[Cite as *Jones v. MTD Consumer Group, Inc.*, 2015-Ohio-1878.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

JEFFREY JONES	C.A. No. 13CA0093-M
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MTD CONSUMER GROUP, INC. et al.	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellee	CASE No. 11CIV0091

DECISION AND JOURNAL ENTRY

Dated: May 18, 2015

MOORE, Judge.

{¶1} Plaintiff-Appellant Jeffrey Jones appeals from the entry of the Medina County Court of Common Pleas granting judgment in favor of Defendant-Appellee MTD Consumer Group, Inc. (MTD) on Mr. Jones' complaint. We affirm.

I.

{¶2} MTD is a corporation that manufactures outdoor power equipment. It has approximately 4,400 employees in the United States and between 700 to 800 employees at its corporate headquarters in Valley City. Approximately 85% of its employees are male. Among the company's policies is one stating that "[a]ny type of harassment, particularly sexual harassment, is unacceptable."

{¶3} MTD hired Mr. Jones in May 1997, to work in the call center answering customer service and technical support calls about the equipment. In 2001, when MTD acquired Troy-

Bilt, Mr. Jones was promoted and his responsibilities then included ordering, processing, and shipping connected to the acquisition of Troy-Bilt.

{¶4} In the fall of 2005, Mr. Jones began a sexual relationship with one of his co-workers, Danae Corbett. The relationship included the exchange of phone calls, emails, text messages, and videos between the two. The messages were often of an explicit sexual nature. After receiving training on MTD's harassment policies, in 2006, both Mr. Jones and Ms. Corbett signed a document explaining MTD's policy on sexual harassment. While both Mr. Jones and Ms. Corbett acknowledged that the relationship ended in April 2007 when Ms. Corbett was promoted to a supervisor, the two continued exchanging emails, texts, and phone calls that often still contained sexual content.

{¶5} In July 2007, after an after-work party, Ms. Corbett and her then boyfriend Sean Meehan were outside of Mr. Meehan's house kissing when they both observed Mr. Jones drive by and make a rude gesture. Mr. Meehan was uncomfortable with Mr. Jones' actions and reported it to Andrew Huffman, who was the assistant business manager at MTD. Mr. Huffman asked Ms. Corbett about the situation but Ms. Corbett said Mr. Jones' actions did not make her uncomfortable at the time.

{¶6} In October 2007, Sally Hershberger, a technician at MTD reported what she believed was workplace harassment to her supervisor Jeff Marvin. Ms. Hershberger sat near Ms. Corbett and "every day [she] would hear derogatory comments and witness interaction with Mr. Jones and Ms. Corbett. And [Ms. Hershberger] heard things [Ms. Corbett] said. * * * [Ms. Corbett] would call [Mr. Jones] and she would laugh that he brought her a doughnut or brought her a cup of coffee, and she would just say, 'Can you believe him? He's so stupid,' and it just

went on every day." Ms. Hershberger told Mr. Marvin that "this was going on and it continued to go on and it was disturbing [her] through the day."

{¶7} To resolve the problem, Mr. Marvin moved Ms. Hershberger's desk away from Ms. Corbett's. After Ms. Hershberger complained to Mr. Marvin, she again observed what she categorized as "very rude" and "very unprofessional" behavior on Ms. Corbett's part to Mr. Jones, and confronted Mr. Jones about it. Additionally, on October 18, 2007, Ms. Hershberger exchanged a series of emails with Mr. Jones about Ms. Corbett's treatment of Mr. Jones.

{¶8} After the email discussion, Ms. Hershberger was called into the office by Mr. Marvin and Mr. Huffman and was told that she "did not understand the situation, the relationship between [Ms. Corbett] and [Mr. Jones], and that it was none of [her] business, the police were involved." Mr. Huffman then "got very upset with [Ms. Hershberger], more or less threatened [her] with [her] job over it, and said that [she] should mind [her] own business and [be] done with it.

{¶9} At some point around that time, Mr. Huffman talked to Ms. Corbett about Ms. Hershberger's complaint and Ms. Corbett told him that she had been upset at Mr. Jones, but that she was "being harassed by Mr. Jones in a sexual nature and that she had wanted it to stop." On October 19, 2007, Ms. Corbett forwarded an email to Mr. Huffman that Mr. Jones sent to her that morning. In the forwarded email, Mr. Jones expressed his love for Ms. Corbett but also indicated he would leave her alone at work and away from work. Ms. Corbett categorized the email as an example of the "type of stuff * * * [Mr. Jones] sen[t her] every day all day long[.]" Mr. Huffman forwarded the email on to Fran Wilson and Neil Winslow in human resources. Mr. Winslow was the Corporate Director of Employee Relations.

{¶10} Mr. Winslow met with both Ms. Corbett and Mr. Jones. Ms. Corbett told him that Mr. Jones "was pursuing her, he was stalking her, he was going to her house stalking her. He allegedly spray painted her garage and keyed her car. He followed her to a bar one time, and he * * * kept sending text messages and I love you's, and she wanted it stopped." Mr. Winslow was able to pull some emails between the two. One sent October 18, 2007, was initiated by Ms. Corbett and was a discussion about her new hair color and how she would have to come by Mr. Jones' desk and show it to him. The other emails were from October 19, 2007, and occurred after Ms. Corbett forwarded the emails to Mr. Huffman. Those emails were initiated by Mr. Jones. In them he called her "sweetie" and asked her about chocolates he was picking up for her. Ms. Corbett replied to the email indicating that she wanted to be left alone and did not want anything from him.

{¶11} When Mr. Winslow confronted Mr. Jones about the alleged harassment, according to Mr. Winslow, Mr. Jones acknowledged he had been pursuing Ms. Corbett and that he cared for her a great deal. He denied, however, damaging her property and, according to Mr. Jones, was shocked to be accused of harassment. Mr. Winslow stated that Mr. Jones had indicated that Ms. Corbett had been emailing him all day every day, but had not indicated that the two were in a consensual relationship until after he was terminated. Mr. Jones on the other hand was adamant that he had not been harassing Ms. Corbett. He claimed he told Mr. Winslow that he and Ms. Corbett had been in a relationship, that all the contact between them was consensual, and then offered to show Mr. Winslow the explicit texts that were sent between them to verify the type of relationship they had. Mr. Jones alleged that Mr. Winslow refused to look at Mr. Jones' phone.

{¶12} Later that day, on October 23, 2007, Mr. Winslow brought Mr. Jones back into his office and had him sign a "Last Chance Agreement[.]" Mr. Winslow described the Last Chance Agreement as a final warning. The agreement detailed Mr. Jones' alleged harassing behavior and required Mr. Jones to "stop all pursuit of [Ms. Corbett] at work and away from work[.]" This included "[s]top[ping] all harassing behavior (emails, phone calls, text messages, personal conversations)[,]" refraining from "talk[ing] to [Ms. Corbett] unless in line of business[,]" "not discuss[ing] th[e] agreement or confront[ing Ms. Corbett] about [it,]" and "[s]tay[ing] away from her at work[.]" Ms. Corbett was required to notify human resources if any further harassment took place. The document indicated that if Mr. Jones failed to abide by the agreement, he would be subject to further disciplinary action which could include termination. Mr. Jones signed the Last Chance Agreement, as did Mr. Winslow and Mr. Huffman. Ms. Corbett was aware of the Last Chance Agreement and was told that Mr. Jones was to have no contact with her but thought it only related to Mr. Jones' conduct while at work.

{¶13} Days after signing the Last Chance Agreement, Mr. Jones became ill and had to be hospitalized for several weeks due to a perforated ulcer and pancreatitis. When he returned to work, he was required to report to a new supervisor, and his duties as crew chief were given to others; instead, he assumed the same responsibilities he had when he started working for MTD. Despite receiving the same salary as before, he considered the actions of MTD to be a demotion.

{¶14} Despite executing the Last Chance Agreement, Mr. Jones continued to communicate via phone and text with Ms. Corbett and continued to see her outside of work. Additionally, Ms. Corbett continued to send Mr. Jones sexually explicit text messages. However, Ms. Corbett did not complain again about Mr. Jones' alleged harassment until June 2008. At that point, she sent Mr. Huffman an email indicating that Mr. Jones was bothering her

again. Mr. Huffman forwarded that on to Mr. Winslow who again met with Mr. Jones. The emails at issue were a string of emails between Ms. Corbett and Mr. Jones which related to Saturday auxiliary work hours. Ms. Corbett believed that Mr. Jones was just trying to talk to her and there was no reason for him to be sending so many emails on the subject. Mr. Jones maintained that the emails were necessary and work-related. According to Mr. Jones, he again offered to show Mr. Winslow the text messages on his phone. While Mr. Jones was not terminated for that email, he was again warned about his behavior and how he was required to leave Ms. Corbett alone. Mr. Winslow told him that any further non-work related emails or texts to Ms. Corbett would result in his termination.

{¶15} Following that incident, Mr. Huffman informed Mr. Winslow of a text from Mr. Jones to Ms. Corbett. Thereafter, Mr. Jones was informed that he had violated the agreement and was terminated. At that meeting, Mr. Jones maintained that the company's actions were unfair and that Ms. Corbett's and his relationship was consensual and that he had text messages to prove it. While Mr. Jones maintained that he tried to bring the text messages to the company's attention at every opportunity, Mr. Huffman asserted that Mr. Jones did not try to bring the text messages and consensual relationship up until the point in time when Mr. Jones was being fired. At no point, however, did Mr. Jones ever assert that Ms. Corbett was harassing him.

{¶16} Mr. Jones contacted Mr. Winslow after he was fired and told him that Ms. Corbett had not been avoiding Mr. Jones, that they had been on dates, had been intimate, that he was helping her financially, and that he had bought Pampered Chef items from her after she asked him during work to do so. Mr. Winslow thereafter emailed Ms. Fran Walsh and Mr. Huffman and expressed his concern that while Mr. Jones did violate the Last Chance Agreement, the company might still have a problem with Ms. Corbett given her actions and the supervisory role

she had. It was a violation of MTD policy for employees to solicit other employees during work using the company's email.

{¶17} Mr. Huffman and the building supervisor then confronted Ms. Corbett about the allegations that she was contacting Mr. Jones during the period of time the Last Chance Agreement was in effect. They requested that Ms. Corbett submit copies of her phone records going back to 2005, gave her 90 days to comply, and placed her on suspension; however, other individuals at MTD were told she was on medical leave due to her pregnancy. While Ms. Corbett was never subject to a Last Chance Agreement, she too was ultimately terminated from MTD.

{¶18} Mr. Jones filed a complaint against MTD and Ms. Corbett in 2008 but subsequently dismissed the suit. In 2011, Mr. Jones again filed a complaint against MTD and Ms. Corbett asserting five causes of action. The claims against Ms. Corbett were dismissed and the matter proceeded to a jury trial on two counts: disparate treatment concerning alleged reverse gender discrimination and negligent retention. At the end of Mr. Jones' case, MTD moved for a directed verdict on both counts. The trial court granted the motion and entered judgment in favor of MTD.

{¶19} Mr. Jones initially appealed the trial court's entry and this Court dismissed the appeal, concluding that Mr. Jones did not successfully dismiss certain claims against MTD and that those remained pending. *See Jones v. MTD Consumer Group, Inc.*, 9th Dist. Medina No. 13CA0077-M (Oct. 17, 2013). Thereafter, the trial court dismissed the counts that remained pending, and Mr. Jones again appealed the trial court's entry granting a directed verdict, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT IMPROPERLY GRANTED A DIRECTED VERDICT IN FAVOR OF [MTD] ON [MR. JONES'] DISPARATE TREATMENT CAUSE OF ACTION IN VIOLATION OF CIVIL RULE 50(A)[(]4) BECAUSE THERE WAS SUFFICIENT EVIDENCE SUBMITTED WHICH WOULD HAVE ALLOWED A REASONABLE JUROR TO COME TO MORE THAN ONE CONCLUSION ON A DETERMINATIVE ISSUE[.]

ASSIGNMENT OF ERROR II

> THE TRIAL COURT IMPROPERLY GRANTED A DIRECTED VERDICT IN FAVOR OF [MTD] ON [MR. JONES'] NEGLIGENT RETENTION CAUSE OF ACTION IN VIOLATION OF CIVIL RULE 50(A)[(]4) BECAUSE THERE WAS SUFFICIENT EVIDENCE SUBMITTED WHICH WOULD HAVE ALLOWED A REASONABLE JUROR TO COME TO MORE THAN ONE CONCLUSION ON A DETERMINATIVE ISSUE[.]

ASSIGNMENT OF ERROR III

> IN GRANTING [MTD'S] MOTION FOR DIRECTED VERDICT, THE TRIAL COURT IMPROPERLY FAILED TO WEIGH EVIDENCE IN FAVOR OF THE NON-MOVING PARTY, AND ACTUALLY WEIGHED AND MISSTATED EVIDENCE IN FAVOR OF THE MOVING PARTY[.]

{¶20} Mr. Jones raises three assignments of error that all relate to the trial court's decision to grant MTD's motion for directed verdict on Mr. Jones' disparate treatment claim and his negligent retention claim. Mr. Jones maintains in his first assignment of error that the trial court erred in concluding that he failed to present sufficient evidence to allow his disparate treatment claim to be decided by the jury. He argues in his second assignment of error that the trial court erred in concluding that he failed to present evidence that MTD knew or should have known of Ms. Corbett's incompetence and thus the trial court erred in directing a verdict to MTD on his negligent retention claim. Finally, Mr. Jones asserts in his third assignment of error that the trial court improperly weighed and misstated the evidence in granting MTD's motion for a directed verdict.

{¶21} "Under Civ.R. 50(A)(4), a motion for a directed verdict should be granted if 'the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party.'" *Bennett v. Admr., Ohio Bur. of Workers' Comp.*, 134 Ohio St.3d 329, 2012-Ohio-5639, ¶ 14, quoting Civ.R. 50(A)(4). "Because a motion for a directed verdict presents a question of law, appellate review of a trial court's decision on the motion is de novo." *Bennett* at ¶ 14.

Trial Court's Characterization of the Evidence

{¶22} Mr. Jones maintains in his third assignment of error that the trial court, in granting MTD's motion, did not review the evidence in a light most favorable to him and in fact mischaracterized much of the evidence. We agree that the trial court's analysis and recitation of the facts is troubling.

{¶23} The trial court does improperly minimize Ms. Hershberger's complaint, characterizing it as a single phone call overheard between Ms. Corbett and Mr. Jones, when in fact Ms. Hershberger testified that Ms. Corbett was rude and unprofessional towards Mr. Jones on a daily basis. The trial court also seems to indicate that Mr. Jones admitted to harassing Ms. Corbett. However, Mr. Jones did not admit to harassing Ms. Corbett. While he did admit to having contact with her, he explained his behavior was consensual and offered to show management the sexually explicit messages that he and Ms. Corbett sent each other. Accordingly, it is clear that, at the very least, the trial court's choice of words in granting the directed verdict seems to deviate from the standard set forth above.

{¶24} Nonetheless, this Court is charged with reviewing the motion de novo. *See id.* After reviewing the evidence in a light most favorable to Mr. Jones, and in light of the arguments

made on appeal, for the reasons discussed below, we cannot say that the trial court's improper actions prejudiced Mr. Jones. *See* Civ.R. 61.

Disparate Treatment

{¶25} Mr. Jones argues in his first assignment of error that the trial court erred in granting a directed verdict to MTD on his disparate treatment claim alleging reverse gender discrimination because he did present sufficient evidence of a prima facie case.

{¶26} It is an unlawful discriminatory practice for any employer to "discharge without just cause, to refuse to hire, or otherwise discriminate against [a] person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment[,]" on the basis of gender. R.C. 4112.02(A). "[T]he Ohio Supreme Court has held that federal case law interpreting Title VII of the Civil Rights Act of 1964 is generally applicable to cases involving alleged violations of R.C. [Chapter] 4112." *Stipkala v. Bank One, N.A.*, 9th Dist. Summit No. 21986, 2005-Ohio-16, ¶ 10, citing *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 196 (1981). Plaintiffs may demonstrate the existence of discriminatory practices via either direct or indirect evidence. *Stipkala* at ¶ 11. Here, Mr. Jones sought to establish disparate treatment via indirect evidence.

{¶27} "Ohio courts analyze discrimination claims which are based on indirect evidence under the framework provided by *McDonnell Douglas Corp. v. Green*[], 411 U.S. 792[(1973).]" *Id.* at ¶ 14. Generally under *McDonnell Douglas*, "[t]o establish a prima facie case of discrimination, a plaintiff must show: (1) membership in a protected class; (2) qualification for the position; (3) an adverse employment action; and (4) replacement by a non-protected person." *Lindsay v. Children's Hosp. Med. Ctr. of Akron*, 9th Dist. Summit No. 24114, 2009-Ohio-1216, ¶ 30, quoting *Atkinson v. Akron Bd. of Edn.*, 9th Dist. Summit No. 22805, 2006-Ohio-1032, ¶ 28,

citing *McDonnell Douglas* at 802. However, "[a] plaintiff may also satisfy the fourth prong of a prima facie case showing by adducing evidence that []he "was [] treated differently than similarly situated non-protected employees.'" *Russell v. Univ. of Toledo*, 537 F.3d 596, 604 (6th Cir.2008), quoting *Newman v. Fed. Express Corp*, 266 F.3d 401, 406 (6th Cir.2001); *see also Lindsay* at ¶ 30, quoting *Atkinson* at ¶ 28, quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992). However, in cases alleging reverse discrimination, such as this, the *McDonnell Douglas* test has been modified so that, "in order to establish the first step, a plaintiff must demonstrate background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority." (Internal quotations and citation omitted.) *Myers v. Cuyahoga Cty., Ohio*, 182 Fed.Appx. 510, 517 (6th Cir.2006); *see also Stipkala* at ¶ 14.

> Establishment of a prima facie case by the plaintiff creates a rebuttable presumption of discrimination, and the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for taking the challenged employment action. If the defendant satisfies this burden, the plaintiff must then prove that the proffered reason was actually a pretext to hide unlawful discrimination. To establish such pretext, a plaintiff must show either (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate [her] discharge, or (3) that they were insufficient to motivate discharge.

(Internal quotations, emphasis, and citations omitted.) *Russell* at 604.

{¶28} The trial court concluded that a trier of fact could come to different conclusions with respect to all of the elements of the prima facie case except for whether a similarly situated individual was treated better than Mr. Jones. It was Mr. Jones' contention that Ms. Corbett was similarly situated to himself and that she was treated better as she was not subjected to a Last Chance Agreement following Ms. Hershberger's allegations about Ms. Corbett's treatment of Mr. Jones. Essentially, Mr. Jones argues that Ms. Hershberger's allegations against Ms. Corbett

should have resulted in Ms. Corbett also being subject to a Last Chance Agreement. The trial court concluded that Ms. Corbett was not similarly situated in all relevant respects.

{¶29} To demonstrate that someone is similarly situated to a plaintiff, the plaintiff must "demonstrate that he or she is similarly-situated to the non-protected employee in all *relevant* respects." (Emphasis in original.) *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir.1998); *see also Kroh v. Continental Gen. Tire, Inc.*, 92 Ohio St.3d 30, 38-39 (2001), citing *Ercegovich* at 353. "[T]o be deemed 'similarly-situated' in the disciplinary context, 'the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'" *Palmer v. Potter*, 97 Fed.Appx. 522, 524-525 (6th Cir.2004), quoting *Ercegovich* at 352, quoting *Mitchell* at 583. "In practical terms, two employees are not similarly-situated in all relevant respects if there is a meaningful distinction between them which explains their employer's differential treatment of them." (Internal quotations and citations omitted.) *Lindsay*, 2009-Ohio-1216, ¶ 38.

{¶30} We remain mindful that the disputed issue before us is whether Ms. Corbett was similarly situated, not whether she received better treatment. Certainly, there is evidence in the record that Ms. Corbett was treated differently than Mr. Jones-Mr. Jones was subject to a Last Chance Agreement, whereas Ms. Corbett was not; Ms. Corbett was given 90 days to provide evidence to defend herself while on paid leave, while Mr. Jones was not. Accordingly, we turn to analyzing the factors articulated by the case law.

Same Role

{¶31} We note that the testimony in the record is not clear regarding the hierarchical structure of employees within MTD, and it is difficult to discern who Mr. Jones' and Ms. Corbett's direct supervisors were. However, the testimony does indicate that as of April 2007, Ms. Corbett was promoted and became a supervisor. Ms. Corbett is referred to in several places as Mr. Jones' supervisor, but there is also a point in the transcript where she claims she had not yet taken over those responsibilities at the time of the Last Chance Agreement. Irrespective, the record is clear that Ms. Corbett had a supervisory role at the time of the Last Chance Agreement and Mr. Jones did not.

{¶32} This Court has previously noted that there is "some authority for the proposition that an employee is not similarly-situated with another employee who has an administrative or managerial role." *Lindsay,* 2009-Ohio-1216, ¶ 43. Mr. Jones asserts that such a distinction should not bar his claim even though Ms. Corbett held a supervisory position and he did not. In so doing, he points to cases such as *Koski v. Willowwood Care Ctr. of Brunswick, Inc.*, 158 Ohio App.3d 248, 2004-Ohio-2668 (9th Dist.). He asserts that *Koski* stands for the proposition that supervisors should be treated more harshly than non-supervisors for misconduct, and, thus, the difference in his position as compared to Ms. Corbett's should strengthen his legal position, rather than preclude his recovery.

{¶33} *Koski* involved a lawsuit alleging reverse gender discrimination filed by a supervisor who, in order to make his prima facie case, sought to compare the company's treatment of him to a non-supervisor. *Id.* at ¶ 2, 16. In concluding that the non-supervisor employee was not similarly situated, this Court pointed out that the difference in status was a meaningful distinction that could explain the different treatment. *Id.* at ¶ 17. While we did state

that "[t]his case illuminates several reasons why an employer might distinguish between a supervisor and a nonsupervisor who have embarked on a romantic relationship and why the employer might choose to punish the supervisor more harshly[,]" we did not hold that, as a general rule, supervisors should be treated more harshly for misconduct. *Id*. Nor did we address whether a non-supervisor who was treated more harshly than a supervisor could be deemed similarly situated to a supervisor despite the difference in their respective roles.

Same Standards

{¶34} Mr. Jones also asserts that, because both he and Ms. Corbett received training on, and signed, MTD's policy on harassment, and there was evidence that both engaged in what could be categorized as harassment, there was evidence from which a jury could conclude that Ms. Corbett was similarly situated to Mr. Jones. Mr. Jones' argument improperly combines two factors into one: whether the employees were "subject to the same standards" and whether they "have engaged in the same conduct" without such meaningful distinction between them which explains their employer's differential treatment of them. *Atkinson*, 2006-Ohio-1032, at ¶ 28, quoting *Mitchell*, 964 F.2d at 583.

{¶35} It is true that both Mr. Jones and Ms. Corbett signed a document entitled "Policy on Prevention of Sexual Harassment[.]" While the policy does focus on sexual harassment, it also mentions other types of workplace harassment. It states that "[a]ny type of harassment, particularly sexual harassment, is unacceptable." Additionally, it provides that "[h]arassment in any form, including sexual, verbal, physical or visual is prohibited." The policy indicates that:

> MTD employees who feel they are being harassed (sexual or other) by supervisors, coworkers, or peers should make it clear to the individual(s) that such behavior is offensive and unwelcome. They should immediately report this behavior to their supervisor or to [] any member of Management or Human Resources. It is the responsibility of every manager and supervisor to examine

> allegations of sexual harassment and take necessary action to ensure that these matters are addressed swiftly, fairly, and effectively.
>
> Complaints of sexual harassment will be handled confidentially, with the facts made available only to those who need to know in order to investigate and resolve the matter. The complainant and the person complained against will be notified of the final disposition of the complaint. If a complaint of sexual harassment is found to be substantiated, appropriate corrective action will follow, up to and including termination of the offending party from MTD, consistent with our procedure.

{¶36} Mr. Huffman testified that his understanding was that the policy was created to "prevent harassment that falls under the legal code, such as sexual, race, age discrimination[,]" and if the harassment was "based upon that" it was his responsibility to report it to human resources and document it. Thus, there is evidence that Ms. Corbett and Mr. Jones were subject to the same standards, at least with respect to MTD's sexual harassment policy. We note that, while the record contains the above quoted policy and some discussion about it, there is little to no testimony about MTD's disciplinary policies and procedures including whether they differ depending on the employee's job title or specific responsibilities. Thus, it is difficult, if not impossible, for this Court to review whether Mr. Jones and Ms. Corbett should have been treated similarly even assuming their misconduct was similar.

Same Conduct

{¶37} With respect to the similarity of the conduct, Mr. Jones' argument is that, because the policy prohibited all type of harassment, the conduct of Ms. Corbett and the conduct of Mr. Jones was comparable, as both could be considered harassment. However, just because the policy prohibits all forms of harassment does not mean that all conduct constituting harassment is comparable. *See Williams v. Akron*, 9th Dist. Summit No. 21306, 2003-Ohio-7197, ¶ 26-27 (concluding that other police officers accused of domestic violence were not similarly situated when injuries of victims were not comparable); *see also Palmer,* 97 Fed.Appx. at 525, fn. 2

(listing cases examining the quality and character of the conduct and concluding the conduct was not similar). For example, we doubt that anyone would consider the act of making an inappropriate joke a comparable act of harassment to the act of a supervisor requiring an employee to have a sexual relationship with her or him in order to maintain employment. Irrespective of whether the policy at issue required the incidents to be reported in the same manner to the same people, that would not necessarily require that the ultimate disciplinary actions taken would be the same in both circumstances.

{¶38} The evidence does not establish that the conduct that Ms. Corbett allegedly engaged in was comparable to Mr. Jones' alleged conduct. Moreover, the record evidences that there were "differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Atkinson,* 2006-Ohio-1032, at ¶ 28, quoting *Mitchell,* 964 F.2d at 583. Mr. Jones seeks to compare Ms. Corbett's conduct as alleged by Ms. Hershberger to his conduct as alleged by Ms. Corbett. Ms. Hershberger alleged that "every day [she] would hear derogatory comments and witness interaction with Mr. Jones and Miss Corbett. * * * [Miss Corbett] would call [Mr. Jones] and she would laugh that he brought her a doughnut or brought her a cup of coffee, and she would just say, 'Can you believe him? He's so stupid,' and it just went on every day." Ms. Hershberger reported this behavior to her supervisor Mr. Marvin and told him that "this was going on and it continued to go on and it was disturbing [Ms. Hershberger] through the day." In response, Mr. Marvin moved Ms. Hershberger's desk away from Ms. Corbett's. Ms. Hershberger also emailed Mr. Jones about Ms. Corbett's conduct and essentially told him he did not have to put up with that kind of behavior. It appears that Mr. Marvin passed along this information at some point, as Mr. Huffman confronted Ms. Corbett about the accusations. It was after this that Ms. Corbett began to make accusations against Mr.

Jones. Additionally, Mr. Marvin and Mr. Huffman spoke with Ms. Hershberger again about her allegations. Mr. Huffman told her that she did not understand what was going on and that she should mind her own business or risk losing her job. Notably, Mr. Jones himself never complained to anyone about Ms. Corbett's behavior and never accused her of harassing him. Even when Mr. Jones tried to tell Mr. Huffman and Mr. Winslow that his relationship with Ms. Corbett was consensual and attempted to show them the explicit text messages, he did not assert that Ms. Corbett was harassing him.

{¶39} Ms. Corbett on the other hand asserted essentially that Mr. Jones was stalking her. Mr. Winslow described Mr. Jones' behavior as alleged by Ms. Corbett as follows: "[Ms. Corbett] said that [Mr. Jones] was pursuing her, he was stalking her, he was going to her house stalking her. He allegedly spray painted her garage and keyed her car. He followed her to a bar one time, and he just * * * kept sending text messages and I love you's, and she wanted it stopped." Additionally, prior to Ms. Corbett's accusations in October 2007, in July 2007, Mr. Meehan reported that Mr. Jones had driven by Mr. Meehan's house when he was with Ms. Corbett and had made a rude gesture. Mr. Meehan indicated that this made him uncomfortable. While this did not make Ms. Corbett uncomfortable at the time, it did provide other evidence from another source that could substantiate Ms. Corbett's claims of stalking behavior.

{¶40} Overall, we cannot say that the conduct of Ms. Corbett and Mr. Jones were similar in nature, particularly given the different circumstances that surrounded each set of allegations. The allegations against Ms. Corbett were reported by a third party (Ms. Hershberger) and were based upon the treatment of Mr. Jones not Ms. Hershberger. Moreover, it appears that Ms. Hershberger was actually complaining that the behavior was bothering her, not that the behavior was bothering Mr. Jones. In fact, Mr. Jones never made any complaints about

this behavior. The allegations against Mr. Jones were made by the alleged victim and there was some evidence in the record that would corroborate the nature of the allegations (Mr. Meehan's complaint). Moreover, we cannot say that treating someone rudely or unprofessionally, even if on daily basis, is similar or comparable to stalking behavior.

{¶41} For purposes of reviewing the trial court's ruling on the motion for directed verdict, we take as true that, in the meetings with Mr. Huffman and Mr. Winslow, Mr. Jones denied harassing Ms. Corbett, told Mr. Huffman and Mr. Winslow that the two had a consensual relationship, and attempted to show them the explicit text messages. However, Mr. Jones never asserted that Ms. Corbett's texts, emails, and ongoing relationship with him was harassment. Nor did Mr. Jones assert that this behavior by Ms. Corbett toward him was the conduct that he believed was comparable to his alleged conduct that resulted in his termination. Instead, Mr. Jones maintained that the behavior that was comparable was Ms. Corbett's acts of belittling him and being rude and unprofessional to him, which he himself never reported. We cannot say that that conduct was similar under the circumstances.

{¶42} This is not to say that there is not abundant evidence in the record that MTD acted inappropriately in handling Ms. Corbett's complaints about Mr. Jones. There is evidence that Mr. Jones denied the accusations, asserted there was a consensual relationship between the two, and offered to provide proof of the same. The company executives showed no interest in reviewing messages Mr. Jones proffered to them from Ms. Corbett. Additionally, MTD had before it at the time of the Last Chance Agreement at least one email (the one Ms. Corbett initiated about intending to show Mr. Jones her new hair color), that would seem to suggest that Ms. Corbett might not be an innocent party. However, whether MTD handled the matter

properly does not in this case resolve the question of whether Ms. Corbett and Mr. Jones were similarly situated.

{¶43} Thus, we cannot say the trial court erred in concluding that Mr. Jones failed to present sufficient evidence that he was treated differently than *similarly situated* female employees. Accordingly, the trial court properly awarded a directed verdict to MTD on Mr. Jones' disparate treatment claim. We overrule Mr. Jones' first assignment of error.

Negligent Retention

{¶44} Mr. Jones argues in his second assignment of error that the trial court erred in granting a directed verdict on his negligent retention claim because he presented evidence that MTD had actual or constructive knowledge of Ms. Corbett's incompetence.

> To prove a claim of negligent hiring and retention, a plaintiff must show (1) [t]he 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.

(Internal quotations and citations omitted.) *Zanni v. Stelzer*, 9th Dist. Lorain No. 07CA009108, 2007-Ohio-6215, ¶ 8.

{¶45} In ruling on the motion for directed verdict, the trial court concluded that "the employer did not have either actual or constructive knowledge of [Ms. Corbett's] incompetence * * * and that [Ms. Corbett's] acts or omissions did not cause [Mr. Jones'] injuries, and that the employer was not negligent in retaining [Ms. Corbett] because that was not a proximate cause of [Mr. Jones'] injuries." Mr. Jones has only argued that there was evidence that MTD had actual or constructive knowledge of Ms. Corbett's incompetence. However, the trial court also found that Mr. Jones had failed to present evidence concerning other elements of negligent retention. Because Mr. Jones has not argued on appeal that he presented evidence of those elements, we

decline to scour the record ourselves for such evidence absent any guidance. *See Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998) ("If an argument exists that can support this assignment of error, it is not this court's duty to root it out."). Even assuming there was evidence that MTD knew or should have known of Ms. Corbett's incompetence, Mr. Jones has not pointed this Court to evidence in the record that would satisfy the other elements that the trial court found were lacking in evidentiary support. We overrule Mr. Jones' second assignment of error on that basis. Further, in light of our resolution of Mr. Jones' first and second assignments of error, we conclude that the trial court's mischaracterizations of the evidence discussed above, did not prejudice Mr. Jones. *See* Civ.R. 61. Accordingly, Mr. Jones' third assignment of error is overruled.

III.

{¶46} We overrule Mr. Jones' assignments of error and affirm the judgment of the Medina County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

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BRUCE G. HEAREY, Attorney at Law, for Appellee.