

[Cite as *Brandt v. Ohio Dept. of Transp.*, 2003-Ohio-5621.]

IN THE COURT OF CLAIMS OF OHIO

NANCY BRANDT :

Plaintiff : CASE NO. 2001-08901
Judge J. Warren Bettis

v. :
DECISION

OHIO DEPARTMENT OF :
TRANSPORTATION :

Defendant

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{¶1} Plaintiff brought this action against defendant asserting claims of sexual harassment, hostile work environment, retaliation, wrongful termination in violation of public policy, negligent retention of an employee, and intentional infliction of emotional distress. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff was employed by defendant, Ohio Department of Transportation (ODOT), in 1981 as an account clerk/timekeeper and assigned to work at the Payne Avenue Garage (garage) in Montgomery County. Phil Fisher was hired by defendant as an assistant superintendent for Montgomery County in 1984 and he too was stationed at the garage. Plaintiff alleges that Phil Fisher engaged in behavior that constituted sexual harassment and resulted in creating a hostile workplace. Specifically, plaintiff asserts that commencing in 1988, Fisher rubbed up against her numerous times, made comments about her dress or her appearance, and generally acted boorishly in her presence.

{¶3} Plaintiff testified that she tolerated Fisher's conduct for quite some time before she confronted him and asked him to cease acting in such manner. According to plaintiff, the unwanted contact continued despite her protestations. Plaintiff stated she reported this conduct to her supervisor, Creola Reese. Plaintiff testified that on one occasion in 1993, Fisher entered her office, sat in a chair in front of her desk, and purposefully exposed his genitals in front of her. She claimed that this incident was extremely upsetting, that she immediately left the area and that she sought help from Reese, who responded by stating she would "take care of it." Plaintiff could not recall the specific dates for any of the incidents she described.

{¶4} In 1995, Tom Berning replaced Creola Reese as superintendent. Plaintiff testified that she continued to find it difficult to work around Fisher. Mr. Berning decided to transfer Fisher to another outpost that was in need of a management team member. Plaintiff conveyed to the court that for the next two years she was content with the workplace environment. However, in 1997, John Glover replaced Tom Berning as superintendent and some time later that title was changed to county manager. In the process of reorganizing the work teams, he brought Fisher back to the same garage where plaintiff worked. Plaintiff testified that this occurred despite her protestations to Berning and Glover. It is undisputed that soon after he returned to the garage, an incident occurred where Fisher came into physical contact with plaintiff. She stated that she was unsure whether Fisher intentionally bumped into her or whether he stumbled and lost his balance. Nonetheless, after plaintiff related this event to Glover, Fisher was relocated to an office area on the other side of the garage, away from plaintiff's work space, and Fisher was instructed to minimize his contact with plaintiff. Plaintiff

testified that this move did not satisfy her because Fisher was still present in the facility, she still had to see him in the lunch room, she still had to process paperwork for him and on occasion, she was expected to work overtime on a night shift when only the two of them would be in the garage. Plaintiff also testified that she believed Fisher began a campaign to harass her in subtle ways, such as altering the temperature settings in the garage or rearranging objects or papers on her desk when she left her office.

{¶5} Plaintiff related that eventually her emotional health began to suffer and she sought treatment from a mental health care provider. Plaintiff continued to work at the garage until she filed a written complaint of sexual harassment with defendant and subsequently took disability leave on April 12, 2000. An internal investigation was conducted by Merka Flynn who worked in ODOT's Equal Employment Opportunity section of the chief legal counsel's office. Flynn testified that she interviewed all of the employees at the garage as well as some at outlying posts in the district. Flynn stated that she was unable to locate any witnesses to the alleged harassment and the incidents described by plaintiff could not be corroborated.

{¶6} Defendant served plaintiff notice of involuntary disability separation effective February 9, 2001. Plaintiff admitted at trial that she had refused to return to work at the garage unless both Glover and Fisher were reassigned to another location. Plaintiff filed this action on September 5, 2001. Defendant denies liability and maintains that plaintiff's claim of sexual harassment is barred by the applicable two-year statute of limitations. Defendant also contends that plaintiff cannot prove her remaining claims by a preponderance of the evidence.

{¶7} 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 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. *Id.*

{¶8} Plaintiff must prove all four of the above-stated elements by a preponderance of the evidence. In this case, plaintiff testified extensively that Fisher's comments and behavior were offensive and upsetting to her, that she became increasingly upset and unhappy about Fisher's presence at the garage, and that her dislike of Fisher was apparent to her co-workers. Indeed, even when the two worked on opposite sides of the garage, others noticed that there was significant tension and friction between plaintiff and Fisher. (Defendant's Exhibit A.) Although defendant described three instances wherein plaintiff voluntarily socialized with Fisher, the court was persuaded by plaintiff's testimony that she attended the three events for work-related purposes. The court finds plaintiff has provided ample evidence that she found Fisher's behavior, and eventually his mere presence, to be offensive.

{¶9} Nonetheless, the testimony concerning specific conduct allegedly committed by Fisher was conflicting. Plaintiff testified that over a twelve-year period Fisher had made particular comments

and gestures in her presence that she found offensive. However, plaintiff was unable to identify any other co-workers who had overheard or witnessed even one of these alleged interactions. Fisher appeared in court and denied that he had committed the offenses listed by plaintiff, except that Fisher acknowledged he had, on one occasion in 1999, accidentally bumped into plaintiff. Fisher conveyed that he and plaintiff were in a rather small office area at the time. He insisted that the contact was accidental and that he apologized to plaintiff immediately afterward. In addition, Fisher specifically denied exposing himself to plaintiff.

Creola Reese testified that she did not believe Fisher had exposed himself in front of plaintiff. Reese explained that Fisher was notorious for overeating at lunchtime and then suffering gastric distress for the rest of the afternoon. Reese described how Fisher would often complain about his stomach and that it was not uncommon to see him rubbing his stomach. Reese testified that on the particular day in 1993, just prior to the time that plaintiff claims Fisher exposed himself, she had walked by plaintiff's office and that she saw Fisher sitting in a chair in front of plaintiff rubbing his stomach. The court notes that Reese testified in a most candid manner and the court found her testimony to be quite convincing and credible. Reese also stated that she believed plaintiff just generally disliked Fisher. Finally, Reese confirmed that the workplace environment at the garage was one where off-color jokes and crude remarks were exchanged by ODOT employees almost daily. Additional testimony and evidence was presented to corroborate Reese's observation that plaintiff harbored a certain amount of personal animosity towards Fisher. Both Fisher and Glover testified that plaintiff made disparaging comments about Fisher's managerial skills and questioned his decision-making process. Plaintiff had complained to Glover that Fisher performed his duties poorly and that he often sought

assistance or instruction from her, despite the fact that he was in a higher position of authority with ODOT. (Defendant's Exhibits L, M.)

{¶10} Upon consideration of all the testimony, and after review of the exhibits in evidence, the court concludes that plaintiff was unable to substantiate her allegations of sexual harassment. Plaintiff failed to present any witnesses or evidence, other than her own testimony, to prove that Fisher engaged in a pattern of sexual harassment or that the offensive conduct was pervasive to the extent that it affected the terms and conditions of her employment. The court does not believe that Fisher exposed himself to plaintiff but does believe that in all probability he was rubbing his stomach. The other alleged incidents cannot be documented as to the specific date or the circumstances. "*** [N]ot all workplace conduct with sexual overtones can be characterized as unlawful harassment.

{¶11} Simple teasing, off-hand comments, and isolated incidents, unless extreme [sic] serious, will not amount to discrimination in the terms and conditions of employment." *DeArment v. The Timken Company*, 5th Dist. No. 2002CA00409, [2003-Ohio-1792](#), citing *Faragher v. City of Boca Raton* (1998), 524 U.S. 775. Moreover, the court finds that plaintiff has failed to show that the terms and conditions of her employment were altered by Fisher's continued presence at the garage. By all accounts, plaintiff was an excellent employee who performed all of her job duties in an efficient and competent manner. Plaintiff consistently received above-average performance evaluations and was a highly regarded employee at the garage. Plaintiff admitted that she tolerated the presence of posters depicting scantily clad women displayed at the garage as well as the profanity and off-color remarks which proliferated in the male-dominated environment.

Although plaintiff complained about Fisher to her supervisors over the years, she did not clearly express to them that she was suffering from sexual harassment. In addition, she refused to initiate formal proceedings prior to January 2000. Considering the length of time plaintiff waited to act on her allegations, the court concludes that the alleged conduct was not severe or pervasive.

{¶12} Even if plaintiff could establish that Fisher's conduct amounted to harassment and that it was sufficiently severe to alter the terms of her employment, plaintiff failed to meet the final element necessary to establish liability on the part of defendant: either that Fisher was her supervisor, or that defendant knew or should have known of the harassment and neglected to take immediate, appropriate, corrective action. Plaintiff testified she worked as a timekeeper and initially she reported directly to superintendent Reese, then to Berning and later to the county manager, Glover. Fisher's title was either an assistant superintendent or a transportation manager. He managed a team of highway workers and reported directly to the superintendent or county manager. A copy of the table of organization for Montgomery County District 7, (Defendant's Exhibit M), substantiated that plaintiff's position was also in a direct line to the county manager; she was not placed under any other line of reporting structure or supervision. Although plaintiff testified that she considered Fisher to be her supervisor, both Glover and Fisher testified that Fisher had no ability to assign job duties to plaintiff, that he did not complete her performance evaluations, and that he could not discipline or fire her. Upon review, the court finds that plaintiff's assertion is not supported by the evidence presented at trial.

{¶13} As previously stated, plaintiff was unable to present any witnesses to the alleged harassment at trial. In addition, the court finds that on those occasions when plaintiff complained to various supervisors about Fisher's unwelcome presence, he was relocated or instructed to minimize his contact with plaintiff. Reese and Berning stated that they tried to act as buffers between Fisher and plaintiff. Glover testified that he tried to appease plaintiff whenever possible, but he also had a responsibility to establish a cohesive and productive work force. Glover further stated that prior to January 2000 plaintiff refused to make an official complaint about Fisher and that without specific information there was nothing more he could do about plaintiff's accusations.

{¶14} Plaintiff acknowledged that throughout all the years during which she was allegedly harassed, from 1988 through at least 1999, she never once filed a grievance or a formal complaint against Fisher. Plaintiff admitted that she was aware defendant had a policy prohibiting sexual harassment in the workplace and that she knew there was a procedure for reporting sexual harassment but claimed that she had been too emotionally fragile over the years to initiate formal proceedings. The court notes that when plaintiff finally did put her statement in writing, she was contacted by an EEO representative who immediately instituted an investigation. Upon review of all the evidence and considering the facts and circumstances as presented, the court finds that plaintiff has failed to prove her claims concerning sexual harassment and a hostile work environment. As a result of this determination, defendant's argument concerning the statute of limitations is moot.

{¶15} Plaintiff is also precluded from recovery on her claims of wrongful termination and reprisal because she failed to prove

by a preponderance of the evidence that she was discharged from her position in retaliation for filing a complaint or in violation of a recognized public policy. The issue whether an employment termination violates public policy must be analyzed according to a four-prong test set forth in *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, [1997-Ohio-219](#). However, to prevail on a claim of wrongful termination in violation of a public policy, plaintiff must show that she suffered some form of discipline or adverse action. Factors that courts consider when determining whether an employment action was materially adverse include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady v. Liberty Nat'l Bank and Trust Co.* (C.A.7, 1993), 993 F.2d 132, 136.

In the instant case, defendant was willing to allow plaintiff to return to work; it was plaintiff who refused to return unless Fisher and Glover were relocated. Defendant chose not to acquiesce to plaintiff's demands and instead, plaintiff was served a notice of involuntary disability separation. The document stated "This type of separation is a non-disciplinary action." (Plaintiff's Exhibit 6, Emphasis sic.)

{¶16} The court finds that the evidence failed to show defendant was motivated by retaliatory animus and that such decision was merely a discretionary personnel action in response to plaintiff's prolonged absence from work. As a result, the court concludes that defendant's act was consistent with its stated desire to form cohesive work groups who functioned well together with the goal of improving the performance of highway maintenance activities within the district. As a general rule, this court will not substitute its judgment for that of the employer and will not

second-guess the decisions of employers regarding personnel matters. See, e.g., *Watson v. Kent State University* (Aug. 8, 1994), Court of Claims No. 91-06627; *Dodson v. Wright State Univ.* (Dec. 3, 1997), Court of Claims No. 93-03196; *Washington v. Central State Univ.* (April 24, 1998), Court of Claims No. 96-08849.

{¶17} Plaintiff also argued that she was constructively discharged and that the discharge was in violation of public policy. "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-334](#), 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.

{¶18} As stated above, plaintiff took disability leave which led to the involuntary separation. Plaintiff testified that her disability separation was not by her own choice or design; that the decision was based on her concerns for her health; and that working conditions were so intolerable that she suffered stress-related medical conditions. However, the court finds that while certain aspects of Fisher's behavior may have been upsetting to plaintiff, they were not objectively threatening or so egregious or pervasive as to render working conditions intolerable. Furthermore, it is undisputed that plaintiff was considered an excellent employee who was not facing either imminent termination or any adverse employment action prior to her disability separation. Indeed, prior to the date on which she received the notice of separation, plaintiff could return to her position any time that she desired.

{¶19} For the foregoing reasons, the court concludes that plaintiff has failed to establish a claim either for constructive discharge or discharge in violation of public policy.

{¶20} Plaintiff further alleged as a cause of action that defendant negligently retained Fisher. 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. In the instant case, evidence established that plaintiff disliked Fisher and that she communicated her feelings to her supervisors over a twelve-year period. However, plaintiff did not provide sufficient specific information about her accusations to give defendant either adequate notice of, or an opportunity to investigate, Fisher's alleged harassment. As of the date of trial, Fisher remained under defendant's employ. The court has previously determined that plaintiff has not proven that Fisher was engaging in a pattern of sexual harassment or that defendant knew or should have known that Fisher was creating a hostile work environment. Thus, plaintiff cannot prevail on her claim of negligent retention.

{¶21} Plaintiff's complaint also alleges a claim for intentional infliction of emotional distress. Under Ohio law, a plaintiff claiming the tort of intentional infliction of emotional distress must show: "(1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff, (2) that 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) that the actor's actions were the proximate cause of the plaintiff's psychic injury, and (4) that the mental anguish suffered by the plaintiff is serious and of a nature that no reasonable man could be expected to endure it." *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 375. Further, "[s]erious emotional distress requires an emotional injury which is both severe and debilitating." *Id.* (Citations omitted.) The Tenth District Court of Appeals has also addressed this issue and held that "to constitute extreme and outrageous behavior, the actions must go beyond all possible bounds of decency and can be considered as utterly intolerable in a civilized community." *Perry v. Speedway SuperAmerica, L.L.C.*, Franklin App. No. 01AP-908, [2002-Ohio-1260](#).

{¶22} Upon review of all the testimony and evidence submitted, the court finds that plaintiff has failed to show extreme and outrageous conduct on the part of defendant. As noted above, the record indicates that defendant, through its agents, attempted to resolve plaintiff's complaints to the extent that any accommodations would not unduly hinder the smooth operation of the garage. Defendant did not act unreasonably under the circumstances nor did it engage in outrageous behavior. For all of the foregoing reasons, the court finds plaintiff has failed to prove any of her claims and accordingly, judgment shall be rendered in favor of defendant.

{¶23} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. WARREN BETTIS
Judge

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