[Cite as *Browning v. Ohio State Highway Patrol*, 2002-Ohio-3529.]

IN THE COURT OF CLAIMS OF OHIO

DENA BROWNING	:	
Plaintiff	:	CASE NO. 2000-02054
v.	:	DECISION
OHIO STATE HIGHWAY PATROL	:	Judge Everett Burton
Defendant	:	

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{¶1} This case was tried to the court on the issues of liability and the civil immunity of Trooper Edward Mejia and Sergeant Michael Black. Plaintiff asserts claims of sexual discrimination and harassment, negligent retention and supervision of Mejia, failure to provide a safe work environment, wrongful discharge, destruction of evidence, negligent infliction of emotional distress and invasion of privacy. Plaintiff also asserts that at all times relevant hereto, Mejia and Black were acting within the course and scope of their employment with defendant, entitling them to civil immunity pursuant to R.C. 2743.02(F) and 9.86. Defendant denies liability and asserts that the actions of Mejia and Black were conducted outside the course and scope of their employment.

{¶2} On October 27, 1997, plaintiff became employed by defendant upon entering the Ohio State Highway Patrol Academy (Academy) in Columbus, Ohio, as a member of the 130th cadet class. While at the Academy, she received training from several instructors, including Black, Mejia and Sgt. Susan Rance. Plaintiff testified that she learned from the rules and regulations handbook

which she was given on the first day of training that women were not allowed in men's dormitory rooms at the Academy and vice versa (also referred to as "out of bounds" areas), that sexual activity was prohibited in the Academy dormitory, and that an 11:00 p.m. curfew was in effect at the dormitory. She also acknowledged that the handbook prohibited a cadet from being intoxicated on Academy premises. She further testified that before her training, she had been intoxicated only two times in her life. Plaintiff was twenty-two years old at the time of the incident in question.

{¶3} On May 8, 1998, plaintiff successfully completed her cadet training at the Academy. At that time, she was promoted to trooper but remained on probationary status until completion of post-graduate training. She underwent field training for approximately ninety days at an assigned post under the supervision of Trooper Chris Smith.

{¶4} On August 24, 1998, plaintiff and other members of the 130th class returned to the Academy for one week of post-graduate training. Plaintiff resided at the Academy dormitory that week. The same conduct rules that had been in effect for cadets at the Academy were in effect for the week of post-graduate training. Mejia also resided at the Academy that week. On August 27, 1998, the day before post-graduate training ended, plaintiff and approximately twenty-five members of the 130th class went to a restaurant/bar known as "BW3" to celebrate their graduation. Flyers with directions to BW3 had been available earlier that day in a classroom at the Academy. Plaintiff rode to the restaurant with four other women from her class. Trooper Deanna Barco was the designated driver and they arrived at approximately 7:00 p.m. Plaintiff admitted that the party was not on her class schedule;

that she was not required to attend; that she did not travel in a patrol car to the gathering; that she did not wear her patrol uniform; that she did not take her badge, gun, or patrol I.D.; that she was not paid to attend the gathering; and, that her duties as a trooper ended at 5:00 p.m. that day.

{¶5} During the time plaintiff was at BW3, she drank four to five wine coolers and a strawberry daiquiri. Mejia arrived after plaintiff, and they had a brief conversation at BW3 at the table where Mejia had been eating. After about fifteen minutes, the group of troopers left BW3 and walked to another nearby establishment known as "Shooters." Plaintiff testified that she was not intoxicated when she walked to Shooters.

{¶6} Mejia bought plaintiff two to four shots of alcohol at Shooters. Plaintiff testified that Mejia did not order or force her to drink the shots. Many of the troopers who were at Shooters witnessed plaintiff and Mejia kissing and touching each other at the bar. At some point in the evening, a fellow member of the 130th class, Trooper Raul Cuellar, approached plaintiff and he danced with her for one song. Plaintiff testified that it gave her a chance to get away from Mejia and that she realized that she had had too much to drink at that point. When the song ended, Mejia grabbed plaintiff's arm as if to pull her back to the bar and said, "Come on, Browning." Plaintiff then turned to another of her classmates, Trooper Andrew Algeier, to dance. Thereafter, plaintiff returned to the bar and sat with Mejia.

{¶7} Plaintiff did not tell Cuellar or Algeier that she did not wish to be left alone with Mejia, and she did not voice any concerns about Mejia to either of them. She did not push Mejia away or show any outward sign that she considered his attention offensive.

{¶8} Plaintiff alleges that Trooper Black saw Mejia kissing her at the bar and at some point in the evening looked at Mejia and shook his head as if to say "no." Plaintiff alleges that Black, as an instructor, had a duty to intervene to prevent any inappropriate contact from occurring between Mejia and herself. Black denied that he had acknowledged Mejia at the bar that evening.

{¶9} Trooper Barco testified that she recalled observing plaintiff and Mejia touching, hugging and kissing each other at the bar that evening. She further testified that her original plans were to leave the bar in time to return to the Academy by curfew, which was 11:00 p.m. However, she realized that she would not meet the curfew that night, so she and the other women who had accompanied her made arrangements to stay overnight at a nearby hotel. When she decided to leave Shooters, she approached plaintiff who was still at the bar kissing Mejia. Barco tapped plaintiff on the shoulder to get her attention and yelled, "Hey, are you going with us or what?" Plaintiff looked at Mejia who shook his head "no," and then plaintiff turned to Barco and also shook her head "no." At that time, Barco and the other women left the bar. Plaintiff denied that this conversation took place.

{¶10} Plaintiff rode back to the Academy with Mejia. When they arrived, it was later than 11:00 p.m. Mejia had a key to the dormitory and used it to allow plaintiff and himself to enter the dormitory after curfew. Mejia and plaintiff engaged in sexual intercourse in Mejia's dormitory room that evening.

{¶11} Subsequently, an investigation commenced regarding allegations that Mejia and plaintiff had entered the Academy dormitory after curfew, and that either plaintiff had been in Mejia's dormitory room, or that Mejia had been in plaintiff's

dormitory room. At first, plaintiff admitted that she and Mejia had engaged in sexual intercourse but asserted that it had occurred in Mejia's vehicle, not on Academy grounds. Initially, Mejia denied that anything had taken place but he later admitted that he and plaintiff had engaged in sexual intercourse in his dormitory room. Plaintiff had a second interview wherein she asserted that she was so intoxicated that she could not remember where the sexual activity took place. At trial, plaintiff asserted that the sexual activity was unwanted and that she had felt compelled to reciprocate Mejia's advances because he was her former supervisor.

{¶12} After the investigation was conducted, both plaintiff and Mejia were terminated from defendant's employment. Mejia, who had been employed with defendant for approximately eight years previous to this incident, filed a grievance and was eventually reinstated. Plaintiff, who was still a probationary employee at the time, had no grievance rights and was unable to contest her termination.

{¶13} Plaintiff's claims are primarily based upon the assertions that defendant sponsored the gathering at BW3, that Mejia and Black's actions that night were within the course and scope of their employment, that Black breached a duty to intervene and prevent Mejia's actions that evening (which were inappropriate since he had been plaintiff's instructor), that Mejia's actions towards plaintiff constituted sexual harassment, that defendant was negligent in its retention of Mejia as an instructor, and that plaintiff was discriminated against because she was terminated but Mejia was ultimately reinstated.

SEXUAL DISCRIMINATION AND HARASSMENT

{¶14} R.C. 4112.02(A) states that it is an unlawful discriminatory practice: "for any employer, because of the *** sex

*** of any person, *** to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." The Supreme Court of Ohio has held that federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196.

{¶15} Plaintiff may establish a violation of R.C. 4112.02(A) by proving either of two types of sexual harassment: "1) 'quid pro quo' harassment, *i.e.*, harassment that is directly linked to the grant or denial of a tangible economic benefit, or 2) 'hostile environment' harassment, *i.e.*, harassment that, while not affecting economic benefits, has the purpose or effect of creating a hostile or abusive working environment." *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 176, 2000-Ohio-128.

{¶16} Plaintiff alleges a claim of hostile environment harassment based upon the conduct of Mejia.

{¶17} "In order to establish a claim of hostile-environment sexual harassment, the 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 at 176-177.

{¶18} The first element plaintiff must prove to state a claim for sexual harassment is that the harassment was unwelcome. Plaintiff asserts that she was subjected to non-consensual sex with Mejia. She asserts that she could not have consented to sex with him because she was intoxicated and because he was her supervisor. Even though Mejia had been plaintiff's instructor, and arguably, her supervisor, the court finds that plaintiff's actions that night, and in the days following the incident, support defendant's contention that the activity between plaintiff and Mejia was consensual.

{¶19} Plaintiff admitted that she drank alcohol and had intimate contact with Mejia at Shooters. Many troopers, including Barco and Cuellar, testified that plaintiff and Mejia were kissing and fondling each other in plain view. Captain Robert James Young, the executive officer in defendant's human resources department, testified that there were never any claims of sexual harassment during the investigation and that there was never any criminal investigation regarding the incident.

{¶20} The court finds that plaintiff's own words negate her claim of sexual harassment. In her statement to highway patrol investigators on September 8, 1998, she stated: "*** I did have consensual sex with him. He didn't force it or anything like that ***."

{¶21} Moreover, in a tape-recorded telephone conversation between plaintiff and Mejia on August 31, 1998, plaintiff stated:

{¶22} "*** I can't believe you left without even saying 'bye," and, "Heck, I didn't think I'd ever even hear from you again." After reviewing all the evidence presented at trial, the court finds that plaintiff and Mejia engaged in consensual sex. Therefore,

plaintiff has failed to prove her claim for sexual harassment by a preponderance of the evidence.

II. CIVIL IMMUNITY

{¶23} Plaintiff asserts that Mejia and Black are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶24} R.C. 2743.02(F) provides, in part:

{¶25} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer, or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶26} R.C. 9.86 provides, in part:

{¶27} "*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damages or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.* ***" (Emphasis added.)

{¶28} In *Thomson v. University of Cincinnati College of Medicine* (October 17, 1996), Franklin App. No. 96API-02260, at pp. 10-11, the court noted that:

{¶29} "Under R.C. 9.86, an employee who acts in the performance of his duties is immune from liability. However, if the state employee acts manifestly outside the scope of his or her employment or acts with malicious purpose, in bad faith, or in a wanton or reckless manner, the employee will be liable in a court of general jurisdiction. 'It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment.' *James H. v. Dept. of Mental Health & Mental Retardation* (1980), 1 Ohio App.3d 60, 61. Even if an employee acts wrongfully, it does not automatically take the act outside the scope of the employee's employment even if the act is unnecessary, unjustified, excessive, or improper. *Thomas v. Ohio Dept. of Rehab. and Corr.* (1988), 48 Ohio App.3d 86. The act must be so divergent that its very character severs the relationship of employer and employee." *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246.

{¶30} Plaintiff contends that Black was acting within the course and scope of his employment when he failed to intervene and prevent Mejia from having inappropriate sexual contact with her at Shooters during a party sponsored by defendant. Plaintiff further contends that Mejia's conduct of kissing her at Shooters and then taking her to the Academy and having sex with her should be considered within the scope of his employment with defendant.

{¶31} Based upon the totality of the evidence presented, the court finds that Mejia and Black acted outside the scope of their employment with defendant during the celebration at BW3 and Shooters. The off-site graduation party was not a part of plaintiff's class schedule and she was not required to attend. The

gathering occurred after business hours and was not part of the official duties of defendant. Consequently, Mejia and Black are not entitled to personal civil immunity pursuant to R.C. 9.86 and 2743.02(F) regarding their conduct at the party.

III. NEGLIGENT RETENTION AND SUPERVISION OF MEJIA

{¶32} The factors needed to establish a claim for negligent retention and supervision are: 1) the existence of an employment relationship; 2) the employee's incompetence; 3) the employer's actual or constructive knowledge of such incompetence; 4) the employer's act or omission causing plaintiff's injuries; and, 5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App.3d 715, 729, citing *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 739.

{¶33} Plaintiff asserts that defendant was negligent in choosing Mejia to be an instructor because it knew that in 1995, Mejia had an affair with another trooper. However, an administrative investigation was conducted and it was determined that the allegation of inappropriate behavior on duty was unfounded. Mejia was not disciplined.

{¶34} Major Darryl Anderson, who retired after having served thirty years with the patrol, testified that he chose Mejia as an instructor based upon his positive service record. He testified that he was not aware of Mejia's 1995 affair at the time he chose him as an instructor, but further stated that it would not have changed his judgment in choosing him as an instructor. Plaintiff alleges that, based upon Mejia's extramarital affair with another trooper in 1995, defendant should not have chosen Mejia to instruct female cadets because he would be in a position to use his authority

to sexually harass them. However, the court finds that this argument lacks merit, specifically because the affair in 1995 was consensual and plaintiff has not proven that the conduct in this case constitutes sexual harassment. Therefore, plaintiff has failed to prove her claim of negligent retention by a preponderance of the evidence.

{¶35} Plaintiff also asserts a claim that Sgt. Black was negligent in his supervision of Mejia at Shooters, and that Black was under a duty to stop Mejia from pursuing plaintiff. However, since this court has found that Black and Mejia's actions that night were outside the scope of their employment, plaintiff's claim regarding Black's alleged negligent supervision is DENIED.

IV. FAILURE TO PROVIDE A SAFE WORK ENVIRONMENT

{¶36} Plaintiff also asserts that defendant failed to provide a safe place of employment pursuant to R.C. 4101.11. The basis of this claim is plaintiff's contention that defendant, by selecting Mejia as an instructor, made plaintiff's work environment unsafe for women, in that Mejia should not have been allowed to attend the graduation party. The court notes that R.C. 4101.11 pertains to cases involving work-related injuries, including claims of Occupational Safety and Health violations. Plaintiff's claims in this regard are totally without merit. As previously stated, the party did not occur at plaintiff's workplace. It was held at a public establishment off site. In addition, her attendance was not mandatory and she was not performing her official duties while at the party. Therefore, plaintiff's claim of failure to provide a safe work environment is DENIED.

V. WRONGFUL DISCHARGE

{¶37} Plaintiff alleges that defendant violated public policy because it treated her differently than Mejia, in that she was terminated whereas he was reinstated based on the same conduct. "To state a claim of wrongful discharge in violation of public policy, a plaintiff must allege facts demonstrating that the employer's act of discharging him contravened a 'clear public policy.'" *Painter v. Graley* 70 Ohio St.3d 377, 1994-Ohio-249 paragraph two of the syllabus. See, also, *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228. A clear public policy may be ascertained from the federal and state constitutions, statutes, administrative rules and regulations, and the common law. *Painter*, supra, at paragraph three of the syllabus. The issue whether or not an employment termination violates public policy must be analyzed according to a four-prong test that balances the justification for the termination against the effect that it will have on the public policy. *Kulch v. Structural Fibers, Inc.* 78 Ohio St.3d 134, 1997-Ohio-219. Specifically, reviewing courts must determine whether: 1) a clear public policy was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); 2) the firing would jeopardize that public policy (the jeopardy element); 3) the dismissal was motivated by conduct related to the public policy (the causation element); and, 4) the employer had a legitimate business justification for the termination (the overriding justification element). Id. at 151. The clarity and jeopardy elements are questions of law, while the causation and overriding-justification elements are questions of fact. Id.

{¶38} Initially, plaintiff has failed to prove that she was terminated from defendant's employment in violation of R.C.

4112.02(A) and Title VII. Therefore, she has failed to prove that defendant's action of terminating her violated a clear public policy, as outlined in R.C. 4112.02(A) (i.e., sex discrimination). Moreover, defendant terminated plaintiff's employment for conduct unbecoming an officer, which is outlined in the policy manual. Plaintiff knew the rules about curfew and about being "out of bounds." Thus, defendant acted within its authority in terminating her employment. Plaintiff has failed to prove her claim of wrongful discharge by a preponderance of the evidence.

VI. DESTRUCTION OF EVIDENCE

{¶39} In her complaint, plaintiff asserts a claim for destruction of evidence regarding the fact that the tape recording of her first interview with defendant during its investigation was not found during the discovery process. Plaintiff did not address this claim in her post-trial brief, and the court finds that no evidence of destruction or tampering with evidence was brought forth at trial. Therefore, this claim is DENIED.

VII. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

{¶40} Ohio courts do not recognize a separate tort for negligent infliction of emotional distress in employment situations. *Antalis v. Ohio Dept. of Commerce* (1990), 68 Ohio App.3d 650, 653. Therefore, plaintiff's claim for negligent infliction of emotional distress is without merit and is DENIED.

VIII. INVASION OF PRIVACY

{¶41} Plaintiff asserts that defendant, through the actions of Mejia, is liable for "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.

Since this court concludes that plaintiff engaged in consensual sexual relations with Mejia, this claim is DENIED.

{¶42} In the final analysis, plaintiff has failed to prove any of her claims by a preponderance of the evidence. Judgment shall be rendered in favor of defendant.

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EVERETT BURTON
Judge

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