IT IS SO ORDERED.

Dated: 03:46 PM September 27 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	**CASE NO. 05-81439**
	)	**Chapter 11**
WCI Steel, Inc.,	)	**Jointly Administered**
an Ohio corporation, *et al.*,	)	
	)	**JUDGE MARILYN SHEA-**
DEBTORS.	)	**STONUM**
	)	
	)	
	)	**MEMORANDUM OPINION RE: OBJECTION TO CLAIM FILED BY RANDALL C. GINTERT**
	)	
	)	

This matter comes before the Court on the Debtors' Fourth Omnibus Objection to Certain Proofs of Claim and Amended Proofs of Claim (Dkt. 1493) and the response (Dkt. 1529) of Randall C. Gintert protesting the Debtors' request for disallowance of his proof of claim in the amount of $3,500,000.[1] In lieu of an evidentiary hearing, the parties agreed to submit the

[1] The schedules attached to the Fourth Omnibus Objection identify the Gintert claim as Claim No. 382, while Gintert's papers reference Claim No. 383. The Court, not being in possession of the Claims Register in this case, will refer to the underlying claim as the 'Gintert Claim".

objection to the Court upon documents presented to the Eleventh District Court of Appeals in *Gintert v. WCI Steel, Inc. et al.*, Case No. 02-TR-124. In that appeal, Mr. Gintert challenged the trial court's summary judgment that Mr. Gintert had no claim against WCI Steel, Inc. ("WCI") arising out of WCI's termination in 2000 of Mr. Gintert as an employee; the appeal was stayed by WCI's filing of its chapter 11 petition.

WCI's chapter 11 case was referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. A claim adjudication is a core proceeding pursuant to 28 U.S.C. Section 157(b)(2)(B), giving this Court jurisdiction pursuant to 28 U.S.C. Section 1334(b).

I. UNDISPUTED FACTS

From the materials submitted by the parties, the Court has determined that there is no genuine issue regarding the following facts:

1. Mr. Gintert had a long employment relationship with WCI and its predecessors, having first been hired as a laborer by Republic Steel in 1979. Gintert Deposition (hereinafter "Dep.") at 17.

2. In May of 1990, Mr. Gintert was promoted to a "melting supervisor". The promotion moved him out of the union bargaining unit and into management. Dep. at 24.

3. In September of 1990, Mr. Gintert voluntarily entered a drug rehabilitation program for treatment of his addiction to crack cocaine. This in-patient program lasted 28 days. Dep. at 59.

4. WCI classified the missed work relating to the September 1990 treatment as sick leave and Mr. Gintert received sick pay. Upon completion of the in-patient program, WCI allowed Mr. Gintert to return to his supervisory position. Dep. at 61. Mr. William Weber was Mr. Gintert's supervisor at the time. Dep. at 25.

5. In March of 1991, Mr. Gintert again voluntarily entered a drug rehabilitation program, this time for a period of ten days. Dep. 62.

Prior to entering the second treatment, Mr. Gintert tested positive for cocaine use. Dep. at 63.

6. WCI classified the missed work relating to the March 1991 treatment as sick leave and allowed Mr. Gintert to return to his supervisory position. Dep. at 62-67. Mr. Weber again met with Mr. Gintert upon his return to work. Dep. at 66-67.

7. Sometime in 1995, Mr. Gintert was promoted to a position as "General Turn Supervisor". Mr. Bob Adair was Mr. Gintert's direct supervisor and Mr. Weber was Superintendent of the relevant operations. Dep. at 27-28.

8. In late April of 1998, Mr. Gintert admitted himself into a rehabilitation program to address both his alcohol and cocaine use. Dep. at 68.

9. Upon Mr. Gintert's release from the 1998 rehabilitation program, Mr. Weber again met with Mr. Gintert. Dep. at 70. WCI and Mr. Gintert entered into a "Salaried Employee Agreement" conditionally reinstating Mr. Gintert. This agreement charged Mr. Gintert with two weeks of vacation for missed work. Dep. at 71. It also included provisions for random drug testing, compliance with Employee Assistance Program rules, and substantiation of future absences. Finally, it provided that any further need for rehabilitation could result in termination of employment. This agreement was attached as Exhibit "G" to Mr. Gintert's deposition.

10. In January of 1999, Mr. Gintert was involved in a heated discussion with a Union employee. Dep. at 37. This exchange apparently began when Mr. Gintert approached the Union employee and asked him to "leave me out of his rumor mill". Dep. at 38. In a memorandum attached as "Exhibit N" to Mr. Gintert's deposition, Mr. Weber summarized a meeting he held the next day with the Union employee, a Union representative, Mr. Adair, and Mr. Gintert. The memo noted that Mr. Gintert "admits to being a drug addict and alcoholic and is trying to put this all behind him." Mr. Gintert testified he recalled Mr. Weber saying at the meeting "Randy, with your past history with drugs and alcohol, that you would be the one to lose your job." Dep. at 176.

11. In December of 1999, two male WCI employees who had been supervised by Mr. Gintert signed "Statements of Discrimination"

alleging that Mr. Gintert had sexually harassed them. A memorandum from Mr. Dennis Pogany, WCI's General Manager of Personnel, dated March 17, 2000 and attached to Mr. Gintert's deposition as "Exhibit O" summarizes WCI's investigation into these allegations. Mr. Gintert denied both incidents. In a document attached to Mr. Gintert's deposition as "Exhibit T", WCI informed Mr. Gintert that WCI's investigation "had been unable to conclude that the information obtained establishes any violation."

12. The March17, 2000 letter also stated: "[I]n conjunction with your 5-8-98 Salaried Employment Agreement and documentation of a 1-12-99 incident, any violations of Company Policy, Rules and Regulations and any other harassment complaint violation shall be grounds for disciplinary action, up to and including termination. "

13. On April 10, 2000, WCI received a report from a Union representative that Mr. Gintert had made a racial slur in a conversation with several employees. The employee who reported hearing about this incident indicated that he did not want to work for Mr. Gintert. Attached as part of "Exhibit V" to Mr. Gintert's deposition is a memorandum dated April 12, 2000 from Mr. Weber to Mr. Pogany. In that memorandum, Mr. Weber detailed the steps he took to investigate the alleged incident. Mr. Gintert denied making the racial slur, but two Union employees told Mr. Weber they had heard Mr. Gintert make the disputed statement.

14. Documents in "Exhibit V" to Mr. Gintert's deposition indicate that on April 14, 2000, Mr. Gintert requested but was denied a vacation day. Although Mr. Gintert reported as scheduled that day, he left before completing the shift, despite instructions from his supervisors that he should not leave early. The documents indicate that Mr. Gintert did make sure that another WCI supervisor worked the remainder of Mr. Gintert's April 14 hours.

15. Also according to the documents in "Exhibit V" and "Exhibit W" to Mr. Gintert's deposition, early on the morning of April 24, 2000, Mr. Weber and Mr. Pogany met with Mr. Gintert to discuss the racial slur matter as well as Mr. Gintert's April 14, 2000 decision to leave work early. Mr. Weber's memorandum to the file dated April 24, 2000 noted that Mr. Gintert again denied making the racial slur, but this time indicated that he remembered another WCI employee making the racially offensive statement.

16. Mr. Weber's April 24, 2000 memorandum included the following:

> [Mr. Gintert] stated his men lost respect for him over [Mr. Weber's previous refusal to support a decision by Mr. Gintert to send an employee home for failure to follow instructions]. I told Randy "His men lost his respect due to the way he treats them and due to his involvement with substance abuse and not from anything Bill Weber did."
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> . . .
>
> Randy's credibility has been an issue with me over the past two years. We made him sign a last chance agreement in June of 1998 after his 3rd rehab for substance abuse. If he had admitted to the racial slur and apologized to William Smith, I think it would have been acceptable to both the Union and Smith. If this had happened, a 30-day suspension could have been considered. His failure to be truthful and his tendency to put blame on others weighed very heavy on the decision to terminate him.

17. Later on April 24, 2000, Messrs. Weber and Pogany met with Mr. Gintert to inform him that he was being terminated because he violated Company Policy, Rules and Regulations by voicing a racial slur in the company of a black Union employee and by acting insubordinately when he failed to complete his April 14, 2000 shift. This meeting was memorialized in a memorandum to the file written by Mr. Pogany and included in "Exhibit V" to Mr. Gintert's deposition.

18. Mr. Pogany's April 24, 2000 letter specifically stated:

> Substantiation of the facts surrounding the two (2) most recent incidents involving Mr. Gintert supported the execution of his 3-17-00 performance understanding. Mr. Gintert's actions toward a black Union employee and his insubordination were grounds for disciplinary action, up to and including termination. Considering Mr. Gintert's overall work record, performance history and the negative impact on his individual and departmental management efforts and credibility, termination of

employment was the most appropriate action.

19. Mr. Pogany's memorandum did not specifically refer to Mr. Gintert's history of drug and alcohol abuse.

20. Mr. Gintert testified on deposition that as of January 2000 he did not believe WCI management viewed him as still engaging in the use of illegal drugs. Dep. at 169.

II. DISCUSSION

In the state appellate proceeding, Mr. Gintert's brief did not contest the trial court's decision to grant summary judgment in favor of WCI on Mr. Gintert's counts for breach of contract and intentional infliction of emotional distress. Inasmuch as Mr. Gintert has agreed to adjudication of his bankruptcy claim on the basis of the state appellate record, this Court concludes that he is not pursuing the contract or emotional distress theories as the basis for his claim.

The remaining theory for recovery is that WCI's decision to terminate Mr. Gintert constituted an unlawful discriminatory practice under Ohio Revised Code Section 4112.02(A), which protects against adverse employment decisions made "because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person." Mr. Gintert contends that WCI terminated him because of his disabilities of alcoholism and drug addiction.

A. Summary Judgment Standard

The Court understands the parties to have submitted the Gintert Claim controversy for a determination pursuant to summary judgment standards. If summary judgment is not appropriate, the adjudication of the Gintert Claim will require further evidentiary proceedings.

Under both the federal and state procedural rules, summary judgment should be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law." F.R.Civ. P. 56(c); Ohio R. Civ. P. 56(c). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catreet,* 477 U.S. 317 (1986). As Mr. Gintert correctly stated in his brief to the state appeals court, the determination that there is no genuine issue of material fact can only be reached after viewing the evidence in a light most strongly in favor of the nonmoving party. *Temple v. Wean United, Inc.,* 364 N.E.2d 267, 274 (Ohio 1977).

B. Application of Ohio Revised Code Section 4112.02(A)

To establish a prima facie case of disability discrimination under the Ohio statute, a plaintiff must demonstrate: "(1) that he or she was handicapped; (2) that an adverse employment action was taken by an employer, *at least in part*, because the individual was handicapped, and (3) that the person, though handicapped, can safely and substantially perform the essential functions of the job." *Columbus Civil Serv. Comm'n v. McGlone*, 697 N.E.2d 204, 206 (Ohio 1998) (emphasis supplied).[2]

The state trial court found that Mr. Gintert had not presented sufficient evidence of his disability to create a genuine issue of fact on that prong of the prima facie case. Similarly, the state trial court found no evidence that WCI's termination of Mr. Gintert was even partially motivated by the alleged disability. This Court, however, will assume (without deciding) that a reasonable trier of fact could find a prima facie case of disability on the present record.

Once a prima facie case has been established under Section 4112.02(A), the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the adverse employment decision. Upon that articulation, the plaintiff's claim will fail unless the plaintiff can demonstrate

[2] After the *McClone* opinion was issued, the Ohio legislature amended Ohio Rev. Code Section 4112.02 to replace the term "handicap" with "disability".

that the reasons set forth by the employer were nothing more than pretext for impermissible discrimination. *Hood v. Diamond Products, Inc.*, 658 N.E.2d 738, 741 (Ohio 1996).

WCI has articulated at least two legitimate reasons for terminating Mr. Gintert, namely that Mr. Gintert uttered a racial slur in violation of company policies and that Mr. Gintert acted insubordinately when he left his shift on April 14, 2000. Further, the record submitted to the Court would not permit a reasonable trier of fact to conclude that these reasons were pretextual. While the very few references by the WCI decisionmakers to Mr. Gintert's past use of alcohol and drugs that appear in the record[3] might lead a reasonable trier of fact to conclude that Mr. Gintert's termination was at least in part attributable to his history of alcohol and drug abuse, no reasonable trier of fact could conclude that those limited references support an inference that the legitimate reasons articulated by WCI for discharging Mr. Gintert are pretextual.

Mr. Gintert's brief on appeal in the state court proceeding suggests that the "racial slur" basis for discharge was a pretext because the only African-American present at the time the slur was alleged to have been made did not file a formal grievance or complaint. Given that at least one other Union employee had heard a rumor about the racial slur and was pointing to the alleged statement as

[3] Mr. Gintert's brief in the state appellate court argues that "throughout the investigation [of the sexual harassment complaints] Dennis Pogany referred to Randall C. Gintert's past drug problems, conferred with the EAP counselor regarding Randall C. Gintert drug problems, noted that Randall C. Gintert attended AA, and repeatedly had Randall C. Gintert submit to drug tests. " Gintert Brief at 12-13. The record submitted to this Court does not support these factual claims. If Mr. Pogany did engage in this conduct, however, that would still not establish pretext. It is not a violation of the Ohio statute to inquire whether allegations of bad conduct by an employee may be related to drug or alcohol use. Indeed, the employer does not violate the statute even when it terminates an employee for bad conduct that is caused by drug or alcohol addiction. See, e.g., Maddox v. Univ. of Tennessee, 62 F.3d 843, 847 (6th Cir. 1995) (there is a distinction between taking an adverse job action for unacceptable misconduct and taking such action solely because of a disability, even if the misconduct is "caused" by the disability). Ohio courts have found that even if the misconduct is related to the disability, adverse action is permissible as a matter of law if the same neutral criteria are applied to disabled and nondisabled persons alike. Cleveland Civil Serv. Comm'n v. Ohio Civil. Rights Comm'n, 565 N.E.2d 579, 583 (Ohio 1991) (a prospective employee's past absenteeism and arrest record, even if attributable to alcoholism, could be considered in making a hiring decision). In any event, **no** adverse job action was taken as a direct result of the sexual harassment complaints.

a reason he did not want to work for Mr. Gintert, the Court believes it would have been irresponsible had WCI not investigated the matter further. [4]

In determining that there is no genuine issue of fact on the pretext issue, this Court notes that WCI took no adverse job action against Mr. Gintert immediately after any of his three rehabilitation treatments. Indeed, Mr. Weber, who was instrumental in the final termination decision, was also instrumental in the decisions not to take adverse job actions after each of Mr. Gintert's three rehabilitation stints and Mr. Weber actually was part of a management team that promoted Mr. Gintert a few years after his second leave to attend a rehabilitation program. *Compare Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463 (6th Cir. 1995) ("An individual who is willing to hire and promote a person of a certain class is unlikely to fire them simply because they are a member of that class. This general principle applies regardless of whether the class is age, race, sex, or some other protected classification.").

If WCI were looking for an "excuse" that would allow WCI to act upon an actual discriminatory animus against Mr. Gintert because he had been treated for drug and alcohol addiction, it could have found such cover at least as early as January of 1999 (when Mr. Gintert verbally initiated a dispute that became very heated) or December of 1999 (when two employees filed sexual harassment complaints against Mr. Gintert). Instead, the Company opted in the first instance to warn Mr. Gintert and the other employee against any further such arguments and in the

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[4] Mr. Gintert's brief also states that Mr. Pogany's personal notes from the time he was first advised of the racial slur dispute indicate that he immediately wrote "He's out of here". There is no evidence of this in the documents the parties provided to this Court, but even if the notes had been included, the Court does not believe this statement yields an inference that the asserted termination ground of the racial slur was a pretext for discrimination on the basis of alcohol and drug addiction. Construed in the light most favorable to Mr. Gintert, such a statement would simply mean that news of the racial slur controversy, coming so close on the heels of the sexual harassment controversy, led Mr. Pogany to a spontaneous reaction that Mr. Gintert should be terminated. The Court notes that such a spontaneous reaction was not

second instance to accept Mr. Gintert's denials as precluding findings of sexual harassment.

III. CONCLUSION

Because there is no genuine issue of fact as to whether the reasons articulated by WCI for Mr. Gintert's termination were pretextual, the Court grants the Debtor's objection to the Gintert Claim, which is disallowed in its entirety.

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finalized until WCI's investigation of the racial slur controversy was completed.