[Cite as *Curry v. Blanchester*, 2010-Ohio-3368.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

ANNETTE CURRY, et al.	:	
Appellees/Cross-Appellants,	:	CASE NOS. CA2009-08-010 CA2009-08-012
	:	
- vs -	:	O P I N I O N 7/19/2010
VILLAGE OF BLANCHESTER, et al.	:	
Appellants/Cross-Appellees.	:	

CIVIL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CVH20040333

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YOUNG, P.J.

{¶1} Defendant-appellant/cross-appellee, Thomas White, appeals the decision of the Clinton County Court of Common Pleas partially granting and partially denying his motion for summary judgment in an action filed by plaintiff-

appellee/cross-appellant, Annette Curry, stemming from the loss of her employment with the village of Blanchester ("the Village").

{¶2} Curry was hired by the Village in May 1990 to serve as clerk of courts for the Mayor's Court and secretary to the mayor. Over the years, Curry was given additional duties including providing clerical work for the police department, zoning office, and clerk-treasurer's office. Curry also provided cleaning services for the municipal building pursuant to a written contract with the Village executed in May 2003.

{¶3} Plaintiff, Barbara Tindle, was hired by the Village in early 2002 to serve as deputy clerk for the Mayor's Court. Tindle assisted Curry and also performed clerical and secretarial work for other departments.

{¶4} Appellant, Thomas White, was elected in November 2003 to serve as mayor of the Village for a term beginning on January 1, 2004. Prior to the beginning of his term, White posted written notices around town holding himself out as mayor and notifying the public that the Mayor's Court would be closed effective January 1, 2004. On January 7, 2004, after taking office, White delivered written notices to Curry and Tindle stating that they were terminated. White also verbally instructed them to leave the premises. When they refused, White called the Clinton County Sheriff's Department for assistance. The deputy sheriffs advised Curry and Tindle they would be arrested for trespass if they refused to leave. After consulting with their attorney over the phone, Curry and Tindle informed the deputies that an arrest would violate their civil rights. After consulting with the prosecutor's office, the

deputies left the scene. Curry and Tindle were neither arrested nor removed from the premises.

{¶5} In January 2004, the Village council adopted a resolution terminating Curry's and Tindle's positions with the Village.

{¶6} Pertinent to this case is a "Comprehensive Personnel Policies and Employee Handbook" adopted by resolution by council on September 26, 1996. This handbook contains provisions covering procedures for abolishing positions and for layoffs and employee recall. Curry asserts the procedures were not followed when her employment with the Village (and that of Tindle's) was terminated or when a new clerical position created by the Village was staffed after they were terminated. White avers that Curry and Tindle were employees "at will" who could be terminated by the Village at any time. White further avers that based upon the handbook's disclaimer language, Curry and Tindle did not have a property interest in their positions; thus, the procedures contained in the handbook needed not be observed.

{¶7} Additionally pertinent to this case are Curry's allegations that White made three derogatory comments about her to other people. First, Curry alleges that while her raise was being discussed during an executive session of council, White stated that her "titties were hanging out and she was wearing short shorts." Second, Curry alleges that White declared, in the presence of several people at a local pub, that Curry was "all tits and no brain." Finally, Curry alleges that White told one of the Blanchester police officers that Curry was having an affair with the police chief.

{¶8} On May 18, 2004, Curry and Tindle filed a complaint against the Village; Mayor White; Vice Mayor Cindy Sutton; council members Madalyn Loftin[1], John Smith, and Dave Wallace; Loree Smith, wife of councilman John Smith; Lieutenant Brett Prickett of the Clinton County Sheriff's Department; the Clinton County Sheriff's Department; and the Clinton County Commissioners. The complaint asserted 13 claims including wrongful termination, violation of due process, and the following intentional tort claims: defamation, invasion of privacy, and intentional infliction of emotional distress.

{¶9} On September 29, 2006, White, joined by the Village, the vice mayor, and the three council members ("the defendants") moved for summary judgment. In July 2007, the trial court ordered Curry and Tindle to file a supplemental brief delineating which of their original claims they intended to pursue against which specific defendants and which claims they intended to dismiss.

{¶10} In compliance with the trial court's order, Curry and Tindle subsequently filed a document in which they stated their intent to pursue the following nine claims against White and the defendants: (1) unlawful and/or wrongful discharge; (2) violation of procedural and substantive due process; (3) breach of contract and/or promissory estoppel; (4) invasion of privacy; (5) defamation; (6) intentional infliction of emotional distress; (7) sex/gender discrimination; (8) tortious interference with business or professional relations; and (9) deprivation of civil rights under 42 Section 1983, Title 42, U.S.Code. The document also listed four of the original claims that were not pursued.

1. Madalyn Loftin died on March 12, 2006. Her estate was subsequently substituted as a defendant pursuant to Civ.R. 25(A)(1).

{¶11} On June 16, 2008, the trial court issued a decision granting in part and denying in part the motion for summary judgment. The trial court denied summary judgment with regard to the claim for breach of the written cleaning contract; denied summary judgment to White with regard to the intentional tort claims; elected not to rule on the tortious interference claim at that time; and granted summary judgment to White and the defendants on the remaining claims listed in the document filed by Curry and Tindle. White and the defendants appealed the trial court's decision to this court; Curry and Tindle filed a cross-appeal.

{¶12} On April 6, 2009, upon finding that the trial court's 2008 decision was not a final appealable order because it did not dispose of all sovereign immunity issues, we dismissed the appeal. We also dismissed the cross-appeal due to pending claims and the lack of a Civ.R. 54(B) certification. *Curry v. Blanchester*, Clinton App. Nos. CA2008-07-024, CA2008-07-028, 2009-Ohio-1649.

{¶13} Curry and Tindle subsequently dismissed council member Dave Wallace, Lieutenant Brett Pickett, the Clinton County Sheriff's Department, and the Clinton County Commissioners as defendants, and dismissed their tortious interference claim.

{¶14} On July 17, 2009, the trial court issued its decision granting in part and denying in part the motion for summary judgment. Relevant to this appeal, the trial court granted summary judgment to White and the defendants with regard to the unlawful/wrongful termination claim. The trial court also found that Curry was not deprived of her civil rights by White and the defendants, and that even if she was, White and the defendants were entitled to qualified immunity. With regard to the

intentional tort claims, the trial court (1) granted summary judgment to the Village on the ground of sovereign immunity; (2) found that the vice mayor and council members Loftin and Smith were not entitled to sovereign immunity with regard to Curry's intentional tort claims but granted summary judgment in their favor based on Curry's deposition; (3) granted summary judgment to White, the vice mayor, and council members Loftin and Smith with regard to Tindle's intentional tort claims based on Tindle's deposition; and (4) summarily denied summary judgment to White with regard to Curry's intentional tort claims. The trial court further found that White was neither entitled to sovereign immunity under R.C. 2744.03(A)(6) nor to "absolute immunity."

{¶15} White appeals, raising one assignment of error[2]:

{¶16} "THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO WHITE FOR DEFAMATION, INVASION OF PRIVACY AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS."

{¶17} On appeal, a trial court's decision granting summary judgment is reviewed de novo.[3] *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. See Civ.R. 56(C); *Harless v. Willis Day*

2. The Village, the vice mayor, and council members Loftin and Smith did not appeal the trial court's 2009 decision. Likewise, Tindle did not appeal the trial court's 2009 decision.

3. In light of the Ohio Supreme Court's decisions in *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, and *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, the trial court's decision is a final appealable order pursuant to R.C. 2744.02(C). See *State ex rel. River City Capital v. Clermont Cty. Bd. of Commrs.*, Clermont App. No. CA2008-12-110, 2009-Ohio-4675.

Warehousing Co. (1978), 54 Ohio St.2d 64, 66. The movant bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once this burden is met, the nonmovant may not rest upon mere allegations or denials of the movant's pleadings. Rather, the nonmovant has a reciprocal burden to set forth specific facts showing a genuine issue for trial. Id.; Civ.R. 56(E).

{¶18} The trial court summarily denied White's summary judgment motion "on [ ] Curry's claims of invasion of privacy, defamation, and intentional infliction of emotional distress, based upon the Civ.R. 56(C) evidence before [the] court." The trial court also held White was not entitled to statutory immunity under R.C. 2744.03(A)(6)(a) and (b) as to Curry's intentional tort claims. Nor were White's statements and actions shielded by absolute immunity as "it [did] not appear [they] were committed in conjunction with legislative action as opposed to personnel matters."

{¶19} On appeal, White argues the trial court erred in denying his summary judgment motion with regard to Curry's intentional tort claims. Specifically, White argues (1) he is entitled to immunity under R.C. 2744.03(A) with regard to the defamation claim; (2) the two derogatory comments referring to Curry's physical appearance are shielded by absolute immunity as they were made during a council meeting; (3) neither comments rise to the level of actionable defamation or intentional infliction of emotional distress; and (4) Curry cannot state a claim for invasion of privacy as the comment about Curry's alleged affair with the police chief was not publicized to the public at large.

{¶20} As noted earlier, Curry's intentional tort claims involve three derogatory comments made by White about her to other people.[4] First, in 1998, while Curry's pay raise was being discussed during an executive session of council, White allegedly stated that Curry's "titties were hanging out and she was wearing short shorts." At the time, White was a council member. Second, in July 2003, White allegedly declared, in the presence of several people at a local pub, that Curry was "all tits and no brain." At the time, White was a private citizen, not an elected official. Finally, in 2004, White allegedly told one of the Village's police officers that Curry was having or had an affair with the police chief. At the time, White was mayor of the Village.

{¶21} Before we address White's immunity arguments, we must determine the appropriate R.C. Chapter 2744 political-subdivision-immunity analysis applicable to White in light of the Ohio Supreme Court's recent decision in *Lambert v. Clancy*, Slip Opinion No. 2010-Ohio-1483. In *Lambert*, the supreme court held that when the allegations in a complaint are directed against an office of a political subdivision, the officeholder named as the defendant is sued in his *official* capacity, not in his individual or personal capacity. As a result, the three-tiered political-subdivision-immunity analysis set forth in R.C. 2744.02 applies to such lawsuits. Id. at ¶17, 22. By contrast, when the allegations in a complaint are directed against the actions of an individual employee of a political subdivision, the employee named as the defendant is sued in his individual or personal capacity, and the employee-immunity

4. Neither the trial court nor the parties provided specific dates as to when these derogatory comments were made. We were able to determine when the statements were made, and White's status when he made them, based upon the parties' depositions and the affidavits Curry attached to her response to the summary judgment motion.

provision of R.C. 2744.03(A)(6) applies to such lawsuits. Id. at ¶10, 15-16.

{¶22} Upon reviewing the complaint filed by Curry, we find that Curry asserted her intentional tort claims against White in his individual capacity as an employee of a political subdivision, rather than in his official capacity as an officeholder of the political subdivision. To be sure, the complaint states White "is being sued in his official capacity as Mayor of the Village of Blanchester for all acts complained of[.]" However, the complaint states White is also being sued "individually for acts outside the scope of [his] position or employment with the Village of Blanchester." More importantly, the allegations in the complaint with regard to the intentional tort claims pertain to actions taken and statements made by White personally, and not to the policies and practices of the mayor's office. See *Lambert* at ¶15-16. It follows we must determine whether White is immune from liability under R.C. 2744.03(A)(6). Id. at ¶10. We note that this employee-immunity analysis will only apply to the comment about the affair and the "titties" comment, and not to the "tits and no brain" comment as the latter was made by White in a local bar as a private citizen, and not as an employee of a political subdivision. For the same reasons, the absolute immunity analysis will not apply to the "tits and no brain" comment.

IMMUNITY

{¶23} We first address the two comments made by White as an elected official, to wit, the "titties" comment made during an executive session of the council when White was a council member, and the affair comment made in 2004 when White was mayor of the Village.

A. Whether the "titties" comment was protected by absolute immunity

{¶24} White argues the "titties" comment is protected by absolute immunity because it was made during an executive session of the council. White was a council member at the time; council was discussing Curry's pay raise. Following White's comment, the subject of Curry's raise was dropped; Curry did not receive a raise that day.

{¶25} Absolute immunity (also called absolute privilege) provides complete protection from liability for defamation. See *Costanzo v. Gaul* (1980), 62 Ohio St.2d 106; *Floyd v. Thomas* (June 26, 2000), Preble App. No. CA99-07-016. However, the application of an absolute immunity is found only in very limited areas of activity and has generally been limited to legislative and judicial proceedings and other acts of state. *Costanzo* at 109. Statements made outside council meetings do not fall within the protection of absolute immunity. *Floyd* at 13.

{¶26} The Ohio Supreme Court determined that the rule of absolute immunity "may reasonably be applied to utterances made during the course of official proceedings by members of local governing bodies, at least where the statements relate to a matter under consideration, discussion or debate." Id. at 110. However, absolute immunity "should not be extended to members of city council, where there is no pending legislation relating to the subject matter of the alleged defamation and where the publication is beyond the legislative forum." Id.

{¶27} We find that White's "titties" comment is not protected by absolute immunity because it was not made in conjunction with legislative action. "[L]ocal legislators are entitled to absolute immunity as long as they are acting in a legislative capacity. * * * the scope of immunity depends on the nature of the activity involved.

[I]f local legislators act in a judicial or legislative capacity, they are entitled to absolute immunity." *Hogan v. South Lebanon* (1991), 73 Ohio App.3d 230, 234, citing *Haskell v. Washington Twp.* (C.A.6, 1988), 864 F.2d 1266. If, however, their conduct is administrative, they are not entitled to absolute immunity. *Hogan* at 234. The action of a local legislator is legislative if the underlying purpose is to establish general policy. If, however, the action singles out specific individuals and affects them differently from others, it is administrative. Id. at 234-235.

{¶28} The record before us indicates White's comment was made while council, of which White was a member, was discussing Curry's pay raise. The conduct dealt with personnel matters regarding a single and specific individual rather than with general policy, and was therefore administrative and not legislative. See *Poppy v. Willoughby Hills City Council*, Lake App. No. 2004-L-015, 2005-Ohio-2071 (city council not entitled to absolute immunity from city employee's action for gender discrimination as council's failure to pass an ordinance increasing employee's pay rate was administrative rather than legislative action). It follows the trial court did not err by finding White was not protected by absolute immunity. At this juncture, we note that absolute immunity also does not apply to White's affair comment as that comment was made beyond the scope of council meetings. See *Floyd*, Preble App. No. CA99-07-016, at 13.

B. Whether White is immune from liability under R.C. 2744.03(A)(6) regarding the "titties" comment and the affair comment

{¶29} Ohio law provides immunity for employees of political subdivisions under R.C. 2744.03(A)(6). This provision states that a political subdivision employee

is immune from liability in a civil action for claims arising from the employee's official actions *unless* one of three exceptions applies: (1) the employee's acts were manifestly outside the scope of employment or official responsibilities; (2) the acts were with malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) liability is expressly imposed by another section of the Revised Code. R.C. 2744.03(A)(6)(a)-(c). Curry does not cite a section of the Revised Code which would impose liability on White under R.C. 2744.03(A)(6)(c). Thus, the only two exceptions relevant to this appeal are the exceptions under R.C. 2744.03(A)(6)(a) and (b).

{¶30} R.C. Chapter 2744 does not define the type of employee acts that fall "manifestly outside the scope of employment or official responsibilities" under R.C. 2744.03(A)(6)(a). However, Ohio courts have generally drawn from agency-law principles to hold that "conduct is within the scope of employment if it is initiated, in part, to further or promote the master's business." *Jackson v. McDonald* (2001), 144 Ohio App.3d 301, 307; *Chesher v. Neyer* (C.A.6, 2007), 477 F.3d 784, 797. "In the context of immunity, '[a]n employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment.'" *Jackson* at 307. "It is only where the acts of state employees are motivated by actual malice or other [situations] giving rise to punitive damages that their conduct may be outside the scope of their state employment." Id.

{¶31} Applying the foregoing definitions, we find that White's "titties" comment was made within the scope of his employment; the affair comment, however, was not. As noted earlier, White made the "titties" comment as a council member during

an executive session of the council while Curry's pay raise was being discussed. At the time, Curry was clerk of courts for the Mayor's Court and secretary to the then mayor. While the comment was derogatory and crude, it was not "manifestly" outside the scope of White's employment.

{¶32} By contrast, White's affair comment was not made within the scope of his employment. The record indicates White made the comment in 2004 to Tim Rector when White was mayor of the Village. Specifically, based upon Rector's deposition, White made the comment to Rector, who was then acting as officer in charge, either in or after July 2004. At the time, Curry was no longer working for the Village. Further, Rector's deposition states that when White made the comment to him, they "did not discuss any legitimate performance issues regarding [Curry] * * * regarding [her] employment with the Village." Based on the foregoing, we find that White's affair comment was manifestly outside the scope of his employment. Therefore, White is not immune under R.C. 2744.03(A)(6) with regard to the affair comment.

{¶33} Although we found the "titties" comment was made within the scope of White's employment, we need to determine whether the exception to immunity found in R.C. 2744.03(A)(6)(b) for acts committed with malicious purpose, in bad faith, or in a wanton or reckless manner would still apply.

{¶34} "Malice" refers to "the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified." *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 453-454. "Bad faith * * * embraces more than bad judgment or

negligence" and involves "a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive, ill will partaking of the nature of fraud, [or] an actual intent to mislead or deceive another." Id. at 454, quoting *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, paragraph two of the syllabus.

{¶35} "Wanton misconduct" is the failure to exercise any care whatsoever. *McDonald*, 144 Ohio App.3d at 309. "[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor." *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 97. Likewise, "in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk. [It] therefore necessarily requires something more than mere negligence. In fact, 'the actor must be conscious that his conduct will in all probability result in injury.'" *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, ¶73-74. "Recklessness" is associated with the words "malicious purpose," "bad faith," and "wanton," all of which suggest conduct more egregious than simple carelessness. *Jackson*, 76 Ohio App.3d at 454.

{¶36} Showing wanton misconduct or recklessness is subject to a high standard when attempting to abolish employee immunity under R.C. 2744.03(A)(6)(b). *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, ¶37.

{¶37} Applying the foregoing definitions and in light of the high standard enunciated by the supreme court, we cannot say that the "titties" comment, while derogatory and crude, constitutes malice, bad faith, or wanton or reckless misconduct

under R.C. 2744.03(A)(6)(b). The trial court, therefore, erred in finding White was not entitled to statutory immunity under R.C. 2744.03(A)(6).

{¶38} In light of all of the foregoing, we find the trial court properly held White was not immune under R.C. 2744.03(A)(6) with regard to the affair comment. The trial court, however, erred in finding White was not immune under R.C. 2744.03(A)(6) with regard to the "titties" comment.

INTENTIONAL TORTS AND SUMMARY JUDGMENT

{¶39} We next address whether the trial court properly denied summary judgment to White on Curry's claims of invasion of privacy, defamation, and intentional infliction of emotional distress with regard to the "tits and no brain" comment and the affair comment.

A. Defamation

{¶40} Defamation is the publication of a false statement of fact "made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession." *Woods v. Capital Univ.*, Franklin App. No. 09AP-166, 2009-Ohio-5672, ¶27, quoting *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶9.

{¶41} To survive a motion for summary judgment in a defamation action, the plaintiff must make a sufficient showing of the existence of every element essential to his or her case. *Daubenmire v. Sommers*, 156 Ohio App.3d 322, 2004-Ohio-914, ¶79. Generally, the essential elements of a defamation action are that the defendant made a false statement, the false statement was defamatory, the false defamatory

statement was published, the plaintiff was thereby injured, and the defendant acted with the required degree of fault. Id. at ¶80.

{¶42} There are four classifications into which a plaintiff alleging defamation may fall: (1) a private person; (2) a public official; (3) a public figure; and (4) a limited-purpose public figure. Id. at ¶87. Classification determines the plaintiff's burden of proof. Id. The determination of whether a party is a private or public figure is a matter of law. Id. at ¶88.

{¶43} In the case at bar, the trial court summarily denied summary judgment to White with regard to Curry's defamation claim without determining Curry's classification. There is no evidence Curry was anything other than a private-figure plaintiff. Curry was clearly not a public official. Nor was she a public figure, or someone "who has achieved 'general fame or notoriety in the community' and 'pervasive involvement in the affairs of society.'" *Woods*, 2009-Ohio-5672 at ¶36, quoting *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 352, 94 S.Ct. 2997. We also find Curry was not a limited-purpose public figure.

{¶44} A limited-purpose public figure is a person who becomes a public figure for a specific range of issues by being drawn into or voluntarily injecting himself into a specific public controversy, *Daubenmire*, 2004-Ohio-914 at ¶89, and/or by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *E. Canton Edn. Assn. v. McIntosh*, 85 Ohio St.3d 465, 482, 1999-Ohio-282. A plaintiff does not become a limited-purpose public figure because the allegedly defamatory statements create a controversy; the controversy must have existed prior to the statements. *Fuchs v. Scripps Howard Broadcasting*

Co., 170 Ohio App.3d 679, 2006-Ohio-5349, ¶11. Upon reviewing the record in light of the foregoing definition, we find Curry was not a limited-purpose public figure. Rather, she was a private-figure plaintiff.

{¶45} When the plaintiff is a private figure, the required degree of fault is ordinary negligence. *Lansdowne v. Beacon Journal Pub. Co.* (1987), 32 Ohio St.3d 176, 180; *Great Lakes Capital Partners Ltd. v. Plain Dealer Publishing Co.*, Cuyahoga App. No. 91215, 2008-Ohio-6495, ¶18. Specifically, the plaintiff must prove by clear and convincing evidence that the defendant "failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication." *Lansdowne* at 180.

{¶46} White argues the trial court erred in denying summary judgment with regard to Curry's defamation claim. White asserts that the "tits and no brain" comment is a statement of opinion and is therefore not actionable. White makes the same assertion regarding the "titties" comment; however, White has immunity from liability under R.C. 2744.03(A)(6) with regard to that comment. White does not mention the affair comment. Curry, in turn, asserts the trial court properly denied summary judgment to White with regard to the three derogatory comments made by White, as well as when he falsely accused her of criminal trespassing on January 7, 2004.

{¶47} To be defamatory, a statement must be a statement of fact and not of opinion. *Fuchs*, 2006-Ohio-5349 at ¶39. Whether the alleged defamatory statement is fact or opinion is a question of law. Id. To determine whether a statement is fact or opinion, a court applies a totality-of-the-circumstances test, considering the

specific language used, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appears. Id. at ¶40.

{¶48} We find the "tits and no brain" comment was protected opinion. The statement was made by White as a private citizen while in a local bar. A reasonable listener would interpret the words used by White to be language conveying an opinion or mere hyperbole rather than factual information. Further, we cannot say the comment was verifiable. "Does the author imply that he has firsthand knowledge that substantiates the opinions he asserts?" *Worldnet Software Co. v. Gannett Satellite Information Network, Inc.* (1997), 122 Ohio App.3d 499, 505. White's statement does not imply "first-hand knowledge." Based upon the totality of the circumstances, White's "tits and no brain" comment was a statement of opinion and is therefore protected speech. See *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668.

{¶49} With regard to the affair comment, we find that Curry has failed to show there is a genuine issue of material fact. As stated earlier, to survive a motion for summary judgment in a defamation action, a plaintiff must make a sufficient showing of the existence of every element essential to his case. *Daubenmire*, 2004-Ohio-914 at ¶79. One of the elements of a defamation action is that the plaintiff was injured by the false defamatory statement. The record indicates White made the statement to Tim Rector either in or after July 2004, thus several months after Curry's employment with the Village was terminated. Curry failed to provide any evidence that she was injured by the affair comment or how she was thereby injured.

{¶50} Finally, Curry asserts White defamed her when he falsely accused her

of criminal trespassing on January 7, 2004; thus, the trial court properly denied summary judgment to White. We disagree. A review of the affidavits and depositions filed in the case show that on January 7, 2004, White called the Clinton County Sheriff's Department after Curry and Tindle refused to leave the premises. After Curry told one of the deputy sheriffs she was not leaving, the deputy advised her she could be arrested for criminal trespassing. Before and after that exchange, White twice stated he wanted Curry and Tindle arrested if they did not leave. The first time was to the deputy in White's office; the second time was to the deputy in front of Curry and Tindle. Curry failed to provide any evidence that White falsely accused her of criminal trespassing or that his statements about Curry's possible arrest were false.

{¶51} In light of all of the foregoing, we find that the trial court improperly denied summary judgment to White with regard to Curry's defamation claim.

B. Intentional infliction of emotional distress

{¶52} To establish a claim for intentional infliction of emotional distress, a plaintiff must show that (1) the actor either intended to cause emotional distress or knew or should have known the actions taken would result in serious emotional distress to the plaintiff; (2) the actor's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency" and was such that it can be considered as "utterly intolerable in a civilized community;" (3) the actor's actions were the proximate cause of plaintiff's psychic injury; and (4) the mental anguish suffered by the plaintiff is so serious and of a nature that "no reasonable man could be expected to endure it." *Garrison v. Bobbitt* (1999), 134 Ohio App.3d 373, 378-379. "[M]ajor

outrage is essential to the tort, and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough." *Strausbaugh v. Ohio Dept. of Transp.*, 150 Ohio App.3d 438, 2002 Ohio 6627, ¶15. Indeed, as the Ohio Supreme Court held,

{¶53} "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. * * * the liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. * * * [P]laintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt." *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374-375.

{¶54} White argues the trial court erred in denying summary judgment with regard to Curry's intentional infliction of emotional distress claim. White asserts that the "tits and no brain" comment, while arguably in poor state, is neither outrageous, extreme, or utterly intolerable and is therefore not actionable. White makes the same assertion regarding the "titties" comment; however, White is immune from liability under R.C. 2744.03(A)(6) with regard to that comment. White does not mention the affair comment. Curry, in turn, asserts the trial court properly denied summary judgment to White with regard to the three derogatory comments made by White, as well as when he falsely accused her of criminal trespassing on January 7, 2004.

{¶55} We find that White's "tits and no brain" and affair comments are not actionable under Curry's intentional infliction of emotional distress claim. While the two comments are inconsiderate and clearly inappropriate, they fell short of being "outrageous," "extreme," or "utterly intolerable." As stated earlier, liability does not extend to mere insults, indignities, annoyances, or other trivialities. *Yeager* at 375. The comments were undesirable but not offensive enough to be called outrageous. Likewise, White's behavior on July 7, 2004, when he unsuccessfully attempted to terminate and remove Curry from her office before calling deputy sheriffs for help, is not actionable. White's behavior, while petty and supercilious, fell short of being "extreme," "outrageous," or "utterly intolerable." Again, liability does not extend to indignities, threats, annoyances, or petty oppressions. Id. The incidents occurring on January 7, 2004 at the instigation of White, while perhaps annoyances or petty oppressions, were not extreme or outrageous.

{¶56} The trial court, therefore, erred in denying summary judgment to White with regard to Curry's intentional infliction of emotional distress claim.

C. Invasion of privacy

{¶57} Until 2007, an actionable invasion of privacy was "the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Housh v. Peth* (1956), 165 Ohio St. 35, paragraph two of the syllabus. In 2007, the Ohio Supreme Court recognized a fourth theory, the "false light" invasion of privacy theory. *Welling v.*

Weinfeld, 113 Ohio St.3d 464, 2007-Ohio-2451, syllabus.

{¶58} In the case at bar, Curry's invasion of privacy claim does not fit under the first or third theory: there was no appropriation of Curry's name by White for his advantage; "[t]he 'intrusion' tort" is not dependent upon publicity of private matters but is akin to trespass in that it involves intrusion or prying into the plaintiff's private affairs. Examples would be wiretapping [and] watching or photographing a person through windows of his residence[.]" *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163, 166. Curry's claim, then, would fit, if at all, under either the second theory (also called the "publicity" tort) or the false light theory.

{¶59} To establish a claim of invasion of privacy under the publicity theory, a plaintiff must prove that (1) there was publicity; the disclosure must be of a public nature, not private; (2) the facts disclosed concerned an individual's private life, not his public life; (3) the matter publicized would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; (4) the publication was made intentionally, not negligently; and (5) the matter publicized was not of legitimate concern to the public. *Killilea* at 166-167; *Oakley v. Nolan*, Athens App. No. 06CA22, 2007-Ohio-2794. "'Publicity' means communicating the matter to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge as opposed to 'publication' as that term of art is used in connection with liability for defamation as meaning any communication by the defendant to a third person." *Killilea* at 166.

{¶60} Under a false light invasion of privacy theory, "[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light

is subject to liability to the other for invasion of his privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Welling*, 2007-Ohio-2451 at ¶22-24. To succeed under a false light theory, the information must be publicized, that is, "communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Id. at ¶52-53.

{¶61} White argues the trial court erred by denying summary judgment with regard to Curry's invasion of privacy claim. Specifically, White argues that Curry cannot state a claim for invasion of privacy as the comment about Curry's alleged affair with the police chief was not publicized to the public at large.[5] We agree.

{¶62} There is no evidence that White publicized Curry's alleged affair to the public at large. According to Rector's deposition, White told him one day that he thought Curry was having or had an affair with the police chief. However, there is no evidence White made the comment to anyone other than Rector, or that the comment was made to Rector in the presence of other persons. We note there is evidence in the record that rumors were spread that Curry was allegedly having an affair with the police chief (as well as with other officers and the previous mayor of the Village).

5. Curry asserts the trial court properly denied summary judgment to White with regard to her invasion of privacy claim as there was "evidence [White] publicized the fact that he was seeking to terminate Ms. Curry from the Village by requesting uniformed deputy sheriffs in marked cars to come and escort her off the premises" on January 7, 2004. Curry does not explain how this action by White falls under either the publicity theory or the false light theory of an invasion of privacy claim. While there was publicity, we fail to see how this particular action by White meets other prongs of either theory. See *Welling*, 2007-Ohio-2451 at ¶52, 54-55 (other elements of a false light claim include (1) the statement made is untrue, and (2) the misrepresentation must be serious enough to be highly offensive to a reasonable person).

Allegedly, these rumors were spread by Loree Smith, who is not a party to this appeal. There is no evidence that White told Loree Smith he believed Curry was having or had an affair with the police chief.

{¶63} The trial court, therefore, erred in denying summary judgment to White with regard to Curry's invasion of privacy claim under either the publicity theory or the false light theory. See *Henson v. Henson*, Summit App. No. 22772, 2005-Ohio-6321.

{¶64} We therefore find the trial court erred in denying summary judgment to White with regard to Curry's intentional tort claims. White's assignment of error is well-taken and sustained.

{¶65} Curry cross-appealed, raising two cross-assignments of error.

{¶66} Cross-assignment of Error No. 1:

{¶67} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING DEFENDANTS SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR WRONGFUL TERMINATION AND VIOLATIONS OF DUE PROCESS RIGHTS."

{¶68} Cross-assignment of Error No. 2:

{¶69} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING DEFENDANTS SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY."

{¶70} In both cross-assignments of error, Curry argues the trial court erred by granting summary judgment to White and the defendants with regard to her unlawful/wrongful termination claims. The trial court granted summary judgment on the ground Curry was an employee at will. The trial court further found: "[Curry and

Tindle] have offered no Civ.R. 56(C) evidence that would cause reasonable minds to come to any other conclusion. Employees in unclassified service/'at will' positions serve at the pleasure of the appointing authority and may be dismissed from their employment without cause, and as such they lack a property interest in their job that requires the observance of procedural due process before being fired."

{¶71} On appeal, Curry first argues the trial court erred by finding she was an employee at will. Curry asserts she had a property interest in her continued employment with the Village based on the personnel policies in the Village employee handbook. Thus, White and the defendants were required to apply the handbook provisions governing village employee layoffs before terminating her employment. Curry further asserts that in light of her property interest, the trial court erred by granting summary judgment to White and the defendants with regard to her civil rights deprivation claim. Curry also argues she was wrongfully terminated in violation of public policy.

{¶72} The general rule in Ohio is that an employment relationship, absent an agreement to the contrary, is regarded as an employment at will which can be terminated at any time by the employer (or the employee) for any reason not contrary to law. See *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, paragraph one of the syllabus. "Generally, where the employee furnishes no consideration other than his or her services incident to the employment, the relationship amounts to an indefinite general hiring terminable at the will of either party unless the terms of the contract or other circumstances clearly manifest the parties' intent to bind each other." *Sagonowsky v. The Andersons, Inc.*, Lucas App. No. L-03-1168, 2005-Ohio-

326, ¶14, quoting *Pyle v. Ledex*, *Inc.* (1988), 49 Ohio App.3d 139, 141.

{¶73} The provisions of an employee handbook will alter the terms of an at-will employment relationship only if the employer and the employee have agreed to create a contract from the writing. *McIntosh v. Roadway Express, Inc.* (1994), 94 Ohio App.3d 195, 210. In the absence of mutual assent, a handbook is simply a unilateral statement of rules and policies that create no obligations or rights. Id.

{¶74} Article I, Section 8 of the handbook provides that "Information included in these personnel policies and procedures, classification plan, compensation plan, and performance evaluation system are not to be considered a contract and may be changed with notice by the Mayor with approval of Council." The trial court held that the foregoing "language clearly establishes that [Curry and Tindle] were 'at will' employees of the Village rather than contractual employees or classified employees." We agree with the trial court. The employment relationship between Curry and the Village was an at will employment.

{¶75} Curry nevertheless asserts that pursuant to the Ohio Supreme Court decision in *State ex rel. Trimble v. State Board of Cosmetology* (1977), 50 Ohio St.2d 283, she had a property interest in her continued employment with the Village and was therefore entitled to the protection of the handbook.

{¶76} "The requirements of procedural due process * * * apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. To have a protected property interest in a benefit such as continued employment * * *, an individual must have more than an abstract need or desire for it or a unilateral expectation of it. He must, instead, have a legitimate claim

of entitlement. * * * it is true that a protected property interest need not be based on tenure or on explicit contractual guarantees of continued employment. Therefore, one is not barred from asserting a due process claim merely because no statute or contract affirmatively grants his job security. However, in the absence of statutory or contractual guarantees of continued employment, one claiming a protected property interest must be able to produce rules or mutually explicit understandings that support his claim of entitlement to the benefit." *Trimble* at 285-286. (Internal citations and quotation marks omitted.)

{¶77} Curry asserts that the personnel policies of the handbook, and specifically Article VII dealing with layoffs and recalls, are "the type of 'rules or mutually explicit understandings' envisioned by the supreme court in [*Trimble*]." We disagree.

{¶78} Curry has not cited, and we have not found, any cases supporting her argument that personnel policies in an employee handbook, even when enacted by a village council, are akin to the "rules or mutually explicit understandings" envisioned by the supreme court in *Trimble*. We find Curry has not produced such "rules or mutually explicit understandings." Article VII of the handbook does not support her claim she is entitled to continued employment. Article VII sets out the framework for layoffs and recalls but does not constitute a guarantee of continued employment or recall. It does not evidence an understanding she was guaranteed continued employment. Rather, Article VII and the rest of the handbook simply constitute a unilateral statement of rules and policies that create no obligations or rights. Thus, Curry does not have a property interest in continued employment protected by the

due process clause of the Fourteenth Amendment.

{¶79} It follows that the trial court did not err by granting summary judgment to White and the defendants with regard to Curry's civil rights deprivation claim. Section 1983, Title 42, U.S.Code, provides a remedy to persons whose federal rights have been violated by government officials. See *Barnes v. Meijer Dept. Store*, Butler App. No. CA2003-09-246, 2004-Ohio-1716. To state a claim under Section 1983, a plaintiff must demonstrate that his procedural due process rights were violated. A due process violation requires a showing that the conduct complained of deprived a plaintiff of a property (or liberty) interest without procedural safeguards. See *Merritt v. Canton Twp. Bd. of Trustees* (1998), 125 Ohio App.3d 533. Because we have found that Curry does not have a property interest in continued employment, she cannot state a civil rights deprivation claim under Section 1983, Title 42, U.S.Code.

{¶80} The trial court therefore properly granted summary judgment to White and the defendants with regard to Curry's civil rights deprivation claim[6]. Curry's first cross-assignment of error is overruled.

{¶81} Curry also argues she was wrongfully terminated in violation of public policy. As stated earlier, employees at will, like Curry, may be terminated at any time for any reason or no reason at all as long as the termination is not contrary to law. *Mers*, 19 Ohio St.3d 100, paragraph one of the syllabus. In 1990, the Ohio Supreme

6. The trial court held that because Curry and Tindle had not been deprived of their civil rights by actions of White and the defendants, there was no need to review whether these public officials had a right to qualified immunity with regard to the Section 1983 claim. The trial court found "in the alternative, even if the [public officials] had violated the plaintiffs' civil rights in any manner, it would not be clear to reasonable village public officials that any such actions had violated the plaintiffs' statutory or constitutional rights. Therefore the * * * officials are entitled to qualified immunity in their individual capacity with regard to the Plaintiffs' 42 U.S.C. Section 1983 claims[.]" In light of our finding that Curry cannot state a civil rights deprivation claim under Section 1983, Title 42, U.S.Code, because of a lack of a property interest, we do not address the qualified immunity issue.

Court created an exception to the employment-at-will doctrine where "[a] discharge is in violation of a statute and thereby contravenes public policy." *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, paragraph two of the syllabus. The *Greeley* holding was later expanded to recognize a cause of action in tort when the wrongful discharge violates the "Constitutions of Ohio and the United States, administrative rules and regulations, and the common law." *Painter v. Graley*, 70 Ohio St.3d 377, 1994-Ohio-334, paragraph three of the syllabus; *Popp v. Integrated Elec. Serv., Inc.*, Butler App. No. CA2005-03-058, 2005-Ohio-5367, ¶8.

{¶82} To prevail on a claim for wrongful discharge, a plaintiff must prove that (1) a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element); (2) dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element); (3) the plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element); and (4) the employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element). *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 151, 1997-Ohio-219.

{¶83} Courts determine the clarity and jeopardy elements as a matter of law while the causation and overriding justification elements are questions of fact determined by the trier of fact. Id.; *Popp* at ¶9. "[A]n exception to the traditional doctrine of employment-at-will should be recognized only where the public policy alleged to have been violated is of equally serious import as the violation of a statute." *Graley* at 384.

{¶84} We find that Curry failed to establish the clarity element. First, Curry has failed to identify the specific public policy allegedly violated by her discharge. See *Poland Twp. Bd. of Trustees v. Swesey*, Mahoning App. No. 02 CA 185, 2003-Ohio-6726, ¶10 (the person seeking to apply the public policy exception to the at-will employment doctrine has the burden to state with specificity the policy allegedly violated by the discharge).

{¶85} In her complaint, Curry alleged she was wrongfully discharged in violation of a clear public policy and set forth several federal and Ohio statutes as a source of such public policy. However, in her response to the summary judgment motion filed by White and the defendants, Curry simply asserted that "assuming arguendo, that the forgoing [sic] is not enough [that is, the fact she was entitled to the protection of the handbook because she had a property interest in her employment], there is the public policy exception to the employment at will doctrine." Curry did not identify which public policy was allegedly violated by her discharge. Nor did she cite or present the trial court with any legal authority in support of her argument that her discharge violated public policy. Rather, Curry merely asserted that her discharge violated public policy. Likewise, on appeal, Curry fails to identify the clear public policy allegedly violated by her discharge. She thus failed to meet her burden. See *Poland*; *Schwenke v. Wayne-Dalton Corp.*, Holmes App. No. 07-CA-003, 2008-Ohio-1412.

{¶86} Second, notwithstanding Curry's assertion, the clarity element is not "satisfied by the specific policies regarding layoff/recall enacted by [council]" in the handbook. Curry asserts that because the handbook and its personnel policies were

adopted by resolution by the council (the Village legislative body), the handbook is more than a mere employee handbook and is a source of public policy.

{¶87} Curry has not cited, and we have not found, any cases supporting her argument that an employee handbook enacted by a city or village council satisfies the clarity element. In *Poland*, the Seventh Appellate District addressed whether an employee handbook (in that case, the township's personnel policy and procedure manual) was a proper source to determine a clear public policy. In finding it was not, the appellate court held that:

{¶88} "Public policy, in substance, is the community's common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, and welfare. * * * while public policy is not expressed solely in places such as constitutions, administrative rules and regulations, statutes and the common law, an employee handbook is not a proper source to determine a clear public policy. Regardless of whether the employer is a government entity, corporation, or sole proprietor, the employee handbook issued from the employer is not a statement of public policy. This is so because an employee handbook has no statewide application and is simply a statement of rules and policies that creates no obligations or rights. If we were to hold that the public policy of this state may be determined by looking to employee handbooks, there would be thousands of 'public policies' with conflicting provisions and limited only by the ingenuity of man. Therefore, it is with sound reasoning that it has been held that public policy is to be determined by the [state] legislature, not the court or an employer." *Poland*, 2003-Ohio-6726, ¶21-22. (Internal citations omitted.)

{¶89} We find the reasoning applies to the handbook adopted by council in the case at bar. In light of the foregoing, we find Curry has failed to prove that a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law. Because Curry failed to establish the clarity element, she cannot establish a claim for wrongful termination in violation of public policy. The trial court, therefore, properly granted summary judgment to White and the defendants regarding this particular claim. Curry's second cross-assignment of error is overruled.

{¶90} Judgment affirmed in part, reversed in part, and remanded for further proceedings in compliance with the law and consistent with this opinion.

BRESSLER and RINGLAND, JJ., concur.