[Cite as *Hinkle v. Ohio Dept. of Transp.*, 2002-Ohio-3520.]

IN THE COURT OF CLAIMS OF OHIO

JULIE HINKLE :

Plaintiff : CASE NO. 2000-12467

v. : DECISION

DEPARTMENT OF TRANSPORTATION : Judge J. Warren Bettis

Defendant :

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{¶1} Plaintiff brings this action against defendant alleging unlawful discriminatory practices in violation of R.C. 4112.02(A). Specifically, plaintiff contends that she was subject to a sexually hostile work environment. The case was tried to the court on the sole issue of liability.

{¶2} Plaintiff was employed by defendant, Ohio Department of Transportation (ODOT), as a Highway Worker II. She began her employment in 1986 at the Geauga County garage. She remained there until her transfer to Lake County, effective August 1999. On September 22, 1999, plaintiff completed an Equal Employment Opportunity (EEO) statement alleging that she had been sexually harassed for many years at the Geagua County garage. Plaintiff maintains that she transferred to Lake County to escape the harassment that she experienced in Geagua County. She further maintains that she filed her EEO complaint when she discovered that the harassment would continue because "rumors" of her complaints and the circumstances of her transfer had been communicated to her new co-workers.

{¶3} Plaintiff's primary complaints concern offensive comments and conduct of co-workers Tom Filla, Jeff Palmer and Ron Wiech. Filla and Palmer were each employed as Highway Workers IV. Plaintiff considered them her supervisors and they did act as

foremen or “crew-leaders” of the highway maintenance staff. Ron Wiech was promoted to Highway Worker IV in 1999.

{¶4} Plaintiff worked with these men for the entire twelve to thirteen years that she was employed in Geagua County. Although she complained to upper-level management on numerous occasions, the conduct either continued or became worse. Among her specific complaints were references to her Native-American heritage such as being called “squaw” or “Pocahontas.” The men also called her “bitch” and “whore,” made comments about her breasts, suggested that they had sexual dreams about her, accused her of having “gang-bangs” in the back of ODOT trucks, and of having sexual relations with her supervisors. Plaintiff claims that even the sexual harassment seminars conducted by ODOT had repercussions for her because the men would accuse her of being the cause for the seminars, and they resented having to attend them. Ultimately, plaintiff left Lake County on disability based upon a diagnosis of post-traumatic stress disorder.

{¶5} Defendant denies liability and asserts that plaintiff cannot prove her claim by a preponderance of the evidence. Defendant also contends that the claim is barred by the applicable two-year statute of limitations.

{¶6} R.C. 4112.02(A) protects individuals from all forms of sex discrimination in the workplace. *Hampel v. Food Ingredients Specialties*, 89 Ohio St.3d 169, 2000-Ohio-128. Of the two recognized forms of sexual harassment, plaintiff has alleged only a “hostile environment” situation. In order to establish such a claim, plaintiff must show: 1) that the harassment was unwelcome, 2) that the harassment was based on sex, 3) that the harassing conduct was sufficiently severe or pervasive to affect the terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment; and, 4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action. *Hampel,* supra. Plaintiff must prove all four of above-stated elements by a preponderance of the evidence. In this case, the first element does not require extensive analysis. Plaintiff testified that she repeatedly complained about the offensive comments made about her. Her testimony was

credible and persuasive. Other witnesses corroborated that they knew plaintiff had complained to management and that they had observed her crying or otherwise reacting to the conduct. The court has little difficulty in finding that the conduct complained of was unwelcome.

{¶7} The evidence relating to the second element is less clear. Very few women had ever worked at the Geagua County garage, up to and including the time period that plaintiff was employed there. Plaintiff testified that comments were made to the effect that she should be at home with her children, that she was cheating a male out of a job, or that she wasn't suited to the type of work required. While that type of comment would necessarily have been based upon gender, the names of the individuals who made the statements and the time period within which they were made was not specified.

{¶8} The testimony concerning specific comments and conduct of Filla, Wiech and Palmer was conflicting. All three denied ever making any of the derogatory comments alleged by plaintiff and, contrary to plaintiff's claim, all three testified that they thought they had a good working relationship with her. However, considering that testimony in light of all the evidence adduced at trial, the court does not find these witnesses to be entirely credible. Rather, it is the court's opinion that Filla, Wiech and Palmer did sexually harass plaintiff. Although there is ample evidence that the environment in the garage was fraught with "shop-talk," such as profanity and off-color jokes, it is the court's opinion that the sexual comments directed toward plaintiff were based upon her sex. There is no evidence that male employees were subjected to the same type of comments or conduct directed toward plaintiff.

{¶9} The third element of plaintiff's claim concerns whether the harassment was sufficiently severe and pervasive as to alter the terms and conditions of her employment. There is no question that the words and conduct directed at plaintiff were hostile and abusive. However, in the context of a sexual harassment claim based upon a hostile work environment, the determination whether such conduct qualifies as severe and pervasive must be made in light of the particular work environment. The court is required to "view the work environment as a whole and consider the totality of all the facts and surrounding

circumstances, including the cumulative effect of all episodes of sexual or other abusive treatment." *Hampel,* supra, at syllabus, note 5.

{¶10} As stated previously, there is ample evidence that profanity and vulgarity were the norm at the garage. Nevertheless, in *Hampel,* supra, the court rejected the notion that sexually abusive work behavior is somehow excusable because it is commonplace. Id. at 181. "*** [w]hile the social context in which particular behavior occurs and is experienced by its target is a relevant factor in judging the objective severity of harassment, sexual harassment that meets the statutory requirements is not excusable solely because it consists of conduct that is commonplace." *Hampel,* supra, at 182. In this case, the determination of the severity of any harassment is complicated by the fact that plaintiff was a participant in much of the typical shop-talk that occurred at the garage. She testified that foul language did not offend her. She admitted using such language herself. For example, she made the following comment during a heated argument with her managers: "*** you two don't have the fucking balls to stand up to these guys because you're afraid they'll fuck with you ***." Several witnesses stated that plaintiff also told off-color jokes. She was at least once heard to comment about her sex life after a weekend away with a boyfriend. While plaintiff admitted to participating in that type of conduct, she also maintained that the name-calling directed toward her was a different matter. The court agrees with that distinction. However, plaintiff's participation in offensive conduct cannot be ignored in evaluating the severity and pervasiveness of the harassment. Moreover, the length of the time that plaintiff endured the conduct must be considered.

{¶11} Based upon the totality of the evidence presented, the court does not find the harassment to be sufficiently severe to have altered the terms and conditions of plaintiff's employment. As such, plaintiff has not established the third element of her claim.

{¶12} In light of the above finding, plaintiff cannot prevail in this case. However, even assuming that she had established sufficient severity, plaintiff would still be precluded from recovery. Specifically, the court would also find that plaintiff failed to establish the fourth element of her claim: that the harassment was either committed by a supervisor or

that defendant knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

{¶13} Although plaintiff considered Filla, Wiech and Palmer to be her supervisors, the court does not agree that they qualify as such in the sense contemplated by case law. For example, none of the three men had the ability to hire, fire or discipline plaintiff or any other employee. They could not evaluate her performance or affect her salary, raises or promotions. Consequently, they did not have sufficient control over the terms and conditions of her employment for liability to attach.

{¶14} Joe Soond, Rick Green and Mike Paoletto were the upper-level managers of the Geauga County garage. They did have the type of authority that Filla, Wiech and Palmer lacked. However, each testified that plaintiff's complaints over the years were generally vague, such as "these guys, they're making remarks again," and that plaintiff would also state that she could take care of her problems herself. She would rarely name specific individuals. Mike Paoletto testified that, in 1997, he provided plaintiff with an EEO instruction booklet after she complained about a co-worker and invited her to talk with him further after completing a statement. Plaintiff did not follow through. Each of the managers stated that from time to time they would caution plaintiff's male co-workers to "tone down" their language. However, they stated that without names or specific information there was not much that could be done.

{¶15} In all of the years that plaintiff complained, she never took any formal action until 1999. When she did, it was only after a manager at Lake County contacted the EEO officer on plaintiff's behalf. Within a matter of days, Lori Goddard, the EEO representative, met with plaintiff and discussed her complaint. Goddard testified that she concluded that the situation was not urgent because plaintiff had advised that she was happy at Lake County and because plaintiff was no longer working with the three individuals named in the complaint. Subsequently, Goddard initiated an investigation. As a result, Filla, Wiech and Palmer were interviewed by a representative from their district. However, all three had to be interviewed on the same day, and the process was delayed because of their snow removal duties during the winter months. Mike Paoletto and Crosby Ameen, a co-worker

whom plaintiff had named as a corroborating witness, were also interviewed. In the end, plaintiff's complaint was held to be "unfounded." Goddard testified that the complaint could not be substantiated because Filla, Wiech and Palmer denied the allegations and Crosby Ameen did not corroborate the complaint as plaintiff had expected.

{¶16} In short, defendant had a policy against sexual harassment, it was disseminated to employees, it was known to plaintiff, and prompt corrective measures were taken by defendant as soon as plaintiff's complaints were made known.

{¶17} For these reasons, the court finds that plaintiff has failed to prove her claim by a preponderance of the evidence. Judgment shall be rendered in favor of defendant. As a result of this ruling, the statue of limitations argument will not be addressed.

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J. WARREN BETTIS
Judge

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Filed 6-11-2002/Jr. Vol. 708, Pg. 11/To S.C. reporter 7-9-2002