides that "[m]emoranda in support of or in opposition to any motion. . . should not exceed twenty (20) pages." Although the Court will allow this brief in this instance, the Court fully expects all counsel to adhere to the Local Rules.**

Bare became Director of the VSC. Plaintiff initially had a good working relationship with Mr. Bare, who gave her good evaluations, several pay raises, and approved a leave request for plaintiff's back surgery in 2008 (¶¶ A, B).

On March 2, 2007, Mr. Bare instructed plaintiff that all overtime had to be approved by him, and reminded her again on November 29, 2007 (¶ C). On March 13, 2009, Mr. Bare reminded plaintiff in writing that all future compensatory time had to be approved by him, prior to working overtime (¶ C). Plaintiff admits receiving at least five emails from Mr. Bare about such issues (¶ D).

The VSC asserts that plaintiff did not comply with Mr. Bare's instructions, her work performance declined in 2009, she claimed unauthorized overtime and/or compensatory time, she was not completing her work, and she had been using her work computer during working hours for non-work activities. Plaintiff acknowledges that Mr. Bare and Frank Morrow (a senior services officer at the VSC) met with her on April 30, 2009 to discuss her work performance issues, including her "lack of proper time management. . . . lack of initiative, detail , and follow through" (¶ D). A memorandum of the meeting indicates that Ms. Nelson had no questions and responded "It is what it is" (doc. no. 129-1 at 10, Nelson Dep., Ex. C). Subsequently, Mr. Bare went on a family trip and was out of the office for part of that summer.

In August 2009, plaintiff informed the VSC that her teenage daughter had been sexually assaulted in June 2009 (¶ E). The Board members unanimously expressed their support for her and her family and promised to help her however they could (¶ E). Plaintiff requested, and was granted, leave to take care of her

daughter (¶ F). Plaintiff also began bringing her daughter with her to work for several weeks. On September 28, 2009, plaintiff requested, and Mr. Bare authorized, five weeks of FMLA leave from September 29, 2009 through November 8, 2009 (¶ F). Nelson provided FMLA certification forms (regarding her daughter's treatment for psychological and physical problems) and indicated she would be providing care for her daughter. Plaintiff indicated her daughter "has been diagnoised [sic] with PTSD and is suffering with a back injury; all due to the assault" and that plaintiff will be "providing emotional support to my daughter and taking her to and from doctor's appt." (doc. no. 149 at 16, citing Nelson Dep. Exs. K, L). On September 21, 2009, Mr. Bare authorized the donation of sick time to Ms. Nelson so that she could use paid leave (doc. no. 129, Ex. N).[2]

Plaintiff's family doctor Dr. E. Caoili, M.D., also submitted an FMLA certification form for plaintiff, dated October 16, 2009, indicating that the condition for which the employee seeks leave is "crying spells, no energy, can't concentrate, cannot focus" (doc. no. 129-1 at 169-172, Ex. M). Dr. Caoili indicated this began August 3, 2009, with "probable duration 4-5 weeks or longer" and recommended "6 weeks" of leave from September 29, 2009 to November 11, 2009. Dr. Caoili indicated she had referred plaintiff to a therapist for "follow-up treatment appointments." Dr. Caoili noted that plaintiff may have "flare-ups" estimated as possibly occurring 1-2 times every 3-4 months.

As the person in charge of payroll for the VSC, plaintiff was responsible for

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[2] **The FMLA entitles an eligible employee to up to 12 weeks of unpaid leave for a qualifying illness. Plaintiff used five weeks of paid leave (doc. no. 149 at 55), and then returned to work, without taking any unpaid leave (doc. no. 129-1 at 396).**

calculating her leave and compensatory/overtime time (doc. no. 155, ¶ G). The timesheets that she signed and submitted to Mr. Bare indicated that "the above hours are a true and accurate account of actual hours worked" (see e.g., doc. nos. 129-1 at 92, 94, 99, 102, 106, 109). She acknowledges, however, that she had improperly calculated her family medical leave, overtime and/or compensatory time (¶ G). In November 2009, while plaintiff was on leave, Mr. Bare reviewed the payroll files. Plaintiff had turned in a payroll sheet indicating she worked no overtime, but he found a timesheet in her desk for the pay period April 20 through May 3, 2009, on which plaintiff indicated she had in fact worked overtime (doc. no. 129-1 at 114). Mr. Bare decided that to comply with Ohio law and the Fair Labor Standards Act, these undisclosed hours had to be paid. At that point, while plaintiff was on FMLA leave, County Attorney Elizabeth Mason reviewed the payroll sheets for 2008-2009 (doc. no. 155, ¶ G). Plaintiff does not dispute that submitting inaccurate time records is a violation of VSC policy (¶ G).

After taking five weeks of paid leave, Ms. Nelson returned to work on November 9, 2009, with a note from her physician stating that she could fully perform all of her job duties (¶ I). She brought her teenage daughter with her to work every day. The VSC Board members requested Mr. Bare to ask plaintiff to stop doing this. On November 13, 2009, Mr. Bare met with plaintiff, with Mark Coyle present as a witness. Mr. Bare advised plaintiff that it was not appropriate for her daughter to be present in the workplace (¶ I). Mr. Bare instructed plaintiff to choose between caring for her daughter or keeping her job by November 18, 2009 (¶ I). On November 16, 2009, plaintiff came to Ms. Mason's office to ask

about filing a grievance. Plaintiff alleges that Mr. Bare learned of this and became angry (¶ I).

At the end of the business day on November 17, 2009, plaintiff submitted a proposed 35-hour work week schedule to Mr. Bare (¶ I). On November 18, 2009, the VSC Board members held an executive session to discuss plaintiff's work performance (¶ J). They decided that a pre-disciplinary hearing was warranted for plaintiff's alleged misconduct. Plaintiff's request for a modified work schedule was not presented to them. Plaintiff was placed on paid administrative leave November 18, 2009, pending a pre-disciplinary hearing. On November 18, 2009, Mr. Bare advised plaintiff that she could either resign or be fired (¶ J). Plaintiff was served with a written notice of the charges and hearing. The notice listed the following charges: "incompetency, dishonesty, insubordination, inefficiency, neglect of duty, violation of any policy or work rule, failure of good behavior, and any other acts of misfeasance, malfeasance, or nonfeasance in office" (doc. no. 129-1 at 158, Notice). The notice provided a brief explanation of the underlying behavior and basis for each charge.[3]

At the hearing on November 24, 2009, Lt. (then Sergeant) Mike McConnell of the Clermont County Sheriff's Office presided as hearing officer (¶ K). Plaintiff was present at the hearing with a representative and was given the chance to present evidence and testimony, but opted not to do so. She provided a written "rebuttal" the day after the hearing. On November 27, Lt. McConnell issued a

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[3] For example, the notice indicated that the charge of dishonesty was based on plaintiff's "concealing unauthorized overtime hours worked; concealing record reflecting overtime hours worked; and using a service officer to approve overtime that would not have been approved by Director" (doc. no. 129-1 at 158, Ex. I).

decision, finding that the charges against plaintiff had been substantiated, except for the charge of "Failure of Good Behavior," for which he found insufficient evidence (doc. no. 129-1 at 152, Ex. H). The hearing officer did not consider plaintiff's post-hearing "rebuttal" letter. The VSC paid plaintiff's salary through December 4, 2009, the effective date of her discharge.

II. Procedural History

On May 14, 2010, plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). She named the VSC as her employer and indicated she was discharged due to "disability" (doc. no. 13-1, "Charge"). She indicated she was struggling at work due to "inability to concentrate and focus, crying spells, lack of energy, memory loss, anxiety and depression" from the "emotion (sic) stress from dealing with the traumatic event involving daughter." Plaintiff alleges she received a "Right to Sue" letter dated April 7, 2011 (doc. no. 6 at ¶ 31), but failed to attach a copy of it to her complaint.

On May 20, 2011, plaintiff filed a six-count federal complaint, alleging violation of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601 et seq., the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq., and Ohio R.C. §§ 4112.01(A) and (I). She also alleged intentional infliction of emotional distress under Ohio common law. Plaintiff named the VSC as her employer, but amended her complaint to add a second defendant, the Board of County Commissioners (doc. no. 6). Upon the Board's motion (doc. no. 13), the Court dismissed the Board as a party because it was not, as a matter of law, the plaintiff's employer, and all the claims were dismissed as to the Board of County

Commissioners (doc. no. 25, Order).

Upon the VSC's motion (doc. no. 26), the Court dismissed 1) the ADA claim because the VSC lacked the requisite number of employees to be a covered employer subject to the ADA, and 2) the state claim of "disability discrimination" because plaintiff failed to allege that she sought accommodation (i.e. a reduced work schedule) for her own "disability," rather than for childcare (doc. no. 34, Order dismissing Counts 1 and 2). Plaintiff concedes there is no "associational" disability claim under Ohio law (doc. no. 149 at 60). The Magistrate Judge subsequently allowed plaintiff to amend her complaint and plead additional facts regarding the state disability claim with respect to plaintiff's own alleged disability. The VSC also moved to dismiss Counts 4, 5, and 6 of the amended complaint (doc. no. 36).

On July 11, 2012, plaintiff tendered an amended pleading that included all the previously-dismissed parties and claims (doc. no. 51-1). The VSC pointed out that the tendered pleading improperly interfered with this Court's previous holdings, and therefore opposed leave to amend and moved to strike the tendered pleading (doc. no. 58). The Magistrate Judge, after considering all the pending motions, allowed plaintiff to submit a re-drafted Second Amended Complaint, which was filed on March 12, 2013 (doc. no. 104). Plaintiff alleged that the VSC violated the FMLA, at 29 U.S.C. § 2615(a), by discharging her because "she had taken FMLA leave" (Count 1) and in retaliation for seeking "information regarding filing a grievance" (Count 2).[4] She also alleged disability discrimination

[4] Although plaintiff asserts alternative grounds for violation of the FMLA, plaintiff

and retaliation under Ohio R.C. § 4112.02(A) and (I) (Counts 3 and 4), and a claim of intentional infliction of emotional distress (Count 5). The VSC answered (doc. no. 105). After discovery concluded, the VSC filed a motion for summary judgment. The motion has been fully briefed and is ripe for consideration.

II. Standard of Review

Rule 56(a) of the Federal Rules of Civil Procedure provides in relevant part:

> **A party may move for summary judgment, identifying each claim or defense or the part of each claim or defense on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.**

Rule 56(c)(1) further provides that:

> **A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . . or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.**

The moving party bears the burden of proving that no genuine issue of material fact exists. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. Id. at 587. In doing so, courts must distinguish between evidence of disputed material facts and mere "disputed matters of professional judgment," i.e. disagreement as to legal implications of those facts. Beard v. Banks, 548 U.S. 521, 529 30 (2006).

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suffered only one adverse action – the termination of her employment.

On summary judgment review, the court must determine whether the evidence presents a sufficient dispute of material fact so as to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). A party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Id. at 248. A mere scintilla of evidence in support of a party's claim is insufficient to survive summary judgment, as there must be enough evidence that a jury could reasonably find for the party. Id. at 252. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. Relevant Law

The FMLA entitles an eligible employee to a total of 12 workweeks of unpaid leave during any 12 month period "because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). The FMLA also permits an employee to take leave from work to care for a parent, spouse, or child suffering from a serious health condition. Id. § 2612(a)(1)(C). When medically necessary, the FMLA leave may be taken "intermittently or on a reduced leave schedule." Id. § 2612(b)(1); 29 C.F.R. § 825.203(a).

There are two theories for recovery under the FMLA: 1) the "entitlement" or

"interference" theory under § 2615(a)(1), and 2) the "retaliation" or "discrimination" theory under § 2615(a)(2). Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 282 (6th Cir. 2012). An employer may not discriminate against employees who have used FMLA leave, nor can they "use the taking of FMLA leave as a negative factor in employment actions." 29 C.F.R. § 825.220(c). On the other hand, "nothing in the FMLA prohibits an employer from investigating allegations of dishonesty or from terminating an employee who violates company policies." Rush v. E.I. DuPont DeNemours and Co., 911 F.Supp.2d 545, 562-63 (S.D.Ohio 2012) (J. Dlott). As the regulations explain, an employee who takes FMLA leave has no greater rights than an employee who remains at work. 29 C.F.R. § 825.216(a) ("An employee lawfully may be dismissed . . . if the dismissal would have occurred regardless of the employee's request for or taking of FMLA leave"); Arban v. West Publ'g Co., 345 F.3d 390, 401 (6th Cir. 2003) (the FMLA does not protect an employee from termination for nondiscriminatory reasons).

IV. Discussion

A. Only Admissible Evidence May be Considered

It is well-settled that only admissible evidence may be considered on summary judgment review. Jacklyn v. Schering–Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 927 (6th Cir. 1999) (inadmissible hearsay evidence may not be considered on summary judgment review). Plaintiff attempts to rely on her own declaration in an effort to withstand summary judgment. Rule 56(c)(4) provides that an affidavit must be made on personal knowledge, set forth facts that would be admissible at trial, and affirmatively show that the affiant is

competent to testify to the matters stated therein. Fed. R. Civ. P. 56(c)(4). The VSC asserts that some of plaintiff's declaration contradicts her prior deposition testimony and contains inadmissible hearsay, and therefore, urges the Court to "strike" the plaintiff's declaration (doc. no. 153 at 3).[5]

The Court observes that the precise issue is whether the Court should *disregard*, rather than *strike*, any inadmissible evidence for purposes of summary judgment. Fed. R. Civ. P. 12(f), which governs motions to strike, authorizes the Court to strike "any redundant, immaterial, impertinent, or scandalous matter" from a pleading, but does not authorize the Court to strike from the record affidavits or statements made in a brief. Bovee v. Coopers & Lybrand, 216 F.R.D. 596, 599 (S.D. Ohio 2003) (quoting Wright & Miller, Fed. Prac. & Proc., § 1380) (Rule 12(f) "is neither an authorized nor a proper way . . . to strike affidavits."). In an additional brief regarding the "motion to strike," the VSC suggests that its argument be construed as evidentiary objections pursuant to Rule 56(c)(2), which provides that a "party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence" (doc. no. 161 at 1-2). Only inadmissible portions, rather than the entire affidavit, must be disregarded. Upshaw v. Ford Motor Co., 576 F.3d 576, 593 (6th Cir. 2009) ("[i]n resolving defendant's objections to the affidavits offered in opposition to summary judgment, the Court must use a scalpel, not a butcher knife").

The VSC objects to plaintiff's attempt to rely on her own assertion that a

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[5] The VSC's reply was captioned in part as a "motion to strike," and thus was also entered in the docket as a motion (doc. nos. 153, 154). For clarity's sake, the practice of asserting a "motion" in a responsive brief is disfavored. It is sufficient to argue that inadmissible material should be disregarded.

co-worker (Rodger Young) told her that he allegedly overheard "through the walls" Mr. Bare say to Ms. Mason, "What does it take to fire someone? Get me something" (doc. nos. 149-1 at 125, ¶ 29; 161 at 2). Plaintiff primarily offers such hearsay statement for the truth of the matter asserted—namely, to prove that Mr. Bare wanted to discharge her. The VSC correctly asserts that this is inadmissible hearsay that may not be considered on summary judgment review. See e.g., Grubb v. YSK Corp., 401 Fed. Appx. 104, 110 (6th Cir. 2010) (citing United States v. Gibson, 409 F.3d 325, 337 (6th Cir. 2005) ("[I]n order for double-hearsay statements to be admissible, both statements must be excluded from the hearsay definition."). The party seeking admission "bears the burden of establishing the proper foundation for the admissibility of the statements." Liadis v. Sears, Roebuck & Co., 47 Fed.Appx. 295, 303 (6th Cir. 2002). Plaintiff has not done so, nor has she shown that any exception would apply. The Court will sustain the VSC's objection and disregard this portion of plaintiff's declaration.

Next, the VSC points out that plaintiff's declaration mischaracterizes her own prior written statement. Plaintiff previously wrote in her rebuttal letter that Mr. Bare "gave me a deadline of November 18, 2009 to decide what I was going to do about my daughter" (doc. no. 129 at 155, Ex. I). Plaintiff was extensively deposed about this in August 2012. In her more recent "declaration" prepared by her counsel and in her second amended complaint, plaintiff alleges that Mr. Bare instructed her "to choose between caring for [her] daughter or keeping [her] job" (doc. no. 104, ¶ 14). Although the VSC contends that this characterization contradicts plaintiff's previous written statement, the Court observes that the

VSC included this characterization in its own proposed findings of fact (doc. no. 155, at ¶ I. This part of the VSC's objection is overruled.[6]

B. No Direct Evidence

Next, the Court must consider whether plaintiff has put forth any direct evidence regarding her FMLA or state claims. "Direct evidence is evidence that proves the existence of a fact without requiring any inferences," Grizzell v. City of Columbus Div. of Police, 461 F.3d 711, 719 (6th Cir. 2006), whereas indirect evidence requires a jury to infer a fact, Johnson v. Kroger Co., 319 F.3d 858, 865 (6th Cir. 2003). Plaintiff again attempts to rely on her own declaration, where she alleges that co-worker Young told her that he "overheard through the walls" Mr. Bare say to Ms. Mason "What does it take to fire someone? Get me something!!" (doc. no. 149 at 30, citing Nelson Decl. at ¶ 29). Plaintiff mischaracterizes this as "direct evidence." The alleged comment, in addition to being inadmissible hearsay, would require inferences to have the meaning urged by plaintiff, and thus is not direct evidence of discriminatory motivation (Id. at 48-49). At most, it suggests that Mr. Bare wanted evidence to support Nelson's discharge, but says nothing at all about why. Plaintiff ignores this salient point. Plaintiff also attempts to rely on what Young claims that Mr. Bare said to staff after plaintiff's termination (doc. no. 149 at 20, citing Young Dep. at 25-26, indicating that Mr. Bare said something to effect of "We can't run business this way" but acknowledging "I don't remember his exact words"). Again, this vague statement would require inferences and is not direct evidence.

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[6] **While a party cannot create a genuine dispute of material fact by contradicting her own sworn statements, plaintiff's rebuttal letter was not a "sworn statement."**

C. Alleged Violation of the FMLA

Absent direct evidence, a plaintiff may prove an FMLA claim with indirect evidence under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case, plaintiff must show: (1) she was engaged in activity protected under the FMLA; (2) the employer knew she was exercising her FMLA rights; (3) after learning of the employee's exercise of FMLA rights, the employer took an employment action adverse to her; and (4) there was a causal connection between the protected FMLA activity and the adverse employment action. Seeger, 681 F.3d at 283. After a plaintiff makes out a prima facie case, the burden of production shifts to defendant to articulate a legitimate, non-discriminatory reason for the employment decision. McDonnell Douglas, 411 U.S. at 802. The burden of production then shifts back to plaintiff to show pretext. Id. Plaintiff may show pretext by demonstrating that the stated reason (1) had no basis in fact; (2) did not actually motivate the action; or (3) was insufficient to warrant the action. Seeger, 681 F.3d at 284.

Plaintiff's Second Amended Complaint alleges that she was terminated in violation of the FMLA, 29 U.S.C. § 2615(a) because "she had taken FMLA leave" (¶ 39) and because she inquired about filing a grievance (¶ 42). It is undisputed that plaintiff requested FMLA leave in 2009, that her employer granted the leave, that plaintiff was later terminated after a disciplinary hearing for alleged misconduct, and that her termination was an adverse employment action. Plaintiff was terminated only nine days after returning from FMLA leave. DiCarlo v. Potter, 358 F.3d 408, 421 (6th Cir. 2004) ("close proximity is deemed indirect evidence such

as to permit an inference of retaliation to arise"). While temporal proximity is generally not enough, plaintiff points to additional evidence indicating that upon her return from FMLA leave, Mr. Bare "overloaded" her with work (doc. no. 149 at 53, citing Young Dep. at 14, 17-18). Construing the evidence in plaintiff's favor for purposes of summary judgment, plaintiff has made out a prima facie case.

In turn, the VSC has articulated legitimate business reasons for terminating plaintiff's employment, including her declining job performance and manipulation of time records. An employer has an honest belief in its rationale when it reasonably relied on the particularized facts that were before it at the time the decision was made. Allen v. Highlands Hosp. Corp., 545 F.3d 387, 398 (6th Cir. 2008) (quoting Michael v. Caterpillar Fincl.Servs. Corp., 496 F.3d 584 (6th Cir. 2007), cert. denied, 552 U.S. 1258 (2008)). "The key inquiry in assessing whether an employer holds such an honest belief is whether the employer made a reasonably informed and considered decision before taking the complained of action." Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998).

Plaintiff contends that the VSC did not make a "reasonably informed and considered decision" because the hearing officer admittedly did not consider her rebuttal letter and the VSC did not follow its own disciplinary procedures. A plaintiff may "demonstrate pretext by offering evidence which challenges the reasonableness of the employer's decision 'to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation.'" Risch v. Royal Oak Police Dept., 581 F.3d 383, 391 (6th Cir. 2009) (quoting White v. Baxter Healthcare Corp., 533 F.3d 381, 393

(6th Cir. 2008), cert. denied, 129 S. Ct. 2380 (2009)). The pivotal question is always whether, under the facts of a case, the plaintiff has shown sufficient evidence that she was terminated under circumstances which give rise to an inference of unlawful discrimination. Clay v. United Parcel Serv., Inc., 501 F.3d 695, 704 (6th Cir. 2007). The Court finds that, construing the evidence in the light most favorable to plaintiff for purposes of summary judgment (and giving her the benefit of all reasonable inferences), triable issues of fact exist regarding the plaintiff's FMLA claims.

D. Disability and Retaliation Under Ohio Law

In Count Three, plaintiff alleges that her "disability and requested accommodation for her own disability motivated the decision to terminate her," thereby violating Ohio R.C. § 4112(A) (doc. no. 104, ¶¶ 44-50). In Count Four, plaintiff alleges that the VSC "retaliated against Ms. Nelson in violation of Ohio R.C. § 4112(I)" (¶¶ 51-52).

Ohio 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." Ohio R.C. § 4112.02(I) makes it an unlawful discriminatory practice "for any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of

the Revised Code." The Ohio statue is modeled on the federal ADA, see Columbus Civ. Serv. Comm. v. McGlone, 82 Ohio St.3d 569, 573 (1998), and courts may generally apply federal case law when analyzing cases brought under Ohio R.C. § 4112. Kocak v. Cmty. Health Partners, Inc., 400 F.3d 466, 471 72 (6th Cir. 2005), cert. denied, 546 U.S. 1015 (2005); Williams v. PVACC, LLC, 369 Fed.Appx. 667, 672 (6th Cir. 2010).[7]

As a threshold matter, plaintiff must actually be disabled (or be regarded as disabled by her employer) to assert such a claim. Bryson v. Regis Corp., 498 F.3d 561, 574–75 (6th Cir. 2007) ("a disability-discrimination plaintiff must establish that she suffers from an impairment that qualifies as a disability").[8] Although plaintiff visited her family doctor and requested five weeks of FMLA leave for "crying spells" and "inability to concentrate or focus" after learning of her daughter's assault, "a short term restriction on a major life activity generally does not constitute a disability." Novak v. MetroHealth Med. Center, 503 F.3d 572, 582 (6th Cir. 2007) (granting summary judgment to employer on such basis); Roush v. Weastec, Inc., 96 F.3d 840, 844 (6th Cir. 1996) (observing that because plaintiff's

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[7] Plaintiff appears to conflate the requirement of a "disability" for purposes of Ohio R.C. § 4112.02 with the requirement of a "serious health condition" under the FMLA. As the regulations explain, these are different concepts and must be analyzed separately. 29 C.F.R. § 825.702(b). Ohio has no counterpart to the FMLA.

[8] Ohio law defines "disability" 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." Ohio R.C. § 4112.01(A)(13). The term "physical or mental impairment" includes "[a]ny mental or psychological disorder, including, but not limited to . . . emotional or mental illness" Ohio R.C. § 4112.01(A)(16)(a)(ii).

condition was temporary, "it is not substantially limiting and, therefore, not a disability"). The mere possibility of recurrence is not sufficient to establish disability. Id. at 844. Contrary to plaintiff's assertion (doc. no. 149 at 58), the VSC does not concede that plaintiff is "disabled" for purposes of Ohio law and points out that plaintiff returned to work without any restrictions.

Plaintiff acknowledges that she sought a modified work schedule as her proposed solution to the problem of "what to do with her daughter" (doc. no. 149 at 66).[9] Plaintiff asserts that her request for a reduced schedule was also for the purpose of "reducing her own anxiety" about caring for her daughter (Id.). Plaintiff asserts in her declaration (at ¶ 2) that she "was diagnosed with post-traumatic stress disorder." She asserts that Dr. Caoili and Susan Ullman (no credentials listed) diagnosed her with "PTSD" (doc. no. 129-1 at 405-406, Interrogatory Answer No. 3), but does not point to any medical evidence of record that actually reflects this diagnosis or any diagnostic testing. Plaintiff appears to confuse a mere diagnosis with disability. Nonetheless, the record reflects evidence that plaintiff may have ongoing "flare-ups" that would render plaintiff "unable to work" and that her condition is expected to last for an indefinite period of time. The Court finds that a genuine dispute of material fact exists as to whether this would amount to an "emotional or mental illness" for purposes of Ohio R.C. § 4112.01(A)(16)(a)(ii), and thus, summary judgment is not appropriate.

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[9] Although plaintiff had previously acknowledged that the office operation time is "8:00 am to 4:00 pm Monday thru Friday; . . . no exceptions" (doc. no. 129-1 at 397), she submitted a request for a modified work schedule beginning at 7:30 am, during hours that the VSC was not open. The Court need not reach the issue of whether this request was reasonable because the VSC did not consider it.

E. Intentional Infliction of Emotional Distress ("IIED")

Ohio law requires the plaintiff to prove that the defendant: (1) intentionally engaged in (2) outrageous conduct "so extreme in degree, as to go beyond all possible bounds of decency," and that (3) the conduct proximately caused (4) serious emotional distress that no reasonable person could be expected to endure. Bays v. Canty, 330 Fed.Appx. 594, 595 (6th Cir. 2009) (per curiam) (citing Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen, & Helpers of America, 6 Ohio St.3d 369 (1983), overruled on other grounds by Welling v. Weinfeld, 113 Ohio St.3d 464 (2007); see also, Monak v. Ford Motor Co., 95 Fed.Appx. 758, 762 (6th Cir. 2004). It is well-settled that such claims may appropriately be dealt with on dispositive motion. Miller v. Currie, 50 F.3d 373, 374 (6th Cir. 1995); Fuelling v. New Vision Med. Lab., 284 Fed.Appx. 247 (6th Cir. 2008) (granting summary judgment on Ohio IIED claim in employment context).

The present case involves an employment termination, with the parties disputing the reasons for the termination. The Sixth Circuit Court of Appeals has repeatedly emphasized that "a decision to terminate an employee, regardless of whether the decision was discriminatory, is not sufficient to sustain a claim of intentional infliction of emotional distress." Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 376 (6th Cir. 1999); Fuelling, 284 Fed.Appx. 247 (same); Blackshear v. Interstate Brands Corp., 495 Fed.Appx. 613, 620 (6th Cir. 2012) (an "employer's decision to discharge an employee because it believes the employee violated a workplace policy is not extreme and outrageous"); Foster v. McDevitt, 31 Ohio App.3d 237, 239 (Ohio Ct.App. 1986) (an employer is entitled to act upon its legal

rights, including its right to terminate an employee, regardless of whether it knew or intended that the act would add to employee's emotional distress).

The state case relied on by plaintiff is readily distinguishable on its facts. Valentino v. Wickliffe Bd. of Educ., 2010 WL 4621818, *6-8 (Ohio App. 11 Dist.) (bus driver was accused of tampering with buses, forced to take a lie detector test, and forced to go to psychiatric counseling). The obvious factual differences between plaintiff's case and Valentino highlight the fact that plaintiff has failed to make a sufficient showing to withstand summary judgment on this claim. Even viewing the evidence in the light most favorable to plaintiff for purposes of summary judgment, neither the VSC's decision to terminate plaintiff, nor Mr. Bare's alleged conduct (including recommending her discharge) went "beyond all possible bounds of decency." Mr. Bare's alleged conduct—including his repeated instructions to properly account for overtime, his inspection of her timesheets, and his comments to her after consulting with counsel and the Board — does not constitute behavior that an average person would find to be "outrageous." Although plaintiff complains that that Mr. Bare informed her that it was inappropriate to bring her teenage daughter to work, this does not amount to "extreme and outrageous conduct." Yeager, 6 Ohio St.3d at 374-75 (explaining that liability for intentional infliction of emotional distress "clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities"). The VSC is entitled to summary judgment on this claim.

V. Conclusion

The plaintiff may proceed with her claims under the FMLA and Ohio R.C. §§

4112.01(A) and (I), but the defendant is entitled to summary judgment on the state common law claim of intentional infliction of emotional distress.

VI. Oral Argument Not Warranted

Local Rule 7.1(b)(2) provides that courts have discretion whether to grant requests for oral argument. The parties have extensively briefed the relevant issues and have not requested another hearing. The Court finds that further oral argument of these issues is not warranted. Yamaha Corp. of Am. v. Stonecipher's Baldwin Pianos & Organs, 975 F.2d 300, 301-02 (6th Cir. 1992); Schentur v. United States, 4 F.3d 994, 1993 WL 330640 at *15 (6th Cir. (Ohio)) (district courts may dispense with oral argument on motions for any number of sound judicial reasons).

Accordingly, the "Motion for Summary Judgment" (doc. no. 128) is DENIED in part and GRANTED in part; the claim of intentional infliction of emotional distress is hereby DISMISSED with prejudice. This case shall proceed as scheduled.

IT IS SO ORDERED.

s/Herman J. Weber
Herman J. Weber, Senior Judge
United States District Court