**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| MICHAEL A. DENOEWER, | : | |
| | : | |
| Plaintiff, | : | Case No.: 2:17-cv-0660 |
| | : | |
| vs. | : | Judge George C. Smith |
| | : | |
| UCO INDUSTRIES, INC., | : | Magistrate Judge Kimberly A. Jolson |
| | : | |
| Defendant. | : | |

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant, Union County Industries, Inc. ("UCO"), by and through its counsel, moves this Honorable Court to grant summary judgment in its favor on Plaintiff's Third Amended Complaint in its entirety ("TAM") for the reasons detailed in the attached Memorandum in Support.

Respectfully submitted,

*/s/ Danny L. Caudill*

Robert J. Beggs (0002966)
BEGGS LAW OFFICES CO., LPA
1675 Old Henderson Rd.
Columbus, Ohio 43220
(614) 678-5640 Direct Dial
(614) 448-9408 Fax
John.Beggs@BeggsLawOffices.com
*Trial Counsel for Defendant U-CO Industries, Inc.*

Danny L. Caudill (0078859)
THE CAUDILL FIRM, LLC
175 S. Third St., Suite 200
Columbus, Ohio 43215
(614) 500-3401 Direct Dial
(631) 448-4544 Fax
dlcaudill@caudillfirm.com
*Co-Counsel for Defendant U-CO Industries, Inc.*

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**MEMORANDUM IN SUPPORT**

## I.INTRODUCTION

The old adage is sad - but apparently true. *No good deed goes unpunished.*

Despite its 40-year, singular mission to provide meaningful employment opportunities for developmentally disabled citizens in Union County, UCO is now being sued for … *discriminating against the developmentally disabled*. Frankly, this is absurd. But UCO can hardly blame Plaintiff for the frivolous allegations contained in his complaint - because this is really *his* lawsuit in name only.

UCO is a non-profit organization created specifically to provide job opportunities for developmentally disabled individuals. In its entire history, UCO has never refused to hire a developmentally disabled person. And UCO has never terminated any such employee - *regardless of their performance*. If a developmentally disabled employee refuses to work, he/she is redirected or permitted to simply relax on-site until ready to work. Indeed, developmentally disabled employees can even fail to show up for work, with no repercussions.

UCO has a Section 14(c) sub-minimum wage certificate from the Secretary of Labor. Despite that fact, UCO chooses to pay at least minimum wage for many jobs held by developmentally disabled individuals – even though UCO could legally pay sub-minimum wage to those individuals for those jobs. And even where UCO pays sub-minimum wage through a Section 14(c) compliant, piece-rate compensation system, UCO has voluntarily set a wage floor of $1.50 per hour, so that even the lowest-functioning of its developmentally disabled employees will still earn some compensation. Where a piece-rate is utilized, it is based on prevailing wage which is significantly higher than the minimum wage. Indeed, any developmentally disabled employee desiring to earn *more* than minimum wage may elect to work in a piece-rate job; and several do. Put another way, every developmentally disabled employee at UCO has the

opportunity to earn at least minimum wage – even though the law permits the payment of sub-minimum wages. And every developmentally disabled employee has the opportunity to earn significantly more than minimum wage, if they choose.

Despite all of this, Plaintiff's mother/next friend and his attorneys (collectively referred to grudgingly as "Plaintiff") alleges that UCO discriminated against him *based on his developmental disability*. This is simply not true.

**II.THE PARTIES AND THE CLAIMS.**

Plaintiff Michael Denoewer is an adult male, who has been previously diagnosed with autism, mental retardation, adjustment anxiety disorder, obsessive compulsive disorder and epilepsy. Further, Plaintiff is non-verbal. UCO is a 501(c)(3), non-profit, Ohio corporation based in Marysville, Ohio. In partnership with the Union County Board of Developmental Disabilities ("UCBDD"), UCO exists to provide employment opportunities to developmentally disabled individuals like Plaintiff. To address the unique needs of its developmentally disabled employees, UCO staff has always worked hand-in-hand with on-site mental health support staff from either the UCBDD or the Columbus Center for Human Services ("CCHS").

Plaintiff alleges two separate but identical claims against UCO in its Third Amended Complaint. The first claim ("Count I") is brought pursuant to the federal Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(a). The second claim is brought under the Ohio Civil Rights Act, R.C. § 4112.02(A). The gravamen of both claims is that UCO discriminated against Plaintiff by denying him the opportunity to work "on the line" or "the shredding machine," "relegating" him instead to working exclusively at "the tables" for the "duration" of his employment. Plaintiff claims that denying him these opportunities (a) deprived him of "the protection of having a wage floor equal to the minimum wage," (b) "denied him the opportunity

to develop new and marketable skills," and (c) "kept him segregated from non-disabled individuals."

It should be noted that UCO never terminated Plaintiff. His mother/next friend voluntarily pulled him out of UCO in November 2015 after she erroneously accused CCHS of restricting Plaintiff's ability to go the restroom through the use of a timer. Further, she did this without ever having complained to UCO human resources or management regarding her alleged belief that UCO was discriminating against Plaintiff.

The truth is, it is only through a pure legal fiction that Plaintiff's mother/next friend can claim Plaintiff was denied something that *he* wanted. Indeed, Plaintiff repeatedly indicated that he *did not want* to be reassigned away from his usual tasks in the pre-production area. In short, Plaintiff's mother/next friend and counsel seek to impose a legal requirement upon UCO to convince, entice, condition or, if all else fails, *force* Plaintiff to undertake tasks he violently resisted doing. This simply cannot be the mandate of the ADA.

## III.SUMMARY OF THE ARGUMENTS

### A. Plaintiff's production line claims.

#### 1. Plaintiff was not qualified to work on the production line.

It is not true that UCO denied Plaintiff an opportunity to work "on the line," also known as the "production line." UCO did try Plaintiff "on the line" but he was unable to perform there and indicated to UCO staff that he wanted to return to "the tables" (also known as the "pre-production area"). Further, UCO's close, daily evaluation and assessment of Plaintiff's performance at "the tables" over *nearly seven years* of employment demonstrated that he could not work on the production line. Work on the line moves much faster and is more complex than work at the tables. While employees may work at their own pace at the tables –they must keep to

a particular pace on the production line. Year after year, Plaintiff was one of the slowest workers at the tables – where the easiest tasks were performed.

Further, Plaintiff violently resisted changes to his daily routine or environment. He physically threatened and assaulted UCO and CCHS staff when they moved him to different jobs, placed co-workers near him he didn't like or even changed his seat. Due to these repeated violent outbursts, which occurred in response to change, Plaintiff was not qualified to work outside the pre-production area.

**2. UCO's decision to keep Plaintiff in the pre-production area was based on legitimate non-discriminatory reasons - his performance and behavior.**

The production line is noisier and imposes more external stimulus than the tables. Plaintiff's Individual Plans ("IP's") cautioned against subjecting Plaintiff to (a) changes in his daily routine and (b) over-stimulation. Further, seven years of observation and close work with Plaintiff revealed that changes in his routine and/or over-stimulation caused him to engage in the outbursts referred to above. Accordingly, UCO rotated Plaintiff through various jobs at the tables, (a) where he demonstrated the most success, (b) indicated he preferred to be and (c) was least likely to engage in violent outbursts.

**3. Plaintiff did not suffer an adverse employment action.**

A move from the pre-production area to the production line is a lateral transfer – the denial of which would not constitute an adverse job action. Plaintiff's pay was never cut. And a move to the production line would not have come with more prestige, responsibility or promotion potential. Plaintiff voluntarily quit his job. He has not alleged that he was constructively discharged.

**B. Plaintiff's shredder claims.**

**1. No vacancy ever existed in File 13 for which Plaintiff could apply.**

It is true UCO never assigned Plaintiff to operate the shredder in File 13. Simply put, there was never an opening for which Plaintiff could apply.[1] Accordingly, Plaintiff cannot establish (1) a causal link between any alleged decision prohibiting him from operating the shredder and a discriminatory animus or (2) that he was subjected to an adverse employment action.

**2. Plaintiff was not qualified to operate the shredder**

Work in File 13 consisted of operating a truck, a forklift and an industrial shredder. Further, the industrial shredder is connected to, and operates in conjunction with, an industrial baler. The shredder and baler are both complex machines, which can pose extreme physical hazards to operators and passers-by. Simply put, File 13 is the noisiest, most complex and most dangerous place to work at UCO. Plaintiff did not have a driver's license. He was not certified to operate a forklift. More importantly, Plaintiff had no concept of danger. He could not read or understand the operating and safety manual for either the shredding machine or the baler. And, Plaintiff could not call for help, if needed. Accordingly, he could not safely operate a motor vehicle, a forklift, an industrial shredder or an industrial baler.

**3. Forcing Plaintiff to work on the production line or the shredder would have created a direct threat to Plaintiff and others.**

Had Plaintiff been forced to operate the shredder, he would have posed a danger to himself and others. Under the "direct threat" defense, Plaintiff was not qualified to operate the shredder.

[1] It is undisputed that no vacancy existed in File 13 into which Plaintiff could be transferred. Further, there is no evidence that employees were rotated through File 13, as a matter of course, before Plaintiff resigned. After the close of discovery, UCO's counsel brought this issue to Plaintiff's counsels' attention and requested that they withdraw Plaintiff's File 13 claims. Despite the total lack of evidence demonstrating a vacancy in File 13, or any practice of rotating employees through File 13, Plaintiff's counsel refused to withdraw this claim – forcing UCO to spend time, effort and money pursuing summary judgment on this issue.

**C. Plaintiff cannot demonstrate that any of UCO's proffered reasons for its decisions are a pretext for discrimination.**

There are three primary ways for Plaintiff to show that UCO's proffered reasons for its decisions are merely a pretext for discrimination: (1) the proffered reasons have no basis in fact; (2) the proffered reasons did not actually motivate the decisions; or (3) the reasons were insufficient to motivate the decisions. See *Downs v. AOL Time Warner, Inc*., Case No. 2:03-CV-1117, 2006 U.S. Dist. LEXIS 4848 at *23-24 (S.D. Ohio, January 20, 2006). The undisputed evidence demonstrates that; (1) Plaintiff engaged in violent behavior when his job assignment was changed; (2) he could not perform complex tasks at a team pace; (3) there was never a vacancy in File 13 he could be transferred into; and, (4) he could not safely perform the complex shredder operation and would have posed a danger to himself and others, if permitted to do so. Further, the undisputed evidence demonstrates that UCO treated Plaintiff as it would have any other similarly situated employee. Plaintiff cannot demonstrate pretext by any method.

**D. Plaintiff cannot point to any evidence that UCO acted with malice or reckless indifference to Plaintiff – punitive damages are unwarranted.**

There is no evidence that UCO refused to permit Plaintiff to work in any position for which he applied and/or otherwise demonstrated he could safely and successfully perform. Unlike the typical employer, the very purpose of UCO's existence is to provide job opportunities for the developmentally disabled. And, also unlike the typical employer, developmentally disabled individuals are never turned away or fired because of their performance. Developmentally disabled employees at UCO can do as much work, or as little, as they prefer. In fact, they can refuse to do any work. If they engage in disruptive, aggressive or even dangerous behavior, as Plaintiff did, they are simply "redirected" by UCO employees or on-site mental health support staff.

UCO assigned Plaintiff primarily to the tables instead of the production line or the industrial shredder for legitimate non-discriminatory reasons. And UCO worked with on-site CCHS staff to ensure that the protective measures outlined in his Individual Plans were followed. Further, UCO regularly and frequently accommodated Plaintiff, including (a) modifying his work routine and environment, (b) providing him with one-on-one attention when needed and (c) simply "re-directing" his negative (even aggressive) behaviors instead of imposing discipline. There is absolutely no evidence UCO acted with any discriminatory purpose - much less with the requisite degree of malice or recklessness to warrant punitive damages.

**E. Plaintiff's claims are barred by the applicable statute of limitations.**

Plaintiff claims he was "relegated" to the pre-production area for the "duration" of his employment. If this is true, then Plaintiff had notice of the alleged discrimination shortly after he was hired in July 2008. He certainly had notice by July 28, 2011 (three years later and six years before he filed this action). To side-step the applicable the statutes of limitations, Plaintiff appears to allege a "continuing violation" theory of discrimination under the ADA. To make out such a claim, however, Plaintiff would have to prove that UCO practiced a longstanding policy of discrimination against a class of which Plaintiff was a member. He cannot do this. It is undisputed that UCO assigned developmentally disabled employees to both the production area and the shredder.

## IV. FACTUAL BACKGROUND

### A. Defendant UCO Industries

#### 1. UCO's history.

Defendant UCO Industries, Inc. is a 501(c)(3) non-profit that exists to employ individuals with disabilities in an integrated setting. (TAM ¶ 2). UCO was created in 1974 at the direction of the Union County Board of Developmental Disabilities ("UCBDD") to provide rehabilitation

services. (Amerine Dep.[2] 60:1-5). Until 2013, UCO operated as a "sheltered workshop" for individuals receiving services from the UCBDD under the direct supervision of the UCBDD. A "sheltered workshop" is one in which developmentally disabled individuals can work at their own pace without fear of termination for failure to meet specific performance goals. (Rucker Dep.[3] 26:7-10).

**2. UCO is privatized in 2013.**

In October 2013, UCO began operating as a private employer of people with disabilities independent of the UCBDD. (Amerine Dep. 25:23-26:4). UCO does not operate like the typical employer. First, it maintains a close partnership with the UCBDD. Indeed, UCO's Board of Directors were appointed by the UCBDD. (Amerine Dep. 60:8-9). UCO's CEO and the UCBDD Superintendent meet regularly. (Id.) Additionally, the two organizations have a joint operating committee, where select members of the respective Boards meet to stay apprised of industry changes and progress at UCO. (Id. 60:16-61:1).

Second, UCO leases space on its premises to the Columbus Center for Human Services ("CCHS"). (Amerine Dep. 170:8-171:6). CCHS provides the Medicaid support services to UCO's developmentally disabled employees that used to be provided by the UCBDD prior to privatization. (Id.). CCHS's services are authorized by the UCBDD and defined by Medicaid rules. (Id. 171:12-14). When UCO interviewed CCHS during the selection process to replace UCBDD, UCO learned that CCHS had experience working with individuals, who had the most severe disabilities. (Dawson Dep. 120;1-7). Examples of the on-site services CCHS provides to UCO's employees include, but are not limited to, (a) redirecting behaviors when a developmentally disabled employee acts out because of frustration or the external stimulus around them, (b)

[2] Deposition of UCO CEO David Amerine - appearing as UCO's corporate designee pursuant to Rule 30(b)(6) on March 5, 2019.
[3] Deposition of Gail Rucker taken on April 11, 2019.

advising UCO staff regarding an employees' unique needs, limitations and goals, as detailed in the their Individual Plans, (c) assisting employees with toileting and (d) helping employees with food preparation. (Id. 151:2-14). Indeed, CCHS staff participate in the development of employees' Individual Plans and are present on-site at all times to assist and advise UCO staff. (Francis Dep. 26:13-24). [4]

UCO obtains work for its employees from its varied customer base. It is undisputed that Honda of America is one of UCO's largest customers. Honda's business relationship with UCO springs from Honda's on-going commitment to partner with the communities where its manufacturing plants are located. (Amerine Dep. 258:24 – 259:23). That partnership includes supporting community health care and educational initiatives. Id. It also includes providing work opportunities for adults with developmental disabilities. Id.

**3. UCO's compensation system.**

UCO employs approximately 130 people – many at "sub-minimum" wages pursuant to a certificate issued under 29 U.S.C. § 214(c) ("Section 14(c) Certificate"). (TAM ¶ 120). To the extent any employee earns "sub-minimum" wages, it is because he/she is paid on a "piece-rate" basis. (Ebelberger Dep. 214:6-215:3). Piece-rate is paid for work performed in the "pre-production area." This area is also referred to as "the tables." (Amerine Dep. 51:17-20) The piece-rate, however, is based on prevailing wage that is significantly higher than the minimum wage. (Amerine Dep. 184:9-185:1). UCO currently uses a prevailing wage figure of $10.25 per hour as the basis for its piece-rate. (Id.) Accordingly, a number of UCO employees prefer to work at the tables because they can earn well in excess of minimum wage. (Id.)

[4] Deposition of Jennifer Francis taken on April 10, 2019. Francis worked on-site at UCO managing the CCHS employees there from September 2013 until she was promoted in April 2018. (Francis Dep. 13:9-14:17).

Although UCO could pay all of its qualifying developmentally disabled employees sub-minimum wages under the Section 14(c) certificate, UCO voluntarily chooses to pay at least minimum wage for certain jobs, such as those on the production line. Further, UCO sets a wage floor of $1.50/hour for piece-rate work, so that the lowest-functioning, developmentally disabled employees can still earn some compensation. (Amerine Dep. 237:9-12)

**4. UCO's hiring, evaluation and assignment processes.**

During its history, while working with UCBDD and after privatization, UCO has never refused to hire a developmentally disabled individual seeking work there. (MSJ Ex. 1, Amerine Aff.). Further, UCO has never terminated a developmentally disabled person regardless of their performance. (Id.).

Before privatization, developmentally disabled employees came to UCO through referral from UCBDD. (Amerine Dep. 77:4-8). At that time, UCBDD decided where to place employees at UCO. (Reed Dep. 33:8-13)[5]. New employees typically started in the pre-production area of UCO's facilities known as "the workshop." (Amerine Dep. 207;7-16). The workshop consisted of the pre-production area (the tables) and the production line (the line). (Snapp Dep. 60:20-61:1).[6] But employee preferences were always considered when determining assignments. (Shiplet Dep. 24:9-25:20). [7]

[5] Deposition of Glenna Reed dated April 8, 2019. Ms. Reed began with UCO in January 2010. (Reed Dep. 9:4-13). She was the first person actually hired to be UCO's CEO. (Id. 14:7-15)

[6] Deposition of Sarah Snapp dated April 25, 2019. Ms. Snapp began at UCO as a Production Trainer in September to 2012. (Snapp Dep. 7:19-8:5). She also held the position of Production Coordinator before assuming her current position as Production Supervisor in April 2014. (Id. 8:6-9:10)

[7] Deposition of Andrew Shiplet dated May 21, 2019. Mr. Shiplet was the Director of Operations for UCBDD for nearly 20 years until 2015 when he became Facilities Manager. (Shiplet Dep. 7:3-8:12). As Director of Operations, he supervised the production trainers at UCO. (Id. 12:2-18). Mr. Shiplet was also responsible for finding work for developmentally disabled individuals at UCO. (Id. 12:2-13:5). After privatization occurred, Mr. Shiplet continued his assignment at UCO as Director of Operations during the transition period. (Id. 15:1-16:13).

After privatization, UCO worked on improving the processes for assessing and evaluating new employees. (Eley Dep. 64:11-66:19).[8] UCO continued to assign employees initially to the pre-production area for assessment and evaluation but also introduced simulations for new employees to try, to further help UCO determine their abilities. (Id.) These simulations involved performing different jobs. (Id.) In determining job assignments, UCO considered each individual's capabilities and preferences. (Eley Dep. 69:14-22; Snapp Dep. 53:12-54:8; Huffman Dep. 26:4-16). And, UCO staff consulted with CCHS staff in evaluating performance to help determine assignments. (Snapp Dep. 82:16-83:7)

Production supervisors, with the assistance of their production coordinators and trainers, were responsible for assessing developmentally disabled employees and determining their job assignments. (Eley Dep. 132:10-133:2). These supervisors were also responsible for determining when a developmentally disabled employee would be reassigned to a minimum wage job. (Id. 144:17-23). Although, the supervisor passed her recommendations up the chain of command, she essentially made the final call regarding which employees worked in which section of the workshop. (Snapp Dep. 60:20-61:13). Neither the production supervisor nor their coordinators or trainers, however, knew the precise nature or extent of any developmentally disabled employee's disability. (Snapp Dep. 100:5-7; Huffman Dep. 36:23-37:5). Recommendations were based solely on the employee's performance and/or conduct.

Production associates often moved between the tables and the production line. (Snapp Dep.97:3-7; Huffman Dep. 35:14-20). The employees, however, were required to demonstrate proficiency at the tables before they were permitted to move to the production line. (Snapp Dep. 64:17-65:3). Some part-time individuals, considered "auxiliary" or "contingent" staff, were

[8] Deposition of Amanda Eley dated April 11, 2019. Ms. Eley was UCO's CEO from May 2014 until March 2017. (Eley Dep. 16:21-17:6; 12:1-7).

brought in to supplement the production line staff when there was a shortage of available production line staff. (Snapp Dep. 56:4-7; Reed Dep. 37:1-22). Contingent employees were also brought in to supplement the pre-production operation when staff shortages existed. (Amerine Dep. 208:3-7). However, UCO is a business, so its customers' needs were also necessarily considered when determining assignments. (Snapp Dep. 71:6-24).

Although Plaintiff's TAM alleges he was denied the opportunity to operate the shredder in File 13, no vacancy ever existed in File 13 for which Plaintiff could have applied. (Amerine Dep. 104:7-21; Eley Dep. 149:6-150:4). UCO acquired the File 13 shredding operation in 2015. (Amerine 103:19). The three employees working at File 13 came over to UCO with the business. (Id. 103:19-23). There are still only three employees working in File 13. (Id. 57:3-5). One of the three File 13 employees, who came over with the business in 2015, was developmentally disabled. (Id. 103:2-23). That employee, Doug Ropp, is no longer with UCO. He was replaced, however, with another developmentally disabled employee. (Id. 73:17-21).

**B. Plaintiff Michael Denoewer.**

Plaintiff is an adult male, who is autistic and non-verbal. (TAM ¶ 1). He also has been previously diagnosed with epilepsy/seizure disorder, anxiety disorder, obsessive compulsive disorder and moderate mental retardation. (MSJ Ex. 2, Dr. Burnsides' medical records). Plaintiff's autism was diagnosed when he was a young child. (T. Basil Dep. 10:18-24). Because he does not speak, Plaintiff communicates using behaviors and assistive devices. (Id. 16:11-17:22).

With regard to his seizure disorder, Plaintiff has both grand mal and petit mal seizures. (MSJ Ex. 3, Nursing Assessment 6/5/2013). His grand mal seizures manifest as dropping to the floor, convulsions, cyanosis of the face, drooling/foaming at the mouth and eyes rolling back into his head. (Id.) It is typical for Plaintiff to be lethargic and to vomit after grand mal seizures. (Id.) Petit mal seizures manifest as staring off into space and unresponsiveness to verbal and/or physical

stimuli. (Id.) Plaintiff takes the prescription medication Depakote to help control his seizures. (MSJ Ex. 2).

As a result of his several medical conditions, Plaintiff requires substantial assistance with almost every aspect of his daily life – even basic functions. (MSJ Ex. 4, Level of Care Assessment 7/22/2015). For example, he requires assistance bathing, brushing his teeth, combing his hair, cutting his nails, shaving, applying deodorant and wiping himself after going to the toilet. (Id.) He needs help changing his clothes when he urinates in them. (Id.) Further, his medication must be administered to him – he cannot reliably self-medicate. (Id.; MSJ Ex. 5, IP 6/22/12-6/21/13). He has also resisted routine medical evaluation at times - refusing to permit his nurse to obtain his vital signs or examine his throat. (MSJ Ex. 6, Nursing Assessment 6/5/2013)

Plaintiff cannot shop for himself or even identify grocery, clothing or household items that need to be purchased. (MSJ Ex. 4). He cannot cook or otherwise prepare his own food. (Id.) He cannot clean his own living quarters. (Id.) He can only clean his own clothes with help. (Id.) He cannot access and use transportation without assistance. (Id.) According to his next friend/mother and his UCBDD case worker, Plaintiff is not able to maintain competitive community employment or self-employment.[9] (Id.) He cannot secure his money and access it without assistance. (Id.) He cannot make simple purchases. (Id.) Again, according to his mother and case worker, Plaintiff requires the presence of another person throughout the day and night to complete activities within his home that require remembering, decision-making or judgment. (Id.) In fact, Plaintiff's

[9] This information was reported by Plaintiff's mother and next friend to the Ohio Department of Developmental Disabilities. The assessment form used and can be found, and is described, on that agency's website at the following URL: https://dodd.ohio.gov/wps/portal/gov/dodd/county-boards/assessments/level+of+care. R.C. § 5123.022 defines "competitive community employment" as employment taking place in an integrated setting, consisting of full-time work in the competitive labor market in which payment is at or above the minimum wage but not less than the customary wage and level of benefits paid by the employer for the same or similar work performed by persons who are not disabled."

Individual Plans warned that Plaintiff requires assistance when making all but the simplest decisions. (MSJ Ex. 7, IP dated 6/22/11 to 6/21/12).

Importantly, Plaintiff has no concept of danger. (MSJ Ex. 5). He is unable to make informed choices on his own that are unlikely to result in harm to himself or others. (MSJ Ex. 4). He cannot follow rules, even for short periods of time, without continual supervision. (Id.) His reading level is somewhere between kindergarten and 3rd grade. (MSJ Ex. 23). He must be supervised, within arm's-reach, when he is in any area where moving vehicles are present. (MSJ Ex. 5). He cannot cross a street safely by himself. (MSJ Ex. 4). He must be reminded not to run when it is inappropriate to do so. (MSJ Ex. 6). He cannot administer first aid, either to himself or others. (MSJ Ex. 5). He cannot distinguish between hot and cold. (Id.). Importantly, Plaintiff cannot ask for help. (MSJ Ex. 4). He requires individual supervision and assistance in the event of an emergency or simulated emergency (i.e., fire drill). (MSJ Ex. 16, IP – Training, Education and Therapy 6/22/12-6/21/13). Indeed, he once injured himself when left unsupervised during a fire drill at UCO. (T. Basil Dep. 23:6-14). Year after year, Plaintiff's Individual Plan, put together with the assistance of Plaintiff's mother and care-givers, specifically instructed that Plaintiff "must be kept out of harm's way." (MSJ Ex. 8, IP 9/2/14-9/1/15).

**1. Plaintiff's employment history at UCO.**

Plaintiff began working at UCO in July 2008, having been referred to UCO by the UCBDD. Plaintiff was in high school at the time, so he started out working only part time. (T. Basil Dep. 80:14-18). In 2008, UCO operated under the direction of the UCBDD. (Amerine Dep. 59:23-60:15). Like all developmentally disabled employees referred to UCO by the UCBDD, Plaintiff's preferences and abilities were initially assessed and evaluated in the pre-production area. After training, Plaintiff's first assignment was Portfolio and Tissue Removal. (MSJ Ex. 1). This was one of the simplest jobs at UCO. (Id.). Over the course of the next seven years, Plaintiff performed

work in 10 different jobs in the pre-production area. (Id.). In addition to Portfolio Tissue Removal, these jobs included: Label Bags; 1 Piece Assembly and Seal; Clean, Block & Set Aside; 1 Piece Antenna E-Lid; Place E-Lids in Trays; and, Place Bolts in Trays. (Id.). UCO Production Specialist Kristie Huffman once attempted to put Plaintiff on the production line, but the attempt was short-lived because Plaintiff indicated to her that he wanted to return to the pre-production area. (Huffman Dep. 43:5-24). Ms. Huffman observed that Plaintiff appeared overwhelmed by the work and environment on the production line. (Huffman Dep. 39:10-40:2).

It is not disputed that Plaintiff spent most of his time at UCO working in Portfolio Tissue Removal. Indeed, Ms. Huffman and UCO Production Supervisor Sarah Snapp observed that Plaintiff indicated through his behavior that he preferred that job. Further, he often engaged in a variety of disruptive behaviors, if his job or work environment was changed.

**2. Plaintiff engaged in violent behavior when his routine was changed.**

Plaintiff had a history of engaging in aggressive, violent behavior as a means of communicating his frustration and/or displeasure. During his employment at UCO, Plaintiff lunged at UCO and CCHS staff, grabbed them by the neck, shook them, head-butted them, and bit them. (Snapp Dep. 103:18-20: T. Basil Dep. 126:2-23). The following demonstrate the frequency of Plaintiff's outbursts during the time he was employed at UCO:

- Annual Nursing Assessment dated 4/24/2012 (updated on 7/18/2012) – Plaintiff had a total of 8 behavioral outbursts during the preceding year-long reporting period. (MSJ Ex. 9, 10).
- Annual Nursing Assessment dated 6/5/2013 – Plaintiff engaged in 7 behavioral outbursts at work (with another 24 reported outside of work). (MSJ Ex. 6).
- CCHS behavior logs recorded at least 8 violent outbursts at work in 2015. (MSJ Ex. 11).

Plaintiff's aggressive behaviors were not confined to work. He also engaged in them at home. (MSJ Ex. 20). For example, Plaintiff "stabbed" a care-giver's hand, who attempted to

retrieve bananas that Plaintiff had taken from his roommate. (MSJ Ex. 20, p. 5 of 12). It must be noted that, at the time of these violent attacks, Plaintiff was a fully-grown, adult male, standing 6 feet 4 inches, weighing 230 pounds and exhibiting significant physical strength. (T. Basil Dep. 126:13-15; MSJ Ex. 20, p. 11 of 12).

Plaintiff's treating psychiatrist and family physician attributed this aggressive behavior to changes in Plaintiff's daily routine. In a letter dated October 19, 2011, Dr. Ramadan M.D. advised that Plaintiff engaged in these "aggressive behaviors" "especially when his daily routine or schedule is changed." (T. Basil Dep., MSJ Ex. F). Plaintiff's family physician, Dr. Burnside, also concluded that a causal relationship existed between change and Plaintiff's negative behaviors. (MSJ Ex. 12, Dr. Burnside's Letter, September 5, 2014). Plaintiff's physicians prescribed him medication in an attempt to control these behaviors. (T. Basil Dep., Ex. F; MSJ Ex. 3, Nursing Assessment 5/19/11). Plaintiff's mother/next friend admits that Plaintiff engaged in these aggressive and violent behaviors. (T. Basil Dep. 126:2-127:23). Despite the opinions of his health care professionals, however, she claims that Plaintiff's violent behavior at work was caused by "boredom." (Id. 126:23-24). This makes little sense because UCO staff observed, and all the evidence supports, that Plaintiff engaged in aggressive behavior when his routine was changed – not when he was left alone. (Snapp Dep. 103:6-104:13; Huffman Dep. 46:5-22).

As stated above, UCO did try Plaintiff in several different tasks and briefly on the production line. But Plaintiff became predictably frustrated and angry when presented with changes to his work environment and/or routine. This frustration and/or anger could result from changes to his job, his seat or even slight changes to his work routine. (Snapp Dep. 104:8-13). When he became frustrated or angry, Plaintiff engaged in the disruptive behaviors referred to above. Some of the behaviors, albeit inappropriate, were relatively non-threatening: walking or running away from his work or supervisors, ignoring his supervisors, flapping his arms, jolting

back and forth, shaking, making beeping noises, etc. (Snapp Dep. 103:14-18; Huffman Dep. 43:5-14). Other behaviors, however, were aggressive and violent. Such behaviors included grabbing UCO employees (sometimes by the back of the neck), head-butting them and biting them. (Snapp Dep. 103:18-20: T. Basil Dep. 126:2-23).

After several such episodes, Plaintiff's supervisors attempted to minimize changes to his work environment and routine for the safety of UCO's staff – and Plaintiff. (Snapp Dep. 6-13). Their strategy became assigning Plaintiff to tasks that maximized his opportunity for success, while reducing the likelihood of disruptive behavior and dangerous outbursts. This included assigning Plaintiff tasks with which he had demonstrated previous success and was familiar. Additionally, UCO staff took other measures to reduce Plaintiff's outbursts, such as moving co-workers away from his work area, who might trigger an outburst. (Snapp Dep. 108:22-109:14). They also moved work to Plaintiff's area - instead of requiring him to move to the area where the work was regularly conducted. (Id.) Importantly, UCO's staff worked hand-in-hand with on-site CCHS staff, who were privy to the details of Plaintiff's Individual Plans and constantly available to redirect his behaviors and provide him other support as needed. (Francis Dep. 47:19-48:4; Snapp Dep. 73:17-74:9).

**3. Plaintiff was consistently one of UCO's lowest performing employees.**

Developmentally disabled employees at UCO demonstrated a wide range of productivity levels – but Plaintiff typically performed at the very low end of the range. (MSJ Ex. 1; MSJ Ex. 13, Production Statistics; Huffman Dep. 40:6-41:16). As stated above, Plaintiff was tried out on a variety of tasks in the pre-production area. But unlike some of his developmentally disabled co-workers, Plaintiff made little progress in his pace and quality of production. Plaintiff's supervisors and CCHS staff often ended up simply doing the work for him, while attempting to keep his focus on his assigned task. (Huffman Dep. 54:16-24; Snapp Dep. 108:10-21). Indeed, Plaintiff's

production continued decreasing year after year to the point that he became one of UCO's lowest performing employees – even on the easiest tasks in the company. (MSJ Ex. 1).

As also stated above, UCO did try Plaintiff on the production line. But that experiment ended quickly because Plaintiff became immediately overwhelmed by the speed and complexity of the tasks and could not perform there. (Huffman Dep. 38:24-40:2). Of course, this cannot happen on a production line. (Shiplet Dep. 31:22-33:12). As for File 13, even if a vacancy would have existed there, Plaintiff could not have worked in File 13 because he could not have safely operated the machinery. (Amerine Dep. 204:22-15; MSJ Ex. 17, Expert Report of Robert Burch).

**4. Plaintiff's mother voluntarily withdrew Plaintiff from UCO after she had a dispute with CCHS regarding his incontinence and other issues.**

Plaintiff's mother/next friend and stepfather were dissatisfied with CCHS services at Plaintiff's home in the months leading up to their voluntary withdrawal of Plaintiff from UCO. Their complaints included that CCHS "was not seeing to" Plaintiff's needs, that CCHS was not cleaning, and that CCHS was ignoring Plaintiff - not personally interacting with him. (M. Basil Dep. 29:5-18). As a result, it appears Plaintiff's parents instructed CCHS not to attend Plaintiff's annual IP meeting in July 2015, as a Medicaid support provider normally would, even though CCHS was providing the critical support Plaintiff needed at UCO. (MSJ Ex. 14, Francis email dated 7/14/15).

The relationship continued to deteriorate when Plaintiff began experiencing a marked increase in incontinence at work on or about July 2015. A doctor who examined Plaintiff in July 2015 concluded the incontinence was caused by constipation, which put pressure on Plaintiff's bladder. (MSJ Ex. 15, Basil email dated 7/29/15). Plaintiff was later examined by his family physician, Dr. Burnsides, on August 18, 2015. As a result of that examination, Dr. Burnsides told Plaintiff's mother/next friend that Plaintiff's incontinence was the "direct effect of the trauma from

the violence and stress from the home environment [Plaintiff] was living in." (T. Basil, Depo. Ex. J). Indeed, Dr. Burnsides' examination notes from August 18, 2015 stated the increased incontinence was occurring "in the face of his environment changing and some turmoil." (MSJ Ex. 2). Ample evidence exists that Plaintiff was experiencing violent confrontations with one of his roommates during this period. (T. Basil Dep. 144:20-145:2; M. Basil Dep. 104:3-11).

In August 2015, Plaintiff's mother/next friend addressed his increased incontinence with CCHS staff at UCO. (Francis Dep. 67:16-24). She requested that CCHS staff use some sort of timing system to prompt Plaintiff every hour to go to the bathroom. (Id.). CCHS staff complied with the request by placing a timer near Plaintiff *to remind staff* to prompt Plaintiff every hour. (Francis, p. 70:16-20). Plaintiff, however, could go to the restroom anytime he wanted. (Id.) CCHS staff put the timer near Plaintiff instead of their staff area because they were always moving around and would be more likely to hear it on the production floor than near their staff area. (Francis Dep. 71:9-14).

Plaintiff's mother/next friend claims she first learned about the timer in November 2015. (T. Basil Dep. 60:14-61:4). She also claims this news made her angry. (Id. 30:13-14). She erroneously accused CCHS of placing the timer as retaliation for her complaints about CCHS's services at Plaintiff's home. (Id. 50:18-52:9). She characterized the use of the timer as a form of illegal restraint. (Id.) As a result, she promptly removed Plaintiff from UCO. (T. Basil Dep. 61:5-12). Although she claims she removed Plaintiff from UCO in December 2015, UCO's records show Plaintiff's last day of work was November 23, 2015. (MSJ Ex. 1). It should be pointed out that neither Plaintiff nor anyone acting on his behalf ever made any complaint of *discrimination* to UCO management or human resources prior to Plaintiff's voluntary separation. (Id.).

## V.PROCEDURAL HISTORY

Plaintiff's discrimination charge was received by the EEOC on October 5, 2016. (Doc. #1-3). The EEOC subsequently issued Plaintiff a "right-to-sue letter" on May 2, 2017. (Id). Plaintiff filed his original Complaint in this case on July 28, 2017. (Doc. #1-3). He subsequently filed his (a) First Amended Complaint on December 12, 2017 (Doc. #27), (b) Second Amended Complaint on January 3, 2019 (Doc. #45, and (c) Third Amended Complaint on February 1, 2019 (Doc. #48).

Plaintiff's EEOC charge and original Complaint are identical. On the other hand, those two initial documents bear little resemblance to his Third Amended Complaint. For instance, neither his EEOC charge nor his original Complaint contained any allegations regarding the failure to provide an "adequate individualized inquiry into his skills and abilities." TAM ¶ 35. Nor did the EEOC charge or original Complaint mention any denial of the opportunity to work "on the line or the shredding machine." TAM ¶ 35. Indeed, the only allegation leveled at UCO in the EEOC charge and original Complaint was that UCO failed to pay Plaintiff "a proper wage."

## VI.LEGAL STANDARD

### A. Motions for Summary Judgment.

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Berryman v. SuperValu Holdings, Inc*., 669 F.3d 714, 716-17 (6th Cir. 2012). The Court's purpose in considering a summary judgment motion is not "to weigh the evidence and determine the truth of the matter" but to "determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine issue for trial exists if the Court finds a jury could return a verdict, based on "sufficient evidence," in favor of the nonmoving party; evidence that is "merely colorable" or "not significantly probative," however, is not enough to defeat summary judgment. *Id*. at 249-50. "The mere existence of a scintilla of

evidence to support [the non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995); see also *Anderson*, 477 U.S. at 251.

**B. An indirect evidence analysis is appropriate in this case.**

UCO's staff tried Plaintiff on a number of different jobs. But their efforts met with little success because of Plaintiff's violent outbursts and low productivity. Further, Plaintiff was not placed on the shredding machine because (1) no openings occurred there for which he could apply and (2) Plaintiff demonstrated over several years that he could not safely operate it.

No evidence exists, much less direct evidence, that UCO's decisions were motivated by his disability. Rather, all the evidence demonstrates that UCO made its decisions based on Plaintiff's demonstrated performance and conduct. See *Sper v. Judson Care Ctr., Inc*., 29 F.Supp. 3d 1102, 1111 (S.D. Ohio, July 8, 2014) (direct evidence not adduced where employer terminated the plaintiff for job-related misconduct related to her disability but not "because of" her disability.)

Accordingly, the Court should apply an indirect evidence, burden-shifting analysis to this case. See *Rafferty v. Giant Eagle Mkts., Inc*., Case No. 2:17-CV-617, 2018 U.S. Dist. LEXIS 186643 (S.D. Ohio, October 31, 2018).[10] First, Plaintiff must establish a *prima facie* case, which gives rise to an inference of discrimination. *Id*. Once Plaintiff has met his burden to establish a *prima facie* case, the burden shifts to UCO to articulate a legitimate, non-discriminatory reason for its decisions. *Id*. UCO need not prove a non-discriminatory reason for its decisions – it merely needs to articulate a valid rationale. *Id*. Once UCO accomplishes this, the burden shifts back to Plaintiff to show by a preponderance of the evidence that the proffered explanation is a pretext for discrimination. *Id.*

[10] Plaintiff's disability discrimination claim brought pursuant to R.C. §4112.02 should be analyzed utilizing the same analytical framework. See *Rafferty, supra*.

## VII.DISCUSSION

### A. Plaintiff's production line claims.

#### 1. Plaintiff was not qualified to work on the production line.

Plaintiff was not qualified to work outside the pre-production area, including on the production line and in File 13, because he exhibited disruptive and violent outbursts when UCO staff attempted to change his job or work environment, or presented him with complex tasks or increased external stimulus. Indeed, Plaintiff's physicians repeatedly warned that changes in Plaintiff's daily routine would result in aggressive behavior. And this was consistently demonstrated year after year. With regard to potentially (in this case, proven) violent employees, the Sixth Circuit has explained:

> "The Seventh Circuit has held that the ADA does not require an employer to retain a potentially violent employee because 'such a requirement would place the employer on a razor's-edge -- in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone.' *Palmer v. Cir. Court of Cook County*, 117 F.3d 351, 352 (7th Cir. 1997). The *Palmer* court made it clear that 'if an employer fires an employee because of the employee's unacceptable behavior, the fact that the behavior was precipitated by a mental illness does not present an issue under the [ADA].' *Id*. And this circuit has followed *Palme*r, holding that while the ADA protects qualified employees, 'threatening other employees disqualifies' an employee from a job. *Sullivan v. River Valley Sch. Dist*., 197 F.3d 804, 813 (6th Cir. 1999) (citing *Palmer*, 117 F.3d at 352). We agree with the Seventh Circuit that employees who threaten violent acts cannot be reasonably accommodated, and the ADA's duty to accommodate does not run in favor of those employees." *Green v. Burton Rubber Processing, Inc*., 30 Fed. Appx. 466; 2002 U.S. App. LEXIS 2959 at **9-10 (6th Cir. 2002).

The overwhelming evidence demonstrates that (a) changes to Plaintiff's daily routine, including changes to his assigned tasks in the pre-production area and his seat assignment, and (b) increased exposure to complex tasks and external stimulus, triggered disruptive and violent outbursts. Accordingly, Plaintiff was not qualified to work outside the pre-production area, including on the production line and in File 13.

**2. UCO's decision to keep Plaintiff in the pre-production area was based on legitimate non-discriminatory reasons - his performance and behavior.**

Even assuming Plaintiff could establish a *prima facie* case, the overwhelming evidence demonstrates that UCO kept Plaintiff primarily in the pre-production area for safety reasons because moving him out of the jobs he was most familiar with caused him to engage in disruptive and violent conduct. Put another way, Plaintiff's violent conduct should also be analyzed in the context of UCO meeting its burden to articulate a non-discriminatory reason for its decision. See *Yarberry v. Gregg Appliances, Inc*., Case No. 1:12-cv-611-HJW, 2014 U.S. Dist. LEXIS 129422 at *26-27 (S.D. Ohio, September 16, 2014); see also, *Sper, supra,* 29 F.Supp. 3d at 1112.

The fact is, UCO could have legally terminated Plaintiff's employment after just one of his many documented violent episodes. Indeed, most employers would have done just that. Instead, UCO and CCHS staff devoted considerable effort, at great personal risk, to create solutions to address Plaintiff's particular needs and proclivities. First and foremost, they refrained from *forcing* Plaintiff to perform tasks or work in environments that caused him to engage in disruptive or violent outbursts. If UCO could have legally terminated Plaintiff for engaging in violent behavior, then they certainly could have refused to force changes upon him that tended to cause such behavior.

Further, Plaintiff's Individual Plans warned against changing his daily routine and exposing him to levels of noise and light that could cause over-stimulation. The Individual Plans also instructed it was important to keep Plaintiff "out of harm's way." From 2008 to 2013, UCBDD provided the mental health support to the developmentally disabled employees working at UCO. After 2013, UCBDD was supplanted by CCHS. UCBDD, however, still provided direction and support to UCO and CCHS. County boards of MRDD have a legal obligation to follow the details of a developmentally disabled person's Individual Plan. See *Estate of Ridley v.*

*Hamilton County Bd. of Mental Retardation and Developmental Disabilities*, 150 Ohio App. 3d 383, 2002-Ohio-6344. UCO, UCBDD and CCHS all attempted to work within the guidelines of Plaintiff's Individual Plans by encouraging Plaintiff to try new tasks without violating the IP's clear warnings regarding changes in his routine and exposure to excessive external stimulus and potentially harmful situations. To the extent that any two mandates in Plaintiff's IP's potentially conflicted, it was not unreasonable for UCO to choose to err on the side of its employees' safety.

The Court should also understand that Plaintiff had the ability to communicate his preferences and desires to UCO and CCHS staff. For example, if he wanted to use the restroom, he sometimes pointed to a picture on his communication device. He could also point to items he wanted in the vending machine. (MSJ Ex. 16). But Plaintiff also had some ability to simply obtain things he wanted on his own. For example, instead of using his communication device to signal that he wanted to go to the restroom, Plaintiff simply walked there. When he wanted a soda, he simply got them from the soda machine or took from them other employees. (T. Basil Dep. Ex. I).

The point is this – if Plaintiff wanted to work on the production line, he could have simply let UCO or CCHS staff know that is what he wanted. He could have done this by walking over to the production line or pointing to that area – it is in the same room and only separated from the pre-production area by a few feet. (Reed Dep. 35:15-36:2). But there is absolutely no evidence suggesting that Plaintiff wanted to work there. In fact, all of the available evidence demonstrates that Plaintiff *did not want* to work there.

Although Plaintiff's mother/next friend was his guardian, R.C. §5126.043(D) mandates that Plaintiff had the right to participate in decisions that affected his life *and to have his needs, desires and preferences considered*. That section further required his guardian to make a decision that was consistent with Plaintiff's needs, desires and preferences.

> (D) Individuals with developmental disabilities, including those who have been adjudicated incompetent pursuant to Chapter 2111. of the Revised Code, have the right to participate in decisions that affect their lives and to have their needs, desires, and preferences considered. An adult or guardian who makes a decision pursuant to division (B) or (C) of this section shall make a decision that is in the best interests of the individual on whose behalf the decision is made and that is *consistent with the needs, desires, and preferences of that individual*. (emphasis added).

Just because Plaintiff's mother/next friend wanted him to try new jobs doesn't necessarily mean that was in his best interest – or that is what *he* wanted. The overwhelming evidence demonstrates Plaintiff *did not* want to work on the production line or anywhere outside of a few select jobs in the pre-production area. He made *his* desires clear and unequivocal. And his medical providers cautioned against changing his daily routine or exposing him to too much external stimulus. Further, that same evidence proves that attempts to *force* Plaintiff to try new tasks exposed Plaintiff and staff to great potential harm.

Plaintiff's mother/next friend and attorneys can disagree with how UCO handled Plaintiff's resistance to new tasks. But the only relevant question is whether UCO's decisions were motivated by a discriminatory animus. See *Land v. S. States Coop., Inc*., 740 Fed Appx. 845, 849, 2018 U.S. App. LEXIS 20365 (6th Cir. 2018)("'the law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons.'")(quoting *Browning v. Dep't of Army*, 436 F.3d 692, 698 (6th Cir. 2006) (quoting *Hartsel v. Keys*, 87 F.3d 795, 801 (6th Cir. 1996)). UCO's response to Plaintiff's behavior was consistent with how it typically responds to production associates, who become "agitated" when faced with new tasks. (Snapp Dep.65:24-66:15).

Finally, it should be noted that while UCO does not contest Plaintiff's status as a developmentally disabled employee, the staff responsible for making decisions regarding

Plaintiff's job assignments did not know the precise nature of, or extent of, Plaintiff's disabilities. This is important because Plaintiff's TAM ¶ 22 claims:

> "Individuals were assigned to work on the tables or on higher paying jobs including the line and the shredding operation based on the perceived nature of their disability (or whether they were disabled at all), such that individuals without disabilities or with disabilities perceived to be less severe, were assigned to the line and shredder, and individuals with disabilities perceived to be more severe were assigned to the tables."

UCO's production supervisors made the determination of job assignments, including minimum wage job assignments, and then passed their recommendations up the chain of command. (Eley Dep. 144:17-145:11). Deposition testimony consistently established, however, that UCO staff did not know the precise nature of, or the extent of, any particular employee's disability. (Huffman Dep. 36:23-37:5; Reed Dep. 22:15-21). For example, Sarah Snapp, Plaintiff's production supervisor, did not know the nature of, or the extent of, Plaintiff's disabilities. (Snapp Dep. 100:5-7).

**3. Plaintiff did not suffer an adverse job action.**

UCO reminds the Court that Plaintiff voluntarily quit his job – or more accurately, his mother/next friend voluntarily pulled him out of his job. Importantly, Plaintiff's TAM does not allege that he was constructively discharged. Further, neither Plaintiff nor anyone acting on his behalf ever made any complaint of discrimination to UCO management or human resources prior to Plaintiff's voluntary separation. (MSJ Ex. 1).

Plaintiff's allegation that he was prohibited from working on the production line is false. The undisputed evidence proves he was given an opportunity to work on the line but was unable to perform there. Further, such a prohibition would not constitute an adverse employment action because any move from the tables to the production line would simply be a lateral transfer. This Court has instructed that "'in general, a lateral transfer, or the refusal to make a lateral transfer, is

not a materially adverse action.'" *Brown v. Duke Energy*, Case No. 1:13cv869, 2019 U.S. Dist. LEXIS 54923 at fn. 5 (S.D. Ohio, March 31, 2019)(quoting *Freeman v. Potter*, 200 Fed. Appx. 439, 443, US. App. LEXIS 25072 (6th Cir. 2006)). Employees working at the tables and on the line are all considered production associates. Additionally, Production Associates often moved back and forth between the tables and the line. In short, a move from the tables to the line is a lateral transfer.

It is undisputed that Plaintiff's wages were not cut. And, he did not suffer a loss of title or advancement opportunity. Although his TAM alleges that the production line was the "premier" place to work at UCO, that sound-bite was simply uttered by a CCHS employee during a brief on-line promotional video.[11] There is no evidence that the production line carries any more objective prestige than the pre-production area. A move to the production line is not a promotion nor does it require any special training or education. See *Freeman, supra*, 200 Fed. Appx. At 444-445. The only unique characteristics or greater responsibilities involved is that the tasks are moderately more complex and move at a team pace. *Id*. Indeed, some employees prefer to work in the pre-production area because they have the opportunity to earn much more per hour than on the production line. (Amerine Dep. 185:9-186:1).

In truth, the piece-rate compensation system permitted Plaintiff to earn *at least* minimum wage and potentially more. Plaintiff *was not* denied the ability to earn minimum wage. To avoid this inconvenient fact, Plaintiff's mother/next friend and attorneys have put forth the novel proposition that Plaintiff was denied the "protection" of a minimum wage "floor." (TAM ¶ 36). But characterizing the minimum wage pay rate in the production area as a *protective floor* is misleading. Employees who fail to keep pace on the production line cannot remain there and

[11] It is interesting that Plaintiff would reference that video in his discrimination complaint, however, because the same CCHS employee who uttered the statement that the production line is the "premier" place to work at UCO also confirmed that individuals get to move to the line when they "do well" on the tables.

therefore have no *protective floor*. By contrast, an employee's piece-rate will always stay the same regardless of his productivity. Employees paid by piece-rate determine their own pay. Further, UCO has voluntarily and unilaterally established a true *protective floor* for its piece-rate employees, which consists of a base hourly rate of $1.50 per hour that employees will earn *regardless* of their productivity. Plaintiff simply argues that this should be more - when in the context of a Section 14(c) certificate holder, no minimum wage is required.

**B. Plaintiff's shredder claims.**

**1. No vacancy ever existed in File 13 for which Plaintiff could apply.**

UCO acquired the File 13 business in 2015. Plaintiff voluntarily quit his job at UCO in November 2015. When UCO acquired File 13, the operation employed three individuals. One of these individuals was developmentally disabled. The File 13 operation performs paper shredding. The equipment utilized consists of a forklift, a truck, and a large, fixed-position industrial shredder, which is attached and feeds into a large, fixed-position industrial baling machine. (MSJ Ex. 1).

It is undisputed that no vacancies opened up in File 13 from the time UCO acquired the operation until Plaintiff quit his job several months later. Further, there is no evidence UCO rotated employees through File 13 when Plaintiff worked there. Accordingly, Plaintiff cannot meet his *prima facie* burden to identify a vacancy. See *Kleiber v. Honda of Am. Mfg*., 420 F. Supp. 2d 809, 821 (S.D. Ohio, February 27, 2006)(case involved denial of reassignment as form of reasonable accommodation); *Hiser v. Grand Ledge Pub. Schs*., 816 F. Supp. 2d 496, 502 (W.D. Mich., September 12, 2011)(case involved failure to transfer internal candidate); and, *Davis v. Wilson Cnty., Tenn*., Case No. 3-13-0238, 2015 U.S. Dist. LEXIS 147585 at *21 (M.D. Tenn., October 30, 2015)(case involved failure to hire external candidate). Accordingly, Plaintiff cannot establish (1) a causal link between any alleged decision prohibiting him from operating the shredder and a

discriminatory animus or (2) that he was subjected to an adverse employment action. See *Davis, supra* at *21-22.

**2. Plaintiff was not qualified to operate the shredder.**

The shredder utilized in File 13 is a medium duty, industrial shredder manufactured by Ameri-Shred Corp. (Model AMS-3000). (MSJ Ex. 1). It is a conveyor-fed shredder, which is attached and feeds into an industrial baling machine. (Id.) The baling machine is manufactured by Harris-Selco (Model HL-12HD). (Id.) See video embedded at https://www.youtube.com/watch?v=Rfnw4UbMZro&feature=youtu.be. (MSJ Ex. 1; MSJ Ex. 24). The shredder/baling operation involves a complex, inherently dangerous, multi-step process. The normal sequence of the shredding operation is as follows, although it can very slightly, based on circumstances.

Bags or boxes of paper refuse are picked up by truck, delivered to UCO and brought to the File 13 shredding area by hand-carry or forklift. (MSJ Ex. 1). The File 13 shredding area is secured by physical barriers and monitored by security cameras for two reasons. (Id.) The first reason is for safety – (a) potentially dangerous equipment is operated in the File 13 area and (b) large, heavy bales weighing in excess of 800 pounds each are being moved and stacked there. (Id.) Second, File 13 handles the destruction of documents containing sensitive and even confidential information. (Id.) Once it arrives in the File 13 area, the paper refuse is inspected and sorted to separate paper refuse from non-paper refuse, which may have inadvertently made its way to UCO. (Id.) The sorting process is extremely important, as certain non-paper objects could damage the spinning shredder knives or worse. (Id.) In the past, File 13 personnel have discovered objects during the sorting process ranging from plastic report covers to metal binder clips, cellphones, and even an unfired bullet. (Id.) Among its diverse customer base, File 13 also collects refuse from

hospitals and medical clinics. (Id.) File 13 personnel have discovered discarded needles and other bio-hazardous materials in refuse collected from those customers. (Id.)

After inspection and sorting, the paper refuse is loaded into a large container, which sits upon a hydraulic lift. (Id.) Once assured that the area is clear, the shredder operator raises the lift so that paper refuse begins falling onto a conveyor belt, which will eventually carry the paper into the shredder. (Id.) The shredder operator again inspects the refuse as it moves along the entry conveyor belt, ready to stop the shredder and remove any dangerous or potentially damaging items that were not discovered during the initial inspection and sorting process. (Id.)

As the paper is shredded, the operator must be alert for any signs that the machine is malfunctioning. (Id.) If a jam or other malfunction occurs, the operator must stop the machine and take the appropriate remedial action. (Id.) Typical remedial action involves cutting power to the machine by initiating the "lock out / tag out" procedure. (Id.) Assured that power to the machine has been cut, the operator removes the metal safety cover from the front of the machine. (Id.) Removing the cover exposes the internal parts – including the shredding knives - for inspection and maintenance. (Id.) If a jam is detected, the operator uses a special debris removal tool to dislodge and clear jamming material. (Id.) The operator, however, must be able to determine whether a malfunction other than a simple jam has occurred, and determine the proper course of action, including discontinuing shredding operations entirely until the proper repairs can be safely made. (Id.)

When operating normally, the shredding machine will discharge shredded paper onto another conveyor belt. (Id.) The shredded paper will ascend upward approximately 20 feet until it is dumped into the attached industrial baling machine. (Id.) The baling operation is also initiated by the shredder operator. (Id.) One of the operator's duties is to load the steel baling wires into the baler and ensure that they are properly manipulated by the baling machine. (Id.) Operators

must be careful not to catch any part of their body between the steel wire and the baler machine as the wire is pulled into the machine and tightened. (Id.) Once a bale is fully formed, it is removed by a forklift and stacked with other bales. (Id.) A typical bale can weigh in excess of 800 pounds. Once enough bales are accumulated, they are loaded onto a truck by forklift and transported away from UCO. (Id.)

The ADA defines "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Plaintiff was not qualified to operate the shredding/baling machines. Performing the shredding/baling operation requires at least a minimum level of sound judgment and decision-making. (MSJ Ex. 17, Expert Report of Robert Burch). It also requires the ability to follow prescribed safety practices. (Id.) The manual for the AMS-3000 contains a safety warning section, which details 20 specific warnings. (Id.; MSJ Ex. 21). Two of those warnings require that operators (1) read and understand the instruction manual and be aware of all warning stickers and (2) never operate the shredder or any other machine while under the influence of drugs, alcohol, or medications. (MSJ Ex. 17; MSJ Ex. 21).

Plaintiff's reading level is somewhere between kindergarten and the 3rd grade. (MSJ Ex. 23). Accordingly, he could not read and understand the operating manual and safety warnings. Additionally, he was required to take medication to control his seizures (Depakote) and his obsessive-compulsive disorder (Fluvoxamine). (Burnside Records). FDA reported side effects for Depakote include drowsiness and dizziness. (MSJ Ex. 18).[12] FDA reported side effects for Fluvoxamine include drowsiness. (MSJ Ex. 19).[13] Because Plaintiff required these medications,

[12] Located on the FDA website at: https://www.accessdata.fda.gov/drugsatfda_docs/label/2018/021168s038lbl.pdf. The Court may take judicial notice of warning label information published on the FDA website. *Aaron v. Medtronic, Inc.*, 209 F. Supp. 3d 994, 1014 (S.D. Ohio, September 22, 2016).

[13]Located on the FDA website at: https://www.accessdata.fda.gov/drugsatfda_docs/label/2012/021519s003lbl.pdf.

he could not comply with the safety warning not to operate File 13 machinery, while taking medications. (MSJ Ex. 17; MSJ Ex. 21).

Plaintiff was also not qualified to operate the shredder and baling machines because he has no concept of danger and lacks the ability to make informed decisions that are unlikely to result in harm to himself or others. Indeed, even at home, Plaintiff required the constant presence of another person, day and night, to perform activities that required remembering, decision-making and judgment. Accidents caused by operating industrial shredders and balers can cause severe injury and even death. (MSJ Ex. 17) Due to the complexity and inherent danger involved with the shredding/baling operation, an operator must have *at least* a minimum level of focus, sound judgment and decision-making ability. (Id.) Plaintiff has never demonstrated these abilities *in his life*.

To even suggest that Plaintiff was qualified to perform this complex operation in a safe and efficient manner is not only a leap of pure fantasy – it is unconscionably irresponsible. Plaintiff demonstrated for years that he needed assistance simply removing tissue paper from folios – sometimes at a rate of less than a handful per hour. In his EEOC charge and original Complaint, Plaintiff's next friend stated that it took her "seven years to teach [Plaintiff] how to put on a pair of socks and tennis shoes that have Velcro enclosures." Simply permitting Plaintiff to enter the File 13 secured area would violate the repeated mandate in his Individual Plans to "keep him out of harm's way."

Incredibly, however, Plaintiff's mother/next friend and attorneys claim he was qualified to perform the tasks required of a File 13 shredder operator, in part, because he "had experience operating a document shredder in connection with his mother's accounting business and enjoyed doing so." (TAM ¶8). This is so disingenuous it borders on outright falsehood. The shredder Plaintiff purportedly utilized to perform shredding is in reality nothing more than a small compact

office shredder (Staples Professional Series). [14] (T. Basil Dep. 95:13-15; MSJ Ex. 22, Plaintiff's Interrogatory Response). Plaintiff's mother admits that (1) the shredder in her office looks nothing like the one at UCO, (2) the one at UCO is an "industrial shredder," and (3) she never even saw or heard the UCO shredder in operation. (T. Basil Dep. 42:24 -45:1-14). The fact is, Plaintiff never operated a machine like the AMS-3000 shredder or the HL-12HD baler and he never performed the type of complex and inherently dangerous operations the File 13 shredder operator was required to perform. The comparison is at best silly and at worst grossly misleading.

**3. Forcing Plaintiff to work on the production line or the shredder would have created a direct threat to Plaintiff and others.**

As a corollary, forcing Plaintiff to operate the shredder and baling machines would have posed a "direct threat" to Plaintiff and others. A disabled person is not qualified for an employment position, "if he or she poses a 'direct threat' to the health or safety of others which cannot be eliminated by a reasonable accommodation." *Mauro v. Borgess Med. Ctr*., 137 F.3d 398, 402 (6th Cir. 1998); see also *Holiday v. City of Chattanooga*, 206 F.3d 637, 647 n.4 (6th Cir. 2000) (same); 42 U.S.C. § 12113(b). A "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

An employer need not rely on a medical opinion to determine that a person poses a direct threat. Rather, "testimonial evidence" concerning the employee's behavior "can provide sufficient support for a direct threat finding under the ADA." *Michael v. City of Troy Police Dept*., 808 F.3d 304, 307 (6th Cir. 2015)(quoting *Darnell*, 417 F.3d at 660). The Sixth Circuit instructs there are four factors to be considered in a direct-threat analysis: (i) the duration of the risk, (ii) the nature and severity of the potential harm, (iii) the likelihood that the potential harm will occur, and (iv) the imminence of the potential harm. *Wurzel v. Whirlpool Corp*., 482 Fed. Appx. 1, *12, 2012

[14] A video demonstrating Staples Professional Series Shredders can be found at: https://www.youtube.com/watch?v=ro4VNZgDSD0

U.S. App. LEXIS 8640 (6th Cir. 2012) (citing 29 C.F.R. § 1630.2(r); and, *Mauro*, 137 F.3d at 402).

UCO can point to evidence establishing each element of the four-part, direct threat analysis. First, with respect to the duration of the risk, Plaintiff suffered from autism, epilepsy, mental retardation and anxiety disorder from childhood and/or early adulthood. There is no evidence this would have changed while he was employment by UCO. Indeed, his post-separation medical records indicated he was still diagnosed with these conditions. (MSJ Ex. 2) Second, the nature and severity of the harm posed by the shredder, baler and the moving vehicles in the area includes serious physical injury and/or death. (MSJ Ex. 17). As to the third and fourth elements, (iii) the likelihood that the potential harm will occur, and (iv) the imminence of the potential harm, Plaintiff's own Individual Plan (developed with the assistance of his mother/next friend) expressly states that Plaintiff has no concept of danger and must be kept out harm's way. Indeed, the instruction that Plaintiff must be supervised *within arms-length* when around moving motor vehicles demonstrates that the likelihood and imminence of the potential harm is very great.

There is simply no doubt that Plaintiff would have posed a danger to himself and others had UCO permitted him to perform the shredding/baling operation. Indeed, had UCO done so, it almost certainly would be in court anyway - facing litigation resulting from the catastrophic accident that was certain to occur. Put another way, Plaintiff's mother/next friend and counsel are attempting to force UCO on to the same "razor's edge" the Sixth Circuit warned about in *Green v. Burton Rubber Processing, Inc*., *supra* (quoting *Palmer v. Cir. Court of Cook County, supra)* – choosing between committing willful negligence or being accused of intentional discrimination.

**C. Plaintiff cannot demonstrate that any of UCO's proffered reasons for its decisions are a pretext for discrimination.**

Because UCO can articulate legitimate, non-discriminatory reasons for its decisions, the burden shifts back to Plaintiff to prove that those reasons are merely a pretext for discrimination. The Sixth Circuit has recognized three primary ways for a plaintiff to show that the defendant's proffered reason for the adverse employment action is pretextual. The plaintiff may show "'either (1) that the proffered reasons had no basis in fact; (2) that the proffered reasons did not actually motivate his [or her] [adverse action]; or (3) that they were insufficient to motivate [the adverse action].'" *Downs v. AOL Time Warner, Inc*., Case No. 2:03-CV-1117, 2006 U.S. Dist. LEXIS 4848 at *23-24 (S.D. Ohio, January 20, 2006)(quoting *Weigel v. Baptist Hospital of East Tennessee,* 302 F.3d 367, 377 (6th Cir.2002)(quoting *Manzer v. Diamond Shamrock Chemicals Co.,* 29 F.3d 1078, 1084 (6th Cir.1994).

It is undisputed that Plaintiff engaged in aggressive behaviors, including violently attacking UCO and CCHS staff. In addition to the testimony of UCO staff, Plaintiff's mother/next friend admits this. Nor can it be disputed that Plaintiff was unable to (a) perform complex work, (b) work at a moderate, sustained pace or (c) recognize danger. The overwhelming testimony and documentary evidence proves this. Therefore, Plaintiff cannot demonstrate pretext through the first method – that UCO's reasons have no basis in fact.

Further, Plaintiff can adduce no evidence that the facts cited above did not actually motivate UCO in making its decisions. UCO production supervisor, Sarah Snapp, testified that Plaintiff was assigned to tasks that reduced the likelihood he would engage in aggressive behavior for safety reasons. (Snapp Dep. 103:6-104:13). Snapp further testified that employees needed to demonstrate proficiency at a simpler task before they could move to the production line. (Id. 90:1-5). She and Kristie Huffman confirmed that developmentally disabled employees often moved

between the tables and the line – sometimes temporarily, sometimes permanently. (Huffman Dep. 35:14-36:9). But the testimony and production statistics prove Plaintiff was one of the slowest employees even when performing the easiest tasks. Accordingly, Plaintiff cannot demonstrate pretext using the second method because UCO's decision to assign Plaintiff primarily to the tables was clearly motivated by his conduct and his performance.

The Sixth Circuit explains that the third method of proving pretext involves demonstrating that the reasons proffered by the employer for its actions were *insufficient* to motivate the actions. *Layman v. Alloway Stamping & Mach. Co*., 98 Fed. Appx. 369, 377, 2004 U.S. App. LEXIS 6478 (6th Cir. 2004). This is ordinarily accomplished through evidence that other employees, particularly employees not in the protected class, were treated more favorably though they engaged in substantially identical conduct to that which the employer contends motivated its decisions. *Id.* (citing *Manzer v. Diamond Shamrock Chem. Co*., 29 F.3d 1078, 1084 (6th Cir. 1994)). Plaintiff can produce no evidence that UCO has treated any non-developmentally disabled employee differently when the employee has demonstrated (1) aggressive conduct, (2) inability to recognize danger or (3) failure to maintain the production line pace – because no such evidence exists. Further, UCO's response to Plaintiff's outbursts when faced with new tasks was consistent with how it normally responded to production associates demonstrating similar reactions. (Snapp Dep. 65:24-66:15).

**D. Plaintiff cannot point to any evidence that UCO acted with malice or reckless indifference to Plaintiff – punitive damages are unwarranted.**

"The ADA permits an award of punitive damages 'if the complaining party demonstrates that the [employer] engaged in a discriminatory practice . . . with malice or with reckless indifference to [her] federally protected rights.'" *Bates v. Dura Auto Sys., Inc.* 767 F.3d 566, 583 (6th Cir. 2014)(citing 42 U.S.C. § 1981a(a)(2) & (b)(1). "The terms 'malice' or 'reckless

indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.'" *Id*. (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999)). "To be liable for punitive damages, 'an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law.'" *Id*. (quoting *Kolstad* at 536). "'Employers who are simply 'unaware of the relevant federal prohibition' or believe that the discrimination is lawful are not subject to punitive damages liability.'" *Preferred Props., Inc. v. Indian River Estates, Inc*., 276 F.3d 790, 799 (6th Cir. 2002) (quoting *Kolstad*, 527 U.S. at 536-37).

The Sixth Circuit describes a three-part test for determining when punitive damages can be recovered. *Hubbell v. FedEx SmartPost, Inc*., Case No. 18-1373/1727, 2019 U.S. App. LEXIS 23300 (6th Cir. 2019)(citing *Kolstad, supra*). First, a plaintiff must demonstrate that the individuals perpetrating the discrimination acted with malice or reckless indifference toward the plaintiff's federally protected rights. *Id*. A plaintiff satisfies this prong by demonstrating the individual in question acted in the face of a perceived risk that its actions will violate federal law. *Id*. (citing *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1072 (6th Cir. 2015)). Second, a plaintiff must demonstrate that the employer is liable by establishing that the discriminatory actor worked in a managerial capacity and acted within the scope of his employment. *Id*. Third, the defendant may avoid punitive-damages liability by showing that it engaged in good-faith efforts to comply with Title VII. *Id.* (citing *Kolstad*, 527 U.S. at 539-41, 544-46).

As the basis for liability, Plaintiff's TAM alleges that UCO failed to provide Plaintiff with "an adequate individualized inquiry into his skills and abilities." (TAM ¶ 35). As a threshold matter, it is undisputed that production supervisors working with Plaintiff made the determination to assign him primarily to the pre-production area. (Snapp Dep. 60:20-61:13). Plaintiff can produce no evidence, however, that any of these production supervisors were aware of any specific

statutory or regulatory requirement to provide Plaintiff with "an adequate individualized inquiry into his skills and abilities" before making such decisions – to the extent that any such specific requirement actually exists.

That said, it cannot be reasonably disputed that UCO's staff made good faith efforts to assess each individual employee's capabilities when there were initially hired. (Amerine Dep. 81:1-14; Snapp Dep. 88:17-89:10). Further, UCO staff took each employee's preferences into account when determining work assignments. (Eley Dep. 69:14-22; Snapp Dep. 53:12-54:8). And, employees' work assignments were individually re-evaluated. (Snapp Dep. 62:5-19, 63:4-6).

Contrary to the allegations in his TAM, Plaintiff's abilities were continually assessed and evaluated. And he was continually encouraged to try new tasks. Further, UCO staff consulted with CCHS staff, who were privy to the information contained in Plaintiff's Individual Plans, and incorporated CCHS advice into their evaluations of Plaintiff's work performance. (Snapp Dep. 79:11-14). UCO staff also consulted with CCHS staff to determine effective methods of communicating with Plaintiff to determine his needs. (Snapp Dep. 100:20-101:13). And, they accommodated in him a variety of other ways, including but not limited to: moving other employees away from him, who might trigger an outburst from Plaintiff; moving work to him, instead of making him move; assisting him with actual performance of his work; and, taking measures to calm Plaintiff down when he was agitated. (Snapp Dep. 108:11-109:14). By any objective measure, UCO deserves to be commended for the patience, care and attention it devoted to Plaintiff – *not subjected to punitive damages.*

**E. Plaintiff's claims are barred by the applicable statute of limitations.**

The alleged discriminatory act occurred on or about July 2008. Plaintiff filed his EEOC charge on October 5, 2016. He filed his original Complaint on July 28, 2017. In Ohio, an EEOC

charge must be filed within 300 days of an alleged violation. *Gainor v. Worthington City Sch*., Case No. 2:11-CV-561, 2013 U.S. Dist. LEXIS 176031 at *20 (S.D. Ohio, December 13, 2013). A legal action based on that EEOC charge must be filed in an appropriate court no later than 90 days after the charging party receives a "right-to-sue" letter from the EEOC. *Gibson v. Mechanicsburg Police Dep't*., Case No. 3:16-cv-48, 2017 U.S. Dist. LEXIS at *26-27 (S.D. Ohio, June 2, 2017). These two requirements form the applicable "statute of limitations" for a federal ADA claim. On the other hand, a six-year statute of limitations period applies to disability discrimination claims brought pursuant to R.C. §4112.02. *Benge v. GMC*, 267 F. Supp. 2d 794, 799-800 (S.D. Ohio, March 31, 2003). Accordingly, any acts of alleged discrimination occurring prior to July 28, 2011 (six years prior to the date Plaintiff filed this action) would fall outside the applicable statute of limitations.

Plaintiff alleges he was "relegated" to the pre-production area for the "duration" of his employment. (TAM ¶ 35). Evidence demonstrates UCO gave Plaintiff an opportunity to work on the production line but he indicated very quickly that he did not want to work there. It is undisputed, however, that Plaintiff began his career in the pre-production area and worked there for most of this time at UCO. If UCO "relegated" Plaintiff to the pre-production area or failed to provide him with an "adequate individualized assessment," as alleged (TAM ¶ 26), then he was on notice of such fact shortly after he was hired in July 2008. He was certainly on notice of such fact by July 28, 2011 (three years later and six years before he filed this action).

Indeed, Plaintiff's mother/next friend claims that she "asked over and over again over the course of seven years" for UCO to try Plaintiff out on other jobs. (T. Basil Dep. 20:17-21:1). When it was pointed out that UCO did try Plaintiff out on a particular job other than tissue removal, she stated "it was a chance that he should have been given seven years before he was offered it." (Id. 36:21-37:4). As early as August 2008, she complained that Plaintiff's pay was "not a good

wage for a handicapped individual." (Id., Ex. E). And yet, she waited until October 5, 2016 to file Plaintiff's EEOC charge and July 28, 2017 to file any legal action claiming disability discrimination.

As worded, Plaintiff's TAM clearly identifies the initial alleged discriminatory actions ("relegating" and "failing to provide individualized assessment") as occurring at or within days of his hiring. Accordingly, the statute of limitations began running sometime in July 2008 or shortly thereafter and would have expired 300 days later for Plaintiff's federal claim and six years later (in mid-2014) for his state claim.[15] Because Plaintiff did not file his EEOC charge until October 2016 or his legal action until July 2017, his claims are barred by the applicable statute of limitations.

**1. Plaintiff's claims cannot be saved by a "continuing violation" theory.**

In Paragraph 3 of his TAM, Plaintiff alleged that UCO "continually violated" the ADA and Ohio law. To the extent Plaintiff is attempting to save his claims from the fatal application of the relevant statutes of limitations, resorting to the "continuing violation" doctrine will not do so. "A plaintiff can establish a continuing violation if he or she shows a 'longstanding and demonstrable policy of discrimination.'" *Katz v. Beverly Hills*, 677 Fed. Appx. 232, 236, 2017 U.S. App. LEXIS 1521 (6th Cir. 2017)(quoting *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003); see also *Dixon v. Anderson*, 928 F.2d 212, 217 (6th Cir. 1991)(plaintiff must demonstrate the existence of an "over-arching policy of discrimination.").[16] "This requires a showing by a preponderance of the evidence that some form of intentional discrimination against the class of

[15] While the Court should look to "state law to identify the applicable statute of limitations, federal law must be applied when determining when the relevant limitations period begins to run." *Swift v. Edelman*, Case No. 1:17-CV-854, 2018 U.S. Dist. LEXIS 207870 at *5 (W.D. Mich., November 8, 2018)(citing *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003) and *Hebron v. Shelby County Gov't*, 406 Fed. Appx. 28, 31, 2010 U.S. App. LEXIS 26028 (6th Cir. 2010).

[16] See also, *Chapa v. Genpak*, LLC, 10th Dist. No 12AP-466, 2014-Ohio-897 at *P100.

which plaintiff was a member was the . . . standing operating procedure." *Id*. Further, a plaintiff "must demonstrate something more than the existence of discriminatory treatment in his case." *Id.* Last, a party cannot claim a continuing violation based on "continuing effects of past discriminatory acts." *Block v. Meharry Med. College*, 723 Fed. Appx. 273, 279, 2018 U.S. App. LEXIS 1392 (6th Cir. 2018).

As a threshold matter, Plaintiff has not even alleged the existence of an "over-arching policy of discrimination" directed at the entire class of which Plaintiff was a member. See *EEOC v. Knoll North America, Inc*., Case No. 1:95-CV-174, 1996 U.S. Dist. LEXIS 7498 at *12 (W.D. Mich., May 2, 1996). Even if his TAM could be liberally construed as making such an allegation, however, Plaintiff cannot point to any evidence proving the existence of such a policy. The undisputed evidence proves that developmentally disabled individuals could work on the production line, so long as they demonstrated the ability to do so. Indeed, the production line has always been staffed primarily with developmentally disabled employees. Further, it is undisputed that developmentally disabled employees worked in File 13, as well. The sad truth is, and always has been, that Plaintiff's opportunities at UCO (and his pay) were limited only by his own performance and behavior.

Although the production line existed when Plaintiff first started at UCO in 2008, he may try to argue that UCO did not acquire File 13 until 2015. This would not save a continuing violation claim, however, because Plaintiff's allegation is that UCO determined *from the beginning* that he could not work in any area outside the pre-production area and refused all subsequent requests to do so. Accordingly, any alleged prohibition regarding an assignment to File 13 would simply constitute a "continuing effect" of the initial alleged discriminatory action – the determination that Plaintiff could not work outside the pre-production area. See *Hebron v. Shelby County Gov't*, 406 Fed. Appx. 28, 31, 2010 U.S. App. LEXIS 26028 (6th Cir. 2010); *EEOC v.*

*Knoll North America, Inc., supra* at *11-12; and, *Borkins v. United States Postal Serv.*, Case No. 94-1589, 1994 U.S. App. LEXIS 33236 at *4 (6th Cir. 1994).

**VIII.CONCLUSION**

For all of the reasons detailed above, Plaintiff cannot produce evidence sufficient to survive summary judgment on any of his claims. That said, UCO also wants to drag the real agenda underlying Plaintiff's lawsuit into the light. The truth is, Plaintiff's lawsuit is really just a collateral attack on the Section 14(c) Certificate. It is unfortunate that UCO rendered itself vulnerable to this activist misuse of the ADA by voluntarily finding ways to pay at least a minimum wage base rate for certain jobs, when it could have simply continued paying piece-rate for all jobs. UCO has, and always will be, committed to creating meaningful employment opportunities for developmentally disabled individuals - many of whom will simply never be able to obtain competitive community employment. The dollars spent on defending this lawsuit, however, are dollars not reinvested toward that critical mission.

It bears repeating. No good deed goes unpunished.

Respectfully submitted,

*/s/ Danny L. Caudill*

Robert J. Beggs (0002966)
BEGGS LAW OFFICES CO., LPA
1675 Old Henderson Rd.
Columbus, Ohio 43220
(614) 678-5640 Direct Dial
(614) 448-9408 Fax
John.Beggs@BeggsLawOffices.com
*Trial Counsel for Defendant U-CO Industries, Inc.*

Danny L. Caudill (0078859)
THE CAUDILL FIRM, LLC
175 S. Third St., Suite 200
Columbus, Ohio 43215
(614) 500-3401 Direct Dial
(631) 448-4544 Fax

dlcaudill@caudillfirm.com
*Co-Counsel for Defendant U-CO Industries, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 29, 2019, a copy of the foregoing was served on counsel for all parties via the Clerk of Court's electronic filing system and/or e-mail.

/s/ *Danny L. Caudill*
Danny L. Caudill (0078859)