[Cite as *Retuerto v. Berea Moving Storage & Logistics*, 2015-Ohio-2404.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102116

DIANA RETUERTO

PLAINTIFF-APPELLANT

vs.

BEREA MOVING STORAGE AND LOGISTICS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-800672

BEFORE: Jones, P.J., Kilbane, J., and McCormack, J.

RELEASED AND JOURNALIZED: June 18, 2015

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LARRY A. JONES, SR., P.J.:

{¶1} Plaintiff-appellant, Diana Retuerto, appeals the trial court's decision to grant summary judgment in favor of Berea Moving and Storage Company, et al. We affirm in part and reverse in part.

I. Procedural History and Facts

{¶2} In 2013, Retuerto filed suit against Berea Moving, owner Willard Melton, and employee Sally Hawthorn. Melton owned Berea Moving, a residential and commercial moving and storage company, with Lisa Holly, his sister.

{¶3} Melton was responsible for dispatch, the drivers, movers, and warehouse employees. Holly served as company president and CEO. Hawthorn and Retuerto both worked in the office; Hawthorn was the office administrator and Retuerto's supervisor. Retuerto performed various office and clerical functions and worked there from March 2010 to October 1, 2012.

{¶4} Berea Moving had an employee handbook, which contained a sexual harassment policy. The policy included a definition of "sexual harassment" and reporting procedures. Retuerto received an employee handbook in December 2010 and attended a training in October 2011 that included instruction on sexual harassment prevention and investigation.

{¶5} A few months after she started, Retuerto claimed that Melton, who was married, began making "verbal advances" towards her. These advances included comments about dreams he was having about her, her physical appearance, and questions

about her makeup and hair. Retuerto was also married.

{¶6} In the summer of 2010, Retuerto brought Melton's behavior to the attention of her supervisor, Hawthorn, claiming that he was making comments of a "sexual nature." At that time, Retuerto had not yet received an employee handbook nor attended the training on sexual harassment. Hawthorn, who did not supervise Melton, spoke to him about Retuerto's complaints and told him the comments were not appropriate. Melton apologized to Retuerto. But, according to Retuerto, the comments "subsided, but did not stop." Instead of making so many comments, Melton would stare at Retuerto and find excuses to come into the office and linger by her desk.

{¶7} In the spring of 2012, Hawthorn was out on medical leave and Melton began to increase the time he spent in the office. Retuerto alleged that Melton "did his best" to keep other male workers away and made daily comments about her physical appearance and dreams he was having about her. She further alleged he would get close to her and rub up against her while she was sitting at her desk, pretending to read her computer screen or crawl under her desk to fix a computer cord.

{¶8} Retuerto alleged Melton would tell her he could not stop thinking about her, could not explain his feelings towards her, and often commented about his constant need for sex. According to Retuerto, in the summer of 2012, Melton began to "profess his love" for her and ask how she felt about him. She averred that Melton "would daily sit down in the chair in front of my desk and whisper in my ear that he cannot stop thinking about me and would demand to know how I felt about him."

{¶9} Retuerto averred that if she tried to get away from Melton or have a break, he "would all of a sudden have to run an errand and I felt as though he was cornering me into having another discussion about his love for me and how he felt," or he would follow her into the kitchen and "rub up" against her. Retuerto dreaded going to work and began to see a counselor.

{¶10} Melton's behavior continued through the summer and early fall of 2012. Retuerto felt as though she was "at her wits end." Then, according to Retuerto, Melton developed an attitude and began to yell at her. Retuerto stated that Melton was her boss and she had previously seen his reactions when things did not go his way, so she tried to do her job without "making any waves."

{¶11} Retuerto stated that Hawthorn would observe and hear some of Melton's behavior and comments, and surmised Melton was going through a "mid-life crisis." According to Hawthorn, however, she did not see or hear Melton engage in any behavior that could be construed as harassment after she spoke with him in 2010.

{¶12} In September 2012, Retuerto brought Melton's behavior to Hawthorn's attention again, telling Hawthorn that Melton was "acting like a jilted high school 'lover' and told her the things that [he] had been saying to me." Retuerto said Hawthorn "agreed" with her "100 percent."

{¶13} The same day, Melton followed Retuerto to her car as she was leaving and asked her if she was ever going to tell him her "true feelings." Retuerto told Melton he was making things in the office "awkward" and asked why he was giving her "attitude."

Melton "glared" at her, said "well I guess that's your answer, thanks a lot," and stormed off.

{¶14} Retuerto took the next day off work. Melton called her cell phone five times and sent two text messages. She called Hawthorn and asked for additional time off. She also informed her about the confrontation with Melton at her car. Hawthorn said this was the first time Retuerto had complained about Melton since 2010.

{¶15} During her time off, Retuerto spoke with Holly, Hawthorn, and a counselor about Melton. Holly sent Retuerto emails asking her how she was doing and inquiring when she was going to return to work.

{¶16} Retuerto returned to work on October 1, 2012, but left at some point during the day. She later sent an email stating that she would not be returning to her job.

{¶17} The record does not show that any disciplinary action was taken against Melton.

{¶18} On December 14, 2012, Retuerto found an envelope in her mailbox from Berea Moving that was ripped open and empty. Retuerto believed Melton had come to her house and tampered with her mail. Melton claimed that the company mailed her a jump drive with her personal files on it and he had no idea what happened to the envelope or its contents.

{¶19} Retuerto filed her complaint in February 2013, alleging sexual harassment, statutory violations, intentional infliction of emotional distress, negligent supervision, vicarious liability, civil assault and battery, invasion of privacy, and negligent hiring and

retention.

{¶20} The defendants collectively moved for summary judgment in October 2013, which Retuerto opposed. The defendants filed a reply brief and a motion to strike portions of Retuerto's brief in opposition. The trial court held a hearing on the motion to strike in January 2014 and ordered Retuerto to resubmit her brief in opposition to the defendants' motion for summary judgment "with a factual basis and reference to the record for every single allegation contained therein."

{¶21} Retuerto filed her supplemental brief in February 2014, which the defendants opposed and asked the trial court to strike her supplemental brief, arguing it did not comply with the court's January 2014 order. The trial court granted the motion.

{¶22} In September 2014, the trial court granted the defendants' motion for summary judgment on all claims.

{¶23} Retuerto appeals, raising one assignment of error for our review:

> I. The trial court erred as a matter of law in granting summary judgment to the Appellees as there are genuine issues of material fact in dispute and as a matter of law judgment could not be rendered via Ohio Civil Rule 56 to the Appellees.

II. Non-Compliance with Appellate Rules

> **{¶24}** As an initial matter, we must note that Retuerto's brief fails to comply with the appellate rules. App.R. 12(A)(2) provides that an appellate court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).

App.R. 16(A)(6) provides that an appellant's brief shall include "[a] statement of facts

relevant to the assignments of error presented for review, with appropriate references to the record in accordance with division (D) of this rule." App.R. 16(D) states:

> [r]eferences in the briefs to parts of the record shall be to the pages of the parts of the record involved * * * . If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

And App.R. 16(A)(7) provides that an appellant's brief shall include

> [a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.

{¶25} The appellant's brief does not set forth the facts of the case, instead Retuerto asks this court to incorporate by reference parts of the record. In addition, although she cites to applicable authorities and statutes in her brief, she fails to specifically cite to the record to support her arguments. Retuerto cites to her deposition and affidavit in opposition to summary judgment generally, but not specifically.[1]

{¶26} If an argument exists that can support an assignment of error, it is not this court's duty to root it out. *Citta-Pietrolungo v. Pietrolungo*, 8th Dist. Cuyahoga No. 85536, 2005-Ohio-4814, ¶ 35, citing *Cardone v. Cardone*, 9th Dist. Summit Nos. 18349 and 18673, 1998 Ohio App. LEXIS 2028 (May 6, 1998).

{¶27} Retuerto has rendered appellate review difficult. This struggle is made more complicated by the fact that she frequently failed to cite to the places in the record

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[1]In her brief, Retuerto states that she could not afford to secure copies of the depositions taken in this case; therefore, she did not review them.

that support her position or to support her factual assertions using evidence in the record. *See* App.R. 16(A)(6) and (7).

{¶28} Notwithstanding this deficiency and although the appellate rules were not complied with, we recognize that cases are best decided on their merits; therefore, we will consider the assigned error. Appellant's counsel is admonished that, in the future, the court may disregard an assignment of error or appeal that is brought in such a manner.

III. Law and Analysis

Standard of Review

{¶29} We review the trial court's judgment de novo, using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Civ.R. 56(C) provides that summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶30} Civ.R. 56(C) sets out the types of documents that may be used to support a motion for summary judgment and states, in part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact

and that the moving party is entitled to judgment as a matter of law.

{¶31} "As a general matter, a deposition transcript must be filed with the court or otherwise authenticated before it can be given the force and effect of legally acceptable evidence." *Mustric v. Penn Traffic Corp.*, 10th Dist. Franklin No. 00AP-277, 2000 Ohio App. LEXIS 4032 (Sept. 7, 2000) ¶ 16, citing *Putka v. Parma*, 90 Ohio App.3d 647, 630 N.E.2d 380 (8th Dist.1993).

{¶32} None of the depositions taken in this case were filed with the trial court. In support of their respective positions, both Retuerto and Berea Moving cite to Retuerto's deposition, portions of which were attached to Berea Moving's motion for summary judgment. A trial court may consider portions of a deposition attached to a motion for summary judgment when that deposition is not properly before the trial court, if no objection is raised.[2] *Mustric* at *id.* citing *Rinehart v. W. Local School Dist. Bd. of Edn.*, 87 Ohio App.3d 214, 621 N.E.2d 1365 (4th Dist.1993). This court has previously held that "when ruling on a motion for summary judgment, a court in its discretion may consider documents not properly qualified per Civ.R. 56 when no objection has been made by the opposing party." *Giant Eagle, Inc. v. Horizon Natl. Contract Servs., L.L.C.*, 8th Dist. Cuyahoga No. 96610, 2012-Ohio-1841, ¶ 15, citing *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986); *see also Brown v. Ohio Cas. Ins. Co.*, 63 Ohio App.2d 87, 90, 409 N.E.2d 253 (8th Dist.1978).

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[2]The proper way to submit portions of depositions for purposes of summary judgment is to submit portions of filed depositions, or to attach an affidavit that attest to the fact that portions are from depositions of witnesses testifying under oath. Neither was done in this case.

{¶33} In this case, Retuerto objected to the defendants' use of her deposition testimony in her brief in opposition to their motion for summary judgment, when she argued that the company's limited citation to, and misuse of her deposition, was inappropriate. Based on this, the trial court should not have, and this court will not, consider Retuerto's deposition in determining whether summary judgment was appropriate. As no other depositions were made part of the record, we will also not consider any reference to them that was made in the parties' appellate briefs or the trial court record.

Counts 1 (Melton) and 2 (Melton and Berea Moving): Sexual Harassment; Count 5 (Berea Moving): Vicarious Liability

{¶34} Counts 1 and 2 of Retuerto's complaint set forth claims against Melton (Counts 1 and 2) and Berea Moving (Count 2) for statutory and common-law sexual harassment. Count 5 alleged vicarious liability against Berea Moving.

{¶35} R.C. 4112.02(A) makes it an unlawful discriminatory practice "[f]or 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." An employer, as used in R.C. Chapter 4112, includes "any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer." R.C. 4112.01(A)(2).

{¶36} Melton was one of two company owners and a supervisor at the company. According to the company's organizational chart, both Melton and Holly shared the top

spots in the company hierarchy, with Holly's position as president and CEO below that of owner. Melton controlled the day-to-day operations of service, which included outside moving, inside storage, the warehouse, and, by his own admission, "supervising various drivers, movers, and warehouse employees." Thus, Melton meets the definition of "employer" under Ohio law.

{¶37} Melton can be held individually liable for his own harassing conduct. R.C. 4112.99 states that "whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief." Because Melton is an "employer," he is subject, in his individual capacity, to a civil action for damages based on his conduct if Retuerto can prove that Melton's conduct constituted unlawful sexual harassment.

{¶38} The Ohio Supreme Court has recognized that "a plaintiff may establish a violation of R.C. 4112.02(A)'s prohibition of discrimination based on sex 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, 729 N.E.2d 726, 731 (2000).

{¶39} To establish a claim of sexual harassment based on a hostile environment, a plaintiff must show the following:

> (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 at paragraph 2 of syllabus.

{¶40} To determine whether the harassing conduct was "'severe or pervasive' enough to affect the conditions of the plaintiff's employment, the trier of fact, or the reviewing court, must view the work environment as a whole and consider the totality of all the facts and surrounding circumstances, including the cumulative effect of all episodes of sexual or other abusive treatment." *Id.* at 181. The circumstances may also include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.* at 180. Importantly, whether harassing conduct is sufficiently severe or pervasive to establish a hostile work environment is "quintessentially a question of fact." *Stachura v. Toledo*, 177 Ohio App.3d 481, 2008-Ohio-3581, 895 N.E.2d 202, ¶ 33 (6th Dist.); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 333 (6th Cir. 2008); *Jordan v. Cleveland*, 464 F.3d 584, 597 (6th Cir. 2006).

{¶41} As it relates to Berea Moving's liability, the First Appellate District explained vicarious and direct corporate liability as follows:

> In Ohio, an employer, as an entity, may be held liable for the unlawful harassing conduct of one of its employees under the doctrine of respondeat superior. Such liability is vicarious because one entity (the employer) is being held liable for another's conduct (the harassing employee).
>
> An employer * * * may also be held directly liable for its own conduct if the

> employer knows or has reason to know that unlawful harassment is occurring or is likely to occur and fails to take action to prevent or correct the behavior. Such liability is not vicarious, although the harassing conduct of another person is involved, because it is based on the employer's own action or inaction.

(Citations omitted.) *Wille v. Hunkar Lab.*, 132 Ohio App.3d 92, 100, 724 N.E.2d 492 (1st Dist.1998). Thus, Berea Moving may be held vicariously liable for the unlawful conduct of one of its employees. The company can also be held directly liable for the unlawful conduct of one of its employees if it knew or had reason to know that unlawful harassment was occurring or likely to occur and failed to take action to prevent or correct the behavior.

{¶42} In her affidavit, Retuerto has presented testimony that, if believed, might convince a reasonable trier of fact that the acts of Berea Moving affected the terms, conditions, or privileges of her employment. Retuerto worked for a small family-owned company and the alleged harasser was one of the company's owners. Retuerto testified that Melton's verbal advances began in 2010 shortly after she began working at Berea Moving. After she first complained to her supervisor, Melton's inappropriate comments decreased, but they did not stop.

{¶43} Melton's inappropriate behavior included inappropriate comments of a sexual nature, frequent intimate conversations about how he felt about his "relationship" with Retuerto, bothering her about her feelings for him, and personal comments about her physical appearance. Retuerto stated that Melton would follow her around and refused to leave her alone. He would look for reasons to brush up against her, touch her, or crawl

under her computer while she was sitting at her desk. He would also sit on her desk within close proximity to her. Melton's comments towards Retuerto increased in frequency in 2012, his alleged behavior and comments were only directed at her, and his remarks were frequent, not occasional.

{¶44} Berea Moving argues that it cannot be held vicariously liable for Melton's behavior because Retuerto was unable to show that Melton was her supervisor or that Hawthorn knew or should have known of the harassment and failed to take immediate and appropriate corrective action. But there is no doubt that Melton, as an owner of the company, was *a supervisor*, which is all that is required under the statute; the law does not require Melton to be Retuerto's direct supervisor. Nevertheless, Retuerto stated that she considered Melton her boss; although Melton may not have personally supervised Retuerto, as owner, he had ultimate authority over her. *See Ward v. Oakley*, 12th Dist. Butler No. CA2013-03-031, 2013-Ohio-4762, ¶ 29.

{¶45} Berea Moving's employee handbook contained a harassment policy, which provided in part:

> The Company considers harassment and discrimination a serious matter and all reported incidents will be thoroughly investigated and handled in the most confidential manner possible. If the results of the investigation reveal that an employee has engaged or is engaging in conduct in violation of this policy, he or she will be subject to disciplinary action, up to and including termination of employment.

{¶46} At the time Retuerto reported Melton's behavior to her supervisor in 2010, Retuerto had not yet received an employee handbook or attended sexual harassment training. After her initial complaint to Hawthorn, Hawthorn spoke to Melton and Melton apologized to Retuerto. There is no evidence that any disciplinary action was taken against Melton. After Retuerto made additional claims in 2012, there is no evidence that Berea Moving conducted an investigation into the matter or took any disciplinary action against Melton.

{¶47} Berea Moving states that Holly emailed Retuerto while she took time off work following the September 2012 confrontation with Melton. In those emails, Holly apologized, offered help, asked how Retuerto was feeling, and offered to have Melton take the day off when Retuerto returned to work. Those emails do not demonstrate that "prompt and corrective action was taken" following Retuerto's reports of sexually harassing conduct or that Melton was subject to disciplinary action as a result of her complaints.

{¶48} Retuerto also averred that Hawthorn had knowledge of Melton's ongoing behavior. Hawthorn observed and heard some of Melton's behavior and told Retuerto that Melton was going through a "mid-life crisis." Hawthorn, on the other hand, averred that Retuerto made no complaints from 2010 until September 2012. Thus, whether Retuerto complained to her supervisor about Melton's harassment and Hawthorn failed to take "immediate and appropriate corrective action" in 2012 is a question of fact.

{¶49} In light of the above, we find that Retuerto has presented sufficient evidence

from which reasonable minds could conclude, when considering the totality of all the facts and surrounding circumstances, that the harassing conduct in this case was sufficiently severe or pervasive to affect the conditions of her employment and that Berea Moving knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

Affirmative Defense

{¶50} Berea Moving asserted an affirmative defense to the hostile work environment claim. The Supreme Court has established that an employer facing vicarious liability for an actionable hostile environment created by a supervisor's harassing conduct can avoid liability by showing by a preponderance of the evidence the following:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Burlington Industries Inc. v. Ellerth, 524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). The affirmative defense is not available, however, when the supervisor's harassment culminates in a tangible employment action. *Id.*

{¶51} Retuerto argues that the harassment culminated in a tangible employment action because she was constructively discharged from her position at the company.[3] A tangible employment action is most often a discharge, demotion, or undesirable

[3]Retuerto did not set forth a separate claim for constructive discharge in her complaint.

reassignment. *See Starner v. Guardian Indus.*, 143 Ohio App.3d 461, 478, 758 N.E.2d 270 (10th Dist.2001). A constructive discharge is when an employee's working conditions are so difficult or unpleasant that a reasonable person would feel compelled to resign. *Scandinavian Health Spa, Inc. v. Ohio Civil Rights Comm.*, 64 Ohio App.3d 480, 487, 581 N.E.2d 1169 (8th Dist.1990). Thus, we doubt that even if Retuerto was able to show that she was constructively discharged from employment, that discharge amounted to a tangible employment action.

{¶52} That being said, based on our earlier findings, there is a genuine issue of material fact as to whether Berea Moving "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Thus, while Berea Moving may assert an affirmative defense, at this point, we cannot say that the affirmative defense operates so as to bar Retuerto's claims. *See Brentlinger v. Highlights for Children*, 142 Ohio App.3d 25, 753 N.E.2d 937, 2001 Ohio App. LEXIS 1419 (1st Dist. 2001) (noting it is not enough for an employer merely to have a sexual harassment policy, the acts of an employer must be evaluated to determine whether the employer acted reasonably); *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 723, 729 N.E.2d 813 (10th Dist.1999) (employee's verbal complaints of sexual harassment, as well as the employer's apparent lax follow-up on complaints, was sufficient to create a genuine issue of material fact as to whether the affirmative defense was established). The trial court erred in finding that the affirmative defense applied in this case at this stage.

{¶53} Construing the evidence most strongly in Retuerto's favor, reasonable minds

could conclude that Retuerto was subjected to a hostile and intimidating working environment. Accordingly, we find that the trial court erred in granting summary judgment on Counts 1, 2, and 5.

Negligent Supervision, Hiring, and Retention

{¶54} In Counts 3 and 8 of her complaint, Retuerto alleged negligent supervision, hiring, and retention against all defendants. For the reasons that follow, we find that the trial court erred in granting summary judgment to Berea Moving but correctly granted summary judgment to Melton and Hawthorn.

{¶55} The elements of a claim for relief for negligent hiring, 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 employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Peterson*, 133 Ohio App.3d at 723, 729 N.E.2d 813 .

{¶56} In *Harmon v. GZK, Inc.*, 2d Dist. Montgomery No. 18672, 2002-Ohio-545, the court found that sexually harassing behavior is "per se incompetent behavior." The "incompetence relates not only or exclusively to an employee's lack of ability to perform the tasks that his or her job involves but also relates to behavior while on the job inapposite to the tasks that a job involves and which materially inhibits other employees from performing their assigned job tasks." *Id.*

{¶57} The evidence, viewed in a light most favorable to Retuerto, demonstrates that

she presented sufficient evidence regarding each element of a claim for negligent supervision, hiring, and retention: (1) Melton was employed by Berea Moving; (2) Melton was incompetent by virtue of his harassing conduct; (3) Berea Moving had actual or constructive knowledge of the harassing conduct, as noted in our discussion of the sexual harassment claims, above; (4) there is evidence Berea Moving failed to appropriately discipline Melton or otherwise remedy the situation; and (5) there is evidence that Berea Moving's negligence in hiring, retaining, and supervising Melton was the proximate cause of the Retuerto's injuries.

{¶58} In *Kerans v. Porter Paint Co.*, 61 Ohio St.3d 486, 493, 575 N.E.2d 428 (1991), the Ohio Supreme Court explained:

> An employer has a duty to provide its employees with a safe work environment and, thus, may be independently liable for failing to take corrective action against an employee who poses a threat of harm to fellow employees * * *. Where an employer knows or has reason to know that one of his [or her] employees is sexually harassing other employees, he [or she] may not sit idly by and do nothing.
>
> **{¶59}** Moreover,
>
> [w]here a plaintiff brings a claim against an employer predicated upon allegations of workplace sexual harassment by a company employee, and where there is evidence in the record suggesting that the employee has a past history of sexually harassing behavior about which the employer knew or should have known, summary judgment may not be granted in favor of the employer * * *.

Id. at 493. In this case, there was evidence that Berea Moving knew that Melton had a past history of harassment because Retuerto complained to her supervisor about the harassment in 2010. Thus, based on this alone, summary judgment was improper.

{¶60} Accordingly, the trial court erred in granting summary judgment to Berea Moving on Retuerto's negligent, hiring, supervision, and retention claims.

{¶61} The trial court did not err in granting summary judgment to Melton or Hawthorn on these claims, however. Melton cannot be held liable under this cause of action as both the employer charged with the duty of making a safe workplace and as the alleged harasser. Retuerto's claims fails against Hawthorn because she presented no evidence that Hawthorn was Melton's employer. To the contrary, Hawthorn, Melton, and Holly averred that Hawthorn did not supervise Melton and made no decisions with regard to his employment or discipline.

{¶62} Therefore, the trial court erred in granting summary judgment to Berea Moving on Counts 3 and 8. The trial court correctly granted summary judgment to Hawthorn and Melton on Counts 3 and 8.

Intentional Infliction of Emotional Distress

{¶63} In Count 4, Retuerto alleged intentional infliction of emotional distress against all defendants.

{¶64} To prevail on a claim for intentional infliction of emotional distress a plaintiff must demonstrate four elements:

> (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 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."

Harmon, 2d Dist. Montgomery No. 18672, 2002-Ohio-545, citing *Takach v. Am. Medical Tech.*, 128 Ohio App.3d 457, 471, 715 N.E.2d 577 (8th Dist.1998).

{¶65} With regard to the first element, the evidence, looked in a light most favorable to Retuerto, shows that Melton knew or should have known that his actions would result in serious emotional distress to Retuerto. Melton, who was married, was part owner of the small company Retuerto, also married, worked for, he made constant harassing comments to her, told her he loved her, and asked her how she felt about him. Melton touched Retuerto, brushed up against her, made excuses to be near her, and followed her around. Even after Retuerto asked Melton to stop and complained about his behavior, the harassment continued.

{¶66} Regarding the second element, whether Melton's comments and actions were outrageous and extreme, Retuerto presents a genuine issue, for all of the reasons stated above and throughout this opinion, whether Melton's alleged behavior "goes beyond all possible bounds of decency."

{¶67} With regard to the third element, causation, Berea Moving argues that Retuerto was on anti-depressant medication before Melton made harassing comments and did not seek counseling until after she left the company's employment. But Retuerto testified that Melton's actions adversely affected her marriage, that she did not want to go

to work and feared being alone with him, and how she finally sought counseling to deal with the issues caused by Melton's incessant harassing. Thus, she has raised a genuine issue of material fact as to causation.

{¶68} As to the fourth element, whether her alleged mental anguish was so serious that no reasonable person should be expected to endure it, Retuerto averred that she quit her job, even though she needed to be employed for financial reasons, because she did not think Melton's actions would stop. She presented evidence that she sought counseling as a result of the harassment. Thus, she has raised a genuine issue of material fact as to this element as well.

{¶69} Therefore, the trial court erred in granting summary judgment in favor of Melton and Berea Moving on Retuerto's claim of intentional infliction of emotional distress. We do not find, however, that the trial court erred in granting summary judgment on her claim as to Hawthorn. Retuerto provided no evidence that would lead a reasonable minds to conclude that Hawthorn intentionally inflicted emotional distress on Retuerto.

{¶70} The trial court erred in granting summary judgment to Melton and Berea Moving on Count 4. The trial court did not err in granting summary judgment to Hawthorn on Count 4.

Civil Assault and Battery

{¶71} In Count 6, Retuerto alleged civil assault and battery against Melton.

{¶72} R.C. 2305.111(B) provides that the statute of limitations for an intentional

tort, such as assault and battery, is one year. Retuerto has failed to support her allegations that Melton "made willful threats or attempts to touch [her] in an offensive manner" and intended to cause or did cause harmful or offensive contact with her with specific dates or range of dates. Retuerto filed her complaint in February 2013, but without a more specific time frame or range of dates from which the trial court could conclude the alleged events occurred, we cannot say the trial court erred in granting summary judgment on this claim.

{¶73} Therefore, the trial court did not err in granting summary judgment on Count 6.

Invasion of Privacy

{¶74} In Count 7, Retuerto alleged invasion of privacy against Melton. Retuerto claims that Melton invaded her privacy by entering her personal space at work and getting too close to her physically while she was at her desk. She also claims he invaded her privacy by tampering with her mail after she left Berea Moving. This claim also fails.

{¶75} To establish a claim for invasion of privacy, Retuerto must show: (1) intrusion upon the plaintiff's seclusion or solitude, or into his or her private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; or (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. *Smith v. Pierce Twp.*, 12th Dist. Clermont No. CA2008-04-015, 2014-Ohio-3291, ¶ 44, citing *Curry v. Blanchester*, 12th Dist. Clinton No. CA2009-08-010, 2010-Ohio-3368.

{¶76} The *Smith* court explained:

> The Ohio Supreme Court has held that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Hamrick v. Wellman Products Group*, 9th Dist. Medina No. 03CA0146-M, 2004-Ohio-5477, ¶ 33, *quoting Sustin v. Fee*, 69 Ohio St.2d 143, 145, 431 N.E.2d 992 (1982). The intrusion must be into a plaintiff's private affairs and the plaintiff must have a "reasonable expectation of privacy" in the area allegedly intruded. *Turner v. Shahed Ents.*, 10th Dist. Franklin No. 10AP-892, 2011-Ohio-4654, ¶ 21.
>
> The intrusion must be wrongful, as well as done in a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. *Roe ex rel. Roe v. Heap*, 10th Dist. Franklin No. 03AP-586, 2004-Ohio-2504, ¶ 82. "'Wrongful' does not require that the intrusion itself be wrongful in the sense that there is no right to make any intrusion. Rather, 'wrongful' may relate to the manner of the making of the intrusion * * *." *Id.*, quoting *Strutner v. Dispatch Printing Co.*, 2 Ohio App.3d 377, 378-379, 2 Ohio B. 435, 442 N.E.2d 129 (10th Dist.1982).

Id. at ¶ 45-46.

{¶77} The "intrusion" tort has also been explained as being akin to trespass "in that it involves intrusion or prying into the plaintiff's private affairs. Examples would be wiretapping [and] watching or photographing a person through windows of his residence[.]" *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 166, 499 N.E.2d 1291 (10th Dist.1985).

{¶78} The trial court found that Retuerto was unable to show that she had a reasonable expectation of privacy in the office area of Berea Moving. We agree. Retuerto shared office space with Hawthorn; Retuerto has not shown that her office area was private. Retuerto also cannot show that Melton invaded her privacy by tampering

with her mail. Retuerto has offered no evidence, other than unsupported allegations, that Melton went to her house and tampered with her mail in her mailbox.

{¶79} Therefore, the trial court did not err when it granted summary judgment to Melton on the invasion of privacy claim.

Conclusion

{¶80} The trial court correctly granted summary judgment in favor of Sally Hawthorne but erred in granting summary judgment in favor of Willard Melton on Counts 1, 2, and 4, and in favor of Berea Moving on Counts 2, 3, 4, 5, and 8. We affirm the trial court's judgment on the remaining claims against Melton and Berea Moving.

{¶81} Judgment affirmed in part and reversed in part. Case is remanded for proceedings consistent with this opinion.

It is ordered that appellant and appellees split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
TIM McCORMACK, J., CONCUR