[Cite as *Porturica v. Dept. of Rehab. & Corr.*, 2007-Ohio-3863.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

DEBORAH C. PORTURICA, et al.

Plaintiffs

v.

DEPARTMENT OF REHABILITATION AND CORRECTION, et al.

Defendants

Case No. 2004-08430

Judge Joseph T. Clark

DECISION

{¶1} Plaintiff, Deborah Porturica, brought this action against defendants alleging a claim in negligence. Plaintiff's husband has alleged a claim for loss of consortium. Pursuant to the court's November 19, 2004, decision, defendants' motion to dismiss was granted, in part, as it related to claims predicated upon negligent infliction of emotional distress. The court also noted in its decision that plaintiff's complaint arguably stated claims for bodily injury and intentional workplace tort. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} According to the complaint, plaintiff had been employed by defendants as a licensed teacher for 11 years when she suffered a "complete breakdown" in August 2003, and was placed on permanent mental disability leave. Plaintiff alleges that she had been required to teach as many as five "level one" inmates at the Ohio State Penitentiary (OSP), a maximum security prison; and that the inmates had harassed her while she was attempting to teach. In her complaint, plaintiff states that she was "subject to inmate conduct, outrageous in nature and utterly intolerable in a civilized society." Plaintiff relates that as she "attempted to teach and do her job, she would continually be subject to inmate verbal and physical assault, dehumanizing in nature, which included inmate masturbation in front of her during the course of instruction." According to plaintiff, her "life was further threatened on at least three (3) occasions and she was accosted with verbiage relating to the most deviate and violent sexual acts." Plaintiff claims that she reported the inmates' behavior to her supervisor, Mr. Grayson, but that he either belittled her or minimized her complaints. Plaintiff maintains that her supervisor's indifference amounted to intolerable conduct and that, as a result, she has suffered severe emotional and physical distress.

{¶3} Defendants contend that plaintiff's claim is subject to a one-year statute of limitations and that the claim was untimely filed. R.C. 2743.16(A), the statute of limitations for commencing actions in this court, states as follows: "Subject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." In addition, the Tenth District Court of Appeals has held that "R.C. 2743.16(A) applies to all actions against the state in the Ohio Court of Claims. *Fellman v. Ohio Dept. of Commerce* (Sept. 29, 1992), No. 92AP-457, ***. In that decision [the appellate court] stated that R.C. 2743.16(A) 'was clearly intended to take precedence

over all other statute of limitations provisions of the Ohio Revised Code.'" *Talmon v. Ohio State Lottery Commission* (Oct. 6, 1992), Franklin App. No. 92AP-693.

{¶4} As a preliminary matter, the court finds that plaintiff failed to produce any evidence that she ever suffered a physical assault or bodily injury as a result of teaching inmates at OSP. Thus, the only remaining cause of action is the intentional infliction of emotional distress. Plaintiff filed her complaint on August 23, 2004, and as such, the court will consider the incidents identified by plaintiff that occurred from August 23, 2002, through August 2003, when plaintiff notified defendants that she was unable to continue teaching inmates due to her mental disability. See *Funk v. Rent-All Mart, Inc.*, 91 Ohio St.3d 78, 2001-Ohio-270 (wherein the court held that a claim alleging an intentional tort by an employer has a statute of limitations of two years).

{¶5} To prevail on a cause of action for intentional infliction of emotional distress, plaintiff must show that: 1) defendants intended to cause emotional distress, or that defendants knew or should have known that their actions would result in serious emotional distress; 2) defendants' conduct was extreme and outrageous; 3) defendants' actions proximately caused plaintiff's psychic injury; and 4) the mental anguish plaintiff suffered was serious. *Hanly v. Riverside Methodist Hosp.* (1991), 78 Ohio App.3d 73, 82, citing *Pyle v. Pyle* (1983), 11 Ohio App.3d 31.

{¶6} The Sixth District Court of Appeals has stated that "*** we are of the opinion that an intentional tort claim can be raised, in certain and specific contexts, where a job is considered 'inherently dangerous.'" *Ross v. Maumee City Schools, et al.* (1995), 103 Ohio App.3d 58, 66. In *Ross*, the court held that a school may be liable for an intentional tort where a teacher's assistant continues to be assigned to control a violent, autistic child and the school knows of the violent acts and inappropriate classroom placement. Additionally, in *Taylor v. Dept. of Rehab. and Corr.* (1994), 75 Ohio Misc.2d 60, this court held that a maximum security prison is an inherently dangerous workplace and that the state may be

liable for an intentional tort where prison staffing, policies and layout make injury to a female staff member substantially certain to occur.

{¶7} Here, plaintiff worked in a maximum security prison where she had regular contact with violent offenders. Plaintiff explained that at times she had been required to teach students one-to-one in front of each inmate's cell door and that, at those times, she was accompanied by a corrections officer. According to plaintiff, she also taught inmates in an area located on an elevated walkway inside the institution, where five or six inmates were handcuffed and locked into single-cell, metal cages referred to as "program booths" from which they received instruction. Plaintiff recalled that the walkway was secured by locked doors on either end and that corrections officers were stationed on the cell block below her. Plaintiff claimed that whenever an inmate became disruptive or hostile, she could contact the officers only by shouting at them or by waving her arms to attract their attention.

{¶8} Plaintiff testified that she repeatedly complained to her co-workers and to her supervisor about the disruptive and offensive behavior exhibited by some of the inmate-students. In addition, plaintiff maintains that many of the inmates were recalcitrant and unruly and that in most instances, plaintiff sought to have those inmates either permanently removed from instruction or assigned to a male teacher. According to plaintiff, although her co-workers were sympathetic, her supervisor was insensitive to her concerns and essentially conveyed that she should either overlook the misconduct or continue to issue conduct reports for disciplinary violations.

{¶9} In *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375, quoting Restatement of the Law 2d, Torts (1965) 73, Section 46, comment d, the court explained that "[l]iability 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. Generally, the case is one in which the recitation of the facts to an average member of the community

would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" Conversely, liability does not arise from mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

{¶10} Defendants maintain that plaintiff has a history of emotional instability which predates her service period at OSP, that defendants utilized all reasonably available safety measures, and that plaintiff's requests could not be accommodated inasmuch as defendants were required to provide an education to inmates who had not attained the equivalent of a high school diploma. In addition, defendants argue that it was not always practical to assign a male teacher to instruct inmates who presented a behavioral problem for plaintiff. Defendants acknowledged that the inmates were each locked into individual metal cages and that the instructor stood in an open area outside the program booths, approximately one and one-half to two feet from the inmates, to deliver instruction. Defendants assert that corrections officers are always present on the range and that they respond readily in the event of any disruption.

{¶11} Plaintiff testified that she was particularly disturbed by inmates who masturbated in front of her and that each time an inmate masturbated during the time she was present, she would write out a conduct violation report in order that the inmate would be subjected to some form of disciplinary action. Nevertheless, inmates were returned to the education program once they had completed any disciplinary sanctions. Plaintiff alleges that defendants were inconsistent with enforcement of disciplinary measures, and that when they allowed inmates to return for instruction after the disciplinary period was served, those inmates were especially rude and disrespectful to her. Upon cross-examination, however, plaintiff acknowledged that none of the inmates that she reported ever masturbated in front of her again.

{¶12} The Tenth District Court of Appeals recently opined that the burden on the employee is an extremely difficult standard to meet inasmuch as a plaintiff must present evidence that proves that the employer was not merely negligent, but rather must present

such proof which surpasses even that required to prove recklessness. Plaintiff must prove here that defendants had knowledge that their conduct was substantially certain to cause her serious emotional distress. See *Singleton v. Ohio Concrete Resurfacing, Inc*., Franklin App. No. 06AP-991, 2007-Ohio-2012.

{¶13} Upon review of the evidence adduced at trial, the court finds that plaintiff failed to prove that defendants intended to cause plaintiff emotional distress. Although defendants had knowledge that plaintiff exhibited a certain amount of emotional fragility, the court cannot find that Mr. Grayson's response was so inadequate or reprehensible that it went beyond all possible bounds of decency and should be considered completely intolerable in a civilized community. Indeed, the court finds that plaintiff has failed to prove that her employer's conduct, as distinguished from the inmates' behavior, rose to the level of outrageous conduct. "While [plaintiff] might have reason to be upset, the law cannot protect against, and redress in damages, all mental anguish a person may suffer. *Lynn v. Allied Corp.* (1987), 41 Ohio App.3d 392, 400, 536 N.E.2d 25, 34 (citing *Yeager*, supra, 6 Ohio St.3d at 374-375, 6 OBR at 425-426, 453 N.E.2d at 670-671)." *Davis v. Billow Co. Falls Chapel* (1991), 81 Ohio App.3d 203, 207. Therefore, the court finds that defendants did not commit the tort of intentional infliction of emotional distress. The court further finds that the loss of consortium claim is derivative of the central cause of action. Thus, the derivative claim fails as well. See *Breno v. City of Mentor,* Cuyahoga App. No. 81861, 2003-Ohio-4051. For the foregoing reasons, judgment shall be rendered in favor of defendants.

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Judge Joseph T. Clark

JUDGMENT ENTRY

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 defendants. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
JOSEPH T. CLARK
Judge

cc:

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SJM/cmd	

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