[Cite as *Glen v. Northcoast Behavioral Healthcare Sys.*, 2005-Ohio-3338.]

IN THE COURT OF CLAIMS OF OHIO
www.cco.state.oh.us

JANIS W. GLEN	:	
Plaintiff	:	CASE NO. 2002-05174 Judge Joseph T. Clark
v.	:	DECISION
NORTHCOAST BEHAVIORAL HEALTHCARE SYSTEM	:	
Defendant	:	

: : : : : : : : : : : : : : : : :

{¶ 1} Plaintiff brought this action against defendant, Northcoast Behavioral Healthcare System (NBHS), alleging claims of self-incrimination and racial profiling in violation of the Ohio and United States Constitutions, race discrimination in violation of R.C. 4112.02, 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's claims arise as a result of the termination of her employment with NBHS on January 8, 2001. She had been employed as a secretary there for approximately 16 years and was a member of a collective bargaining unit. Plaintiff's supervisor at the time was Gail McFarland.

{¶ 3} On November 4, 2000, McFarland received the following message on her NBHS voice-mail system: "You're always unavailable bitch. I'll tell you what. I'm going to dig your dog up, stick him in your bed, and when you come home that's what you can hump on. Ha, ha, ha. Bow, wow." McFarland was of the opinion that the voice on the tape was that of plaintiff. She also asked two other individuals who worked in her department to listen to it

independently. Both persons identified plaintiff's voice with no prior prompting from McFarland. The purported motive for the message was that plaintiff had been denied leave time that she requested for the Thanksgiving holiday.

{¶ 4} On November 6, 2000, McFarland made a complaint to the NBHS police department with regard to the voice-mail message. Officer Mark Micco then began an administrative investigation of the complaint of telephone harassment. Thereafter, NBHS Police Chief Quentin Gary discussed the matter with Ohio State Highway Patrol Trooper Tom Lemmon, who monitored the NBHS facility as part of his duties. As a result of that conversation, Trooper Lemmon initiated a criminal investigation of the alleged telephone harassment.

{¶ 5} Trooper Lemmon interviewed plaintiff on November 7, 2000. As part of the process he administered plaintiff's *Miranda*[1] rights. After leaving the interview and returning briefly to her office, plaintiff appeared at Chief Gary's office and asked whether she could listen to the tape of the voice-mail message. When Gary refused the request, plaintiff stated to him: "You believe that all black people look alike, think alike, and talk alike." She also added that "I am saying all Caucasians think the same way, it's in their upbringing."

{¶ 6} On November 8, 2000, after the criminal investigation concluded, McFarland's supervisor, Tom Cheek, requested that plaintiff provide a statement for the administrative investigation. Plaintiff reported to Officer Micco, but refused to provide a statement. Cheek then issued a written order to plaintiff directing her to provide the requested statement and explaining that refusal to do so could result in termination of her

---

[1] *Miranda v. Arizona* (1966), 384 U.S. 436.

employment. Plaintiff refused to accept the envelope containing the written order.

{¶ 7} It is not clear whether plaintiff understood the difference between the criminal and administrative investigations. The evidence on the issue is conflicting; however, plaintiff contends that she was not advised, in accordance with the mandates of *Garrity,*[2] that her statement in the administrative investigation could not be used for the criminal investigation. Officer Micco contends that he did explain the difference between the investigations to plaintiff, that he did provide her with her *Garrity* rights, and that he also advised her that she could have a union representative present during the interview.

{¶ 8} In any event, on November 15, 2000, Trooper Lemmon came to NBHS to arrest plaintiff on a charge of telephone harassment issued from the Cuyahoga Falls Municipal Court. Officer Micco and Lieutenant Ted Jarmol went to plaintiff's office to escort her to the NBHS police department where Trooper Lemmon was waiting to effect the arrest. When the trio passed McFarland's office, plaintiff stopped and shouted: "I did not call you [on the telephone] bitch and if I have a problem with you I will slap the shit out of you." Plaintiff then referred several times to the Caucasians in the area as "peckerwoods," which was defined at trial as a derogatory term meaning indigent white people.

{¶ 9} After returning to the office from the courthouse, plaintiff was asked to provide an administrative statement regarding her conduct and the language she used during her escort

---

[2] *Garrity v. New Jersey* (1967), 385 U.S. 493, 500, holding that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

to the NBHS police department. She refused to write a statement regarding the events. As of that date, she was placed on administrative leave and was later transferred to a different department pending the outcome of the administrative investigation.

{¶ 10} At the time, the evidence obtained had revealed no one, other than plaintiff, as a suspect for leaving the voice-mail message to McFarland.

{¶ 11} On December 4, 2000, NBHS conducted a pre-disciplinary conference during which plaintiff was charged with failure of good behavior; threatening another employee; use of obscene, abusive or insulting language to co-workers and/or management; being disrespectful and/or engaging in heated arguments with superiors and/or co-workers; engaging in acts of discrimination or insult on the basis of race, color or national origin; insubordination in the form of willful disobedience of a direct order by a superior and failure to comply with or cooperate in an official administrative investigation. She was found to have violated the NBHS polices embodied in those charges and was terminated from her position. However, the criminal charge of telephone harassment was dismissed on January 3, 2001, for lack of prosecution.

{¶ 12} In her complaint, plaintiff alleges a violation of her rights against self-incrimination under the Fifth Amendment of the United States Constitution and Article I §10 of the Ohio Constitution. That claim is premised on the contention that plaintiff was coerced into giving a statement to NBHS police under threat of termination without first being advised that her statements could not be used against her in a criminal prosecution.

{¶ 13} To the extent that plaintiff alleges violations of her constitutional rights, actions against the state under Section 1983, Title 42, U.S.Code may not be brought in the Court of Claims because the state is not a "person" within the meaning of Section

1983. See, e.g., *Jett v. Dallas Indep. School Dist.* (1989), 491 U.S. 701; *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170; *White v. Chillicothe Correctional Inst.* (Dec. 29, 1992), Franklin App. No. 92AP-1230. Thus, this court is without jurisdiction to hear constitutional claims. *Graham v. Board of Bar Examiners* (1994), 98 Ohio App.3d 620.

{¶ 14} Plaintiff's second claim alleges that she was subject to racial profiling. Specifically, plaintiff contends that only Caucasian employees of NBHS were permitted to hear the tape of the voice-mail message but that no Caucasian employees were ever investigated as suspects in the telephone harassment case. Further, plaintiff contends that only African-American females were asked to provide voice samples for the tape analysis. The results of the analysis were not conclusive and plaintiff was not positively identified as the caller. Thus, plaintiff contends that as a result of racial profiling she was falsely accused of making the harassing phone call, that she was arrested and charged with a criminal offense, and that she was terminated from her job.

{¶ 15} To the extent that profiling or targeting an individual on the basis of race gives rise to an equal protection constitutional claim, this court is, as stated previously, without jurisdiction to determine such claims. However, to the extent that these allegations form the basis of plaintiff's racial discrimination claim under R.C. 4112.02, they will be considered in that context.

{¶ 16} Plaintiff's third claim is one of racial discrimination in violation of R.C. 4112.02.

{¶ 17} R.C. 4112.02 provides in relevant part:

{¶ 18} "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to

discharge without just cause, to refuse to hire, or otherwise 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."

{¶ 19} The Supreme Court of Ohio has stated that "federal case law interpreting Title 7 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 Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196. To establish a prima facie case, plaintiff must show that (1) she was a member of a statutorily-protected class; (2) she was discharged; (3) she was qualified for the position; and (4) she was replaced by a person not belonging to the protected class. *Manofsky v. Goodyear Tire and Rubber Co.* (1990), 69 Ohio App.3d 663, 667. See, also, *Sivarajan v. Nationwide Life Ins. Co.* (June 16, 1998), Franklin App. No. 97APE10-1426, discussing *Henderson v. Cincinnati Bell Long Distance, Inc.* (1996), 113 Ohio App.3d 793, 796, and *Mitchell v. Toledo Hosp.* (C.A.6, 1992), 964 F.2d 577, 582.

{¶ 20} If plaintiff is able to demonstrate a prima facie case, defendant need only show a legitimate nondiscriminatory reason for its actions. Once the employer meets its burden of proof, plaintiff-employee must prove defendant's reason was only a pretext for discrimination or was unworthy of credence. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248.

{¶ 21} In the instant action, plaintiff cannot establish a prima facie case because there is no evidence of who, if anyone, replaced her in her position. However, even assuming that plaintiff had met that requirement, the court finds that NBHS supplied ample, credible and compelling evidence that established that it terminated plaintiff's employment for legitimate business

and professional reasons unrelated to plaintiff's race. Whether or not plaintiff made the harassing telephone call, NBHS was justified in terminating her employment based upon her various violations of workplace policies. For example, her behavior in threatening McFarland; referring to other employees in a derogatory manner; and refusing to provide a statement regarding her conduct. The evidence shows that plaintiff's attitude and demeanor throughout the process was unprofessional and disruptive to the workplace environment.

{¶ 22} Inasmuch as the court has found that NBHS articulated legitimate, nondiscriminatory reasons for plaintiff's discharge, the presumption of discrimination has been rebutted; therefore, plaintiff must show that defendant's proffered reasons were a mere pretext for unlawful discrimination. *Manofsky v. Goodyear Tire & Rubber Co.*, supra.

{¶ 23} The Tenth District Court of Appeals has explained that, in order to meet the burden with respect to pretext, plaintiff must show the "employer's explanation is not credible." *Ullmann v. Ohio Bureau of Job & Family Servs.*, Franklin App. No. 03AP-184, 2004-Ohio-1622. Pretext requires proof by a preponderance of the evidence. Id. In addition, the Sixth Circuit has held that to prove pretext, plaintiff must show that: 1) defendant's reasons had no basis in fact; 2) the reasons did not actually motivate the discharge; and 3) the reasons were insufficient to warrant a discharge. *Manzer v. Diamond Shamrock Chemicals Co.* (C.A.6, 1994), 29 F.3d 1078.

{¶ 24} In this case, the court finds no evidence demonstrating that defendant's reasons for terminating plaintiff lacked a factual basis, were motivated by plaintiff's race, or were insufficient to warrant her discharge. If there was any evidence of racial discrimination in this case, it was on the part of plaintiff, not

NBHS. Further, absent a finding of illegal purpose or discriminatory intent, this court has consistently held that it will not substitute its judgment for that of the employer and may not second-guess the business judgments of employers regarding personnel decisions. See, e.g., *Dodson v. Wright State Univ.* (1997), 91 Ohio Misc.2d 57; *Washington v. Central State Univ.* (1998), 92 Ohio Misc.2d 26; *Boyle v. Dept. of Rehab. and Corr.* (Apr. 22, 2002), Court of Claims No. 00-03140.

{¶ 25} In sum, the court finds that plaintiff failed to prove, by a preponderance of the evidence, that defendant's reasons for terminating her were a mere pretext.

{¶ 26} Plaintiff's complaint also contains a claim for intentional infliction of emotional distress. To prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove: "1) that the [defendant] 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 [defendant'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 [defendant's] actions were the proximate cause of plaintiff's psychic injury; and 4) that the mental anguish suffered by plaintiff is serious and of a nature that 'no reasonable man could be expected to endure it.'" *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 34. (Citations omitted.)

{¶ 27} Plaintiff's claim for intentional infliction of emotional distress is predicated upon several bases. Specifically, plaintiff contends that McFarland and NBHS police intentionally withheld information from her in order to increase the emotional impact on her when she learned both the nature of the investigation and that she was a suspect. She also contends that her arrest and

transport to Cuyahoga Falls Municipal Court was deliberately calculated to cause severe emotional distress; and that the process of being criminally charged, when the tape analysis had been inconclusive, was also severely distressful.

{¶ 28} Having found that NBHS had legitimate business reasons for its actions, the court also finds that defendant's actions did not rise to the level of outrageous conduct that is utterly intolerable, or beyond all possible bounds of decency. See *Yeager v. Local Union 20 Teamsters* (1983), 6 Ohio St.3d 369.

{¶ 29} For the foregoing reasons, the court concludes that plaintiff cannot prevail on any of her claims for relief. Accordingly, judgment shall be rendered in favor of defendant.

IN THE COURT OF CLAIMS OF OHIO
www.cco.state.oh.us

JANIS W. GLEN	:	
Plaintiff	:	CASE NO. 2002-05174 Judge Joseph T. Clark
v.	:	JUDGMENT ENTRY
NORTHCOAST BEHAVIORAL HEALTHCARE SYSTEM	:	
Defendant	:	

: : : : : : : : : : : : : : : : :

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.

_____
JOSEPH T. CLARK
Judge

Entry cc:

John A. Frenden — Attorney for Plaintiff
724 Leader Building
Cleveland, Ohio 44114

Matthew J. Lampke — Attorneys for Defendant
Walter J. McNamara
Assistant Attorneys General
Executive Agencies
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

LH/cmd
Filed June 22, 2005
To S.C. reporter June 29, 2005