[Cite as *Kimmel v. Lowe's, Inc.*, 2011-Ohio-28.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

TERRY SCOTT KIMMEL, et al.	**:**	
Plaintiffs-Appellants	**:**	**C.A. CASE NO. 23982**
vs.	**:**	**T.C. CASE NO. 2009-CV-4932**
LOWE'S, INC., et al.	**:**	**(Civil Appeal from Common Pleas Court)**
Defendants-Appellees	**:**	

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O P I N I O N

Rendered on the 7th day of January, 2011.

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Mark J. Bamberger, Atty. Reg. No. 0082053, 8 S. 3rd Street, Tipp City, OH 45371
Attorney for Plaintiffs-Appellants

Charles C. Warner, Atty. Reg. No. 0023052, 41 South High Street, Suite 2900, Columbus, OH 43215; Caroline H. Gentry, Atty. Reg. No. 0066138, One South Main Street, Suite 1600, Dayton, OH 45402
Attorneys for Defendants-Appellees

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GRADY, J.:

{¶ 1} Plaintiffs, Terry Kimmel and Toni Kimmel ("the Kimmels"), appeal from an order granting summary judgment in favor of Defendants, Lowe's Inc., and others.

{¶ 2} Terry Kimmel was hired as a delivery driver at Lowe's

Home Centers, Inc. ("Lowe's") in June 2008. Between October 2008 and April 2009, Kimmel "worked closely" with Douglas Bowman, another delivery driver. (Dkt. 1, ¶12.) On March 27, 2009, Bowman and Kimmel were involved in a verbal dispute. Both Bowman and Kimmel submitted written statements to Lowe's regarding the verbal dispute. On April 22, 2009, Kimmel quit his job at Lowe's.

{¶ 3} On June 15, 2009, the Kimmels commenced an action against Lowe's, Bowman, and other employees of Lowe's, alleging causes of action of negligence, civil conspiracy, unlawful discriminatory practices, intentional and negligent infliction of emotional distress, and loss of consortium. Defendants moved for summary judgment on all claims asserted in the Complaint. (Dkt. 16.) On March 16, 2010, the trial court granted Defendants' motion for summary judgment. (Dkt. 22.) The Kimmels filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 4} "THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS ON THE PLAINTIFF'S CLAIM OF HOSTILE WORK ENVIRONMENT."

{¶ 5} When reviewing a trial court's grant of summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. "De Novo review means that this court uses the same standard that the trial court should have used, and we examine

the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. Of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St.2d 116, 119-20. Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

{¶ 6} Terry Kimmel alleged a hostile work environment claim pursuant to R.C. 4112.02(A), which provides, in pertinent part:

{¶ 7} "It shall be an unlawful discriminatory practice for any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person . . . to discriminate against that person . . . ."

{¶ 8} To establish a prima facie case of hostile work environment pursuant to R.C. 4112.02, the plaintiff needs to establish that (1) he was a member of a protected class; (2) he was subjected to unwelcomed verbal or physical conduct; (3) he was harassed by such unwelcomed verbal or physical conduct; (4) the alleged harassment had the effect of unreasonably interfering with his work performance and created an intimidating, hostile, or offensive environment; and (5) respondeat superior liability exists. *Northern v. Med. Mut. of Ohio*, Cuyahoga App. No. 86527, 2006-Ohio-1075, citation omitted.

{¶ 9} "Fortunately or unfortunately, not all upsetting or even

mean-spirited conduct in the workplace is actionable." *Easterling v. Ameristate Bancorp, Inc.*, Montgomery App. No. 23980, 2010-Ohio-3340, at ¶44, citing *Harris v. Forklift Sys., Inc.* (1993), 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295. "In the absence of an employee's membership in a protected class, participation in a protected activity, or a clear public policy that prohibits the employer's conduct, an employee cannot maintain a claim for harassment merely because his employment has become unpleasant or undesirable." *Easterling*, at ¶45.

{¶ 10} Kimmel did not allege in his complaint or submit any evidence in response to the summary judgment motion that supports a finding that he was a member of a protected class, was participating in a protected activity, or was protected by a clear public policy. Therefore, the trial court properly granted summary judgment on his hostile work environment claim.

{¶ 11} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 12} "THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS ON THE PLAINTIFF'S CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS."

{¶ 13} To establish a claim for intentional infliction of emotional distress, the plaintiff must prove that: (1) the defendant either intended to cause emotional distress or knew or

should have known that the actions taken would result in serious emotional distress to the plaintiff; (2) the defendant's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency"; (3) the defendant's actions were the proximate cause of plaintiff's psychic injury; and (4) the mental anguish suffered by plaintiff is serious and of a nature that "no reasonable man could be expected to endure it." *Parker v. Bank One* (March 30, 2001), Montgomery App. No. 18573, citations omitted. A claim for intentional infliction of emotional distress must be based on more than "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375, citation omitted.

{¶ 14} Upon a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue of material fact exists for trial. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Once the moving party satisfies its burden, the nonmoving may not rest upon the mere allegations or denials of the party's pleadings. Id.; Civ.R. 56(E). Rather, the burden then shifts to the non-moving party to respond, with affidavits or as otherwise permitted by Civ.R. 56, setting forth specific facts which show that there is a genuine issue of material fact for trial. Id. Throughout, the evidence must be construed in favor of the non-moving party. Id.

{¶ 15} In support of their motion for summary judgment, Defendants submitted written statements prepared by Terry Kimmel and Bowman regarding their versions of what occurred between them during the March 27, 2009 verbal dispute. Defendants also submitted notes prepared by the Operations Manager at Lowe's regarding his conversations with Kimmel and Bowman regarding their verbal dispute. Also attached to Defendants' motion for summary judgment is an "Employee Complaint Resolution Form" prepared by the Store Manager of Lowe's in which it was documented that both Kimmel and Bowman would be cited "for uncooperative/counter productive behavior." (Dkt. 16.)

{¶ 16} We agree with the trial court that the evidence submitted by Defendants demonstrate that Defendants' actions do not rise to the level of those required to establish intentional infliction of emotional distress. Therefore, Defendants met their Civ.R. 56 burden of showing no genuine issue of material fact exists for trial. In response, the Kimmels did not submit any evidence in support of the claim of intentional infliction of emotional distress. Rather, the Kimmels stated:

{¶ 17} "There was abundant and robust evidence discussed in the complaint itself and further available for cross-examination that the actions of the named Defendants herein led directly and causally to mental, physical, and financial injury to both

Plaintiffs. Medical records, billing records, and direct testimony are readily available to show the direct and significant impact the Defendants' actions had on both Plaintiffs." (Dkt. 19, p. 5-6.) Plaintiffs' conclusory statements are insufficient to create a genuine issue of material fact on their claim of intentional infliction of emotional distress.

{¶ 18} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 19} "THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS ON THE PLAINTIFF'S CLAIM OF CIVIL CONSPIRACY."

{¶ 20} A claim for civil conspiracy requires proof of "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damage." *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 1995-Ohio-61, citations omitted. "An underlying unlawful act is required before a civil conspiracy claim can succeed." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 1998-Ohio-294, citations omitted.

{¶ 21} The Kimmels failed to submit evidence that a civil conspiracy existed or that an underlying tortious act occurred. Rather, the Kimmels argue on appeal that "[t]he mere fact that Lowe's failed to reconcile the issues between Bowman and Kimmel

should be enough proof that a conspiracy existed." Kimmels' Appellate Brief, p. 11. We do not agree that this "mere fact" is sufficient to create a genuine issue of material fact on the claim of civil conspiracy. Rather, the Kimmels failed to carry their burden under *Dresher* and the trial court correctly granted summary judgment on this cause of action.

{¶ 22} We note that the Kimmels did not challenge in their assignments of error the trial court's finding that their claims for negligence, unlawful discriminatory practices, and negligent infliction of emotional distress must fail. Therefore, the Kimmels cannot rely on any of these causes of action to form the basis for their civil conspiracy claim. Based on our disposition of the previous two assignments of error, no causes of action remain to establish that an underlying tort occurred.

{¶ 23} The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 24} "THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS ON THE PLAINTIFF'S CLAIM OF LOSS OF CONSORTIUM."

{¶ 25} "A loss of consortium claim is a derivative cause of action dependant upon the existence of a primary cause of action." *Miller v. City of Xenia*, Greene App. No. 2001CA82, 2002-Ohio-1303. Based on our disposition of the previous three assignments of

error, we agree with the trial court that Kimmel's loss of consortium claim must fail because no underlying tort claims remain to support the derivative, loss of consortium claim. Id.

{¶ 26} The assignments of error are overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and FAIN, J. concur.

Copies mailed to:

Mark J. Bamberger, Esq.
Caroline H. Gentry, Esq.
Charles C. Warner, Esq.
Hon. Mary Wiseman