[Cite as *Steadman v. Sterilite Corp.*, 2010-Ohio-3391.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
ALFONZA STEADMAN	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellant	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 00280
	:	
	:	
STERILITE CORP.	:	<u>O P I N I O N</u>
Defendant-Appellee		

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas Case No. 2009 CV 00422
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 19, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
ERIC D. HALL P.O. Box 232 Medina, Ohio 44258	JOHN N. CHILDS Brennan, Manna & Diamond, LLC 75 East Market Street Akron, Ohio 44308

Edwards, P.J.

{¶1} Plaintiff-appellant, Alfonzo Steadman, appeals from the October 19, 2009, Judgment Entry of the Stark County Court of Common Pleas granting the Motion for Summary Judgment filed by defendant-appellee Sterilite Corporation.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Alfonzo Steadman, an over fifty (50) year old African-American man, was employed by appellee Sterilite Corporation from January 17, 2002, through September 15, 2006. The employment application that appellant signed on January 17, 2002 stated, in relevant part, as follows:

{¶3} "I hereby understand and acknowledge that unless otherwise defined by applicable law, any employment relationship with this organization is of an *'at will'* nature, which means that the Employee may resign at any time and the Employer may discharge Employee at any time with or without cause. It is further understood that this *'at will'* employment relationship may not be changed by any written document or by conduct unless such change is specifically acknowledged in writing by an authorized executive of this organization."

{¶4} In addition, the Employee Handbook provided to appellant after he was hired states that "Sterilite is an 'at will' employer in that your employment may be terminated with or without cause and with or without notice at any time at the option of either you or Sterilite, except as otherwise provided by law." The handbook further states that it is not intended to create an employment agreement between Sterilite and its employees and that "[n]o statement or promise by a supervisor, manager or department head, either verbal or written, may be interpreted as a change in policy nor

will it constitute an employment agreement with any employee." While appellant was provided with a copy of the handbook and had a chance to read it appellant testified during his deposition that he did not read the same. Appellant also testified in his deposition that he was verbally advised that he was an at-will employee during appellant's orientation training and that he understood that he was an at-will employee.

{¶5} During his employment with appellee, appellant received ten (10) Employee Warning Notices. The following is a summary of the dates of the notices and the specific violations alleged therein:

{¶6} December 26, 2002: Absence.

{¶7} March 31, 2003: Defective Work and Carelessness.

{¶8} September 10, 2003: Lateness/Tardy and Absence.

{¶9} September 30, 2003: Defective Work and Carelessness.

{¶10} October 13, 2003: Defective Work and Carelessness.

{¶11} February 19, 2004: Defective Work and Carelessness.

{¶12} February 1, 2005: Lateness/Tardy.

{¶13} May 12, 2005: Defective Work and Carelessness.

{¶14} May 23, 2005: Defective Work and Carelessness.

{¶15} May 24, 2005: Defective Work and Carelessness.

{¶16} All of the notices were signed by appellant.

{¶17} With respect to his February 19, 2004, and May 24, 2005, violations, appellant received three day suspensions for defective work and carelessness. He testified during his deposition that the suspensions were appropriate. In addition to

appellant, another African-American employee and a Caucasian employee received three day suspensions as a result of the May 24, 2005, incident.

{¶18} Appellant also was involved in an altercation with Darlene Young, a Caucasian employee, in October of 2004. As a result, both appellant and Young were informed during a meeting with Dave Erskine, appellee's Traffic Manager, that they were expected to come to work and do their jobs while abiding by the standards of conduct set forth in the Employee Handbook. Both appellant and Young, who indicated during the meeting that they had received a copy of the handbook, were told that documentation from their conversation with Erskine would be placed in their respective files and that any similar future behavior would lead to disciplinary action.

{¶19} Appellant was involved in another incident involving Darlene Young on February 24, 2006. As a result, appellant received a Letter of Concern dated March 2, 2006, signed by Erskine and Dennis Foltz, appellee's Plant Manager, concerning his failure to follow appellee's safety procedures and his inappropriate and unacceptable behavior towards his co-workers and his supervisor. The letter stated, in relevant part, as follows:

{¶20} "We have counseled you on more than one occasion surrounding your failure to follow established safety procedures as well as your unacceptable behavior towards your co-workers and your Supervisors and have advised you that behavior of this nature will not be tolerated under any circumstances.

{¶21} "Alfonza, your job is now in jeopardy. You will lose your job if we need to address a situation of a similar nature with you."

{¶22} On September 8, 2006, appellant was involved in an incident involving a Caucasian temporary worker named Harold Taylor. During the incident, Taylor allegedly stated as follows to appellant: “My mother didn’t tell me she had you.” Appellant testified that he believed that such comment was racist in nature. When asked during his deposition why he believed the same was a racial comment, appellant stated as follows: Because he was white, and I’m black. And what’s his Mamma doing having a black baby?” Transcript of Appellant’s deposition at 29. Appellant agreed that Taylor did not say anything about appellant’s color in the statement. As a result of the incident, appellant filed a complaint dated September 11, 2006, with Judy Ellison, appellee’s Resource Manager, alleging that Taylor had discriminated against him. Another employee, James Miller, filed a statement about the incident on or about September 8, 2006. Miller, in his statement, indicated that appellant had yelled and cursed at Miller and Taylor during a disagreement.

{¶23} As a result of appellant’s complaint, Judy Ellison conducted an investigation into the incident. During her investigation, Ellison spoke with two of appellee’s employees. Two other temporary employees were interviewed by representatives from the temporary employment agency that they were hired through. All four of the employees stated that appellant had been unsafe during his operation of a tow motor and had engaged in inappropriate conduct toward other employees, including using inappropriate language. Pending further investigation, appellant was suspended. Appellant was then terminated on September 15, 2006, based upon his past performance and the September 8, 2006, incident.

{¶24} On January 30, 2009, appellant filed a complaint[1] against appellee, alleging race and age discrimination, promissory estoppel, implied contract and intentional infliction of emotional distress. On August 21, 2009, appellee filed a Motion for Summary Judgment. Pursuant to a Judgment Entry filed on October 19, 2009, the trial court granted such motion.

{¶25} Appellant now raises the following assignment of error on appeal:

{¶26} "THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S MOTION FOR SUMMARY JUDGMENT WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED REGARDING APPELLANT'S CLAIMS."

I

{¶27} Appellant, in his sole assignment of error, argues that the trial court erred in granting appellee's Motion for Summary Judgment. We disagree.

{¶28} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C) which provides, in pertinent part:

{¶29} "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. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that

[1] The complaint was a refiled complaint.

conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶30} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶31} As is stated above, appellant contends that the trial court erred in granting summary judgment in favor of appellee on appellant's implied contract claim. Appellant appears to argue that the Employee Handbook was a contract of employment. However, as a general rule in Ohio, employee handbooks do not constitute an employment contract. *Stembridge v. Summit Acad. Mgmt.*, Summit App. No. 23083, 2006-Ohio-4076. The handbook is simply a unilateral statement of rules and policies creating no obligations or rights. *Tohline v. Cent. Trus. Co*. (1988), 48 Ohio App.3d 280, 549 N.E.2d 1223.

{¶32} The Ninth District Court of Appeals addressed the issue raised herein in *Stembridge v. Summit Acad. Mgt.*, supra,

{¶33} "An employment relationship is terminable at the will of either party unless expressly stated otherwise. (Citation omitted). *Henkel v. Educational Research Council of Am.* (1976), 45 Ohio St.2d 249, 255, 344 N.E.2d 118. However, the employment-at will doctrine is the subject of two exceptions: (1) the existence of an implied or express contract which alters the terms of discharge; and (2) the existence of promissory estoppel where representations or promises were made to an employee. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 104, 483 N.E.2d 150….

{¶34} "Generally, employee handbooks do not constitute an employment contract. *Rudy v. Loral Defense Sys.* (1993), 85 Ohio App.3d 148, 152, 619 N.E.2d 449. This Court has previously held that "'employee manuals and handbooks are usually insufficient, by themselves, to create a contractual obligation upon an employer.' " *Gargasz v. Nordson Corp.* (1991), 68 Ohio App.3d 149, 155, 587 N.E.2d 475, quoting *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio App.3d 663, 591 N.E.2d 752. Evidence of an employee handbook may be considered when deciding whether an implied contract exists, but its existence alone is not dispositive of the question. *Wright v. Honda of Am. Mfg., Inc.* (1995), 73 Ohio St.3d 571, 574-575, 653 N.E.2d 381.

{¶35} "In *Karnes v. Doctors Hospital* (1990), 51 Ohio St.3d 139, 141, 555 N.E.2d 280, the Ohio Supreme Court held that an employee handbook that expressly disclaimed any employment contract could not be characterized as an employment contract. This Court has also addressed disclaimers and found that " '[a]bsent fraud in the inducement, a disclaimer in an employee handbook stating that employment is at

will precludes an employment contract other than at will based upon the terms of the employee handbook.' " *Westenbarger v. St. Thomas Med. Ctr.* (June 29, 1994), 9th Dist. No. 16119, at 7, quoting *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph one of the syllabus." Id. at paragraphs 26-28.

{¶36} In the case sub judice, appellant signed an application for employment on January 17, 2002, which clearly stated that any employment would be at-will and that any employee could be discharged with or without cause of notice. In addition, the Handbook Acknowledgement form signed by appellant clearly and unequivocally states as follows:

{¶37} "I understand that this handbook is not a contract of employment, express or implied, between Sterilite and me and that I should not view it as such, or a guarantee of employment for any specific duration.

{¶38} "I further understand that no manager or representative of Sterilite, other than the president, has the authority to enter into any agreement guaranteeing employment for any specific period of time. I also understand that any such agreement, if made, shall not be valid or enforceable unless it is in a formal written agreement signed by both the president and me."

{¶39} Appellant testified during his deposition that he did not read the form before signing it although he had the opportunity to do so. Moreover, as is stated above, the Employee Handbook itself repeatedly refers to the "at-will" nature of employment.

{¶40} During his deposition, appellant testified that while he did not read the "at will" part of the employment application form, he was verbally told that any employment would be at-will. The following is an excerpt from appellant's deposition testimony:

{¶41} "Q. Did you have an opportunity to read it before you signed it?

{¶42} "A. I read some of that. But the 'at will,' I didn't' read that part. I knew what that meant meaning they could get rid of you. Plus, I was told verbally that.

{¶43} "Q. That they could get rid of you at any time?

{¶44} "A. Yes. We can do what we want.

{¶45} "Q. And there is nothing else in this document that disagrees with that statement that is there; is that correct?

{¶46} "A. Yes.

{¶47} "Q. Besides the application, any other promise made either verbally or in writing to you about being employed for a period of time by Sterilite?

{¶48} "A. I was told verbally upon this application, you can work as long as you want, but we can get rid of you when we get rid of you.

{¶49} "Q. Who told you that?

{¶50} "A. What is - - the tall - - the one who works in the office. I don't know her name.

{¶51} "Q. But she said they could get rid of you at any time they wanted?

{¶52} "A. Absolutely.

{¶53} "Q. Okay. That is what she said?

{¶54} "A. Right.

{¶55} "Q. So they could get rid of you any time they wanted?

{¶56} "A. But you can work there as long as you like.

{¶57} "Q. Until they get rid of you?

{¶58} "A. Yes.

{¶59} "Q. And they can decide when to get rid of you?

{¶60} "A. Yes.

{¶61} "Q. And you say here that there is no verbal statements otherwise; is that correct?

{¶62} "'It is further understood that this 'at will' employment relationship may not be changed by any written document or by conduct unless such charge is specifically acknowledged in writing by an authorized executive of this organization.' Do you see that there?

{¶63} "A. Yes.

{¶64} "Q. And that was on that document when you signed it, even though you chose not to read it?

{¶65} "A. Yes.

{¶66} "Q. And you had the opportunity to read that if you wanted, but you didn't?

{¶67} "A. Yes." Transcript of Appellant's deposition at 66-68.

{¶68} Based on the foregoing, we find that the trial court did not err in granting summary judgment to appellee on appellant's implied contract claim. There is no evidence of any implied contract altering the terms of appellant's at-will employment.

{¶69} We further find that the trial court did not err in granting summary judgment to appellee on appellant's promissory estoppel claim. The elements necessary to establish a claim for promissory estoppel are: (1) a promise clear and

unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be reasonable and foreseeable; and (4) the party claiming estoppel must be injured by the reliance. *Schepflin v. Sprint-United Telephone of Ohio* (April 29, 1997), Richland App.No. 96-CA-62-2, 1997 WL 1102026 at 3-4, citing *Stull v. Combustion Engineering, Inc.* (1991), 72 Ohio App.3d 553, 557, 595 N.E.2d 504.

{¶70} Upon our review of the record, we find no evidence that appellant was promised anything when he was hired by appellee. Rather, as is stated above, both the Employee Handbook and the acknowledgement form signed by appellant indicating that he had received the same stress that appellant's employment was at-will and that appellant could be terminated with or without cause or notice. As noted by the trial court, appellant "makes no claims that he relied upon a promise of employment, if one existed, and passed up other employment opportunities." Rather, during his deposition, appellant himself testified that he was never verbally promised any term of employment.

{¶71} As is stated above, appellant also has set forth claims of age and race discrimination in his complaint. Under Ohio law, a prima facie case of age or race discrimination may be proved either directly or indirectly. In order to establish a prima facie case of discriminatory treatment under R.C. 4112.02(A), a plaintiff must prove that (1) he or she is a member of a protected class,[2] (2) he or she suffered an adverse employment action, (3) he or she was qualified for the position he or she held, and (4) he or she was either replaced by someone outside the protected class or was treated less favorably than a similarly situated employee not in the protected class. See *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 and

[2] With respect to age discrimination claims, the statutorily protected class is 40 years of age or older. See R.C. 4112.14(A).

Plumbers and Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission (1981), 66 Ohio St.2d 192, 421 N.E.2d 128. Once an employee establishes a prima facie case of discrimination, the burden shifts to the employer to provide some legitimate, nondiscriminatory reason for the action taken. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 503, 575 N.E.2d 439. If the employer establishes a nondiscriminatory reason, the employee then bears the burden of showing the employer's proffered reason was a pretext for impermissible discrimination. *Cruz v. South Dayton Urological Associates, Inc.* (1997), 121 Ohio App.3d 655, 659, 700 N.E.2d 675. The employee must prove the employer's nondiscriminatory reason was false and discrimination was the real reason for the action taken. *Wagner v. Allied Steel & Tractor Co.* (1995), 105 Ohio App.3d 611, 617, 664 N.E.2d 987. Mere conjecture the employer's proffered reason is pretext is insufficient to withstand a summary judgment motion. *Surry v. Cuyahoga Community College,* 149 Ohio App.3d 528, 2002-Ohio-5356, 778 N.E.2d 91, at ¶ 24. To avoid summary judgment, the plaintiff must produce some evidence the defendant's proffered reasons were factually untrue. *Id.*

{¶72} In the case sub judice, we find that appellant has failed to establish a prima facie case of race and/or age discrimination. There is no dispute that appellant, as an over 40 year old African-American, is a member of two protected classes (age and race) and that he was terminated. However, appellant has not shown that he was qualified for the position he held or that he was either replaced by someone outside the protected class or was treated less favorably than a similarly situated employee not in the protected class. As is stated above, appellant received eight Employee Warning Notices indicating that his work was defective and that appellant was careless.

Appellant also was disciplined for engaging in altercations with other employees. The record thus supports the conclusion that appellant was not qualified for the position. While appellant maintains that he was replaced by a person outside his protected classes of race and/or age, appellant has failed to produce any evidence whatsoever to support his allegation. Appellant also has failed to point this Court to any evidence that he was treated less favorably than a similarly situated employee who was not in the protected class. With respect to the incident involving Harold Taylor, appellant testified that it was his understanding that Taylor was terminated the same day that appellant was terminated. Appellant also testified that as a result of the incident on May 24, 2005, two other employees, one who was Caucasian, also received a three day suspension along with appellant. Appellant testified that the suspension was appropriate.

{¶73} Assuming, arguendo, that appellant established a prima facie case of either race and/or age discrimination, we concur with the trial court that appellee proffered a legitimate reason for appellant's termination and that appellant has produced no evidence showing that such reason was pretextual. Once again, this Court notes that appellant has an extensive disciplinary record involving defective work, carelessness, lateness/tardiness and absences and was advised on about March 2, 2006 that, due to same, his job was in jeopardy and that he would lose his job if appellee "need[ed] to address a situation of a similar nature with you." Simply put, the incident on September 8, 2006 was the proverbial "last straw."

{¶74} Based on the foregoing, we find that the trial court did not err in granting appellee's Motion for Summary Judgment with respect to appellant's race and age discrimination claims.

{¶75} Appellant's final claim is for intentional infliction of emotional distress. To state a claim for intentional infliction of emotional distress, a plaintiff must be able to establish that: (1) the defendant either intended to cause emotional distress, or knew or should have known that its actions would result in serious emotional distress; (2) defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency, and would be considered utterly intolerable in a civilized community; (3) defendant's actions proximately caused injury to plaintiff; and (4) the mental anguish plaintiff suffered is serious and of such a nature that no reasonable person could be expected to endure. *Ashcroft v. Mt. Sinai Medical Center* (1990), 68 Ohio App.3d 359, 366, 588 N.E.2d 280.

{¶76} The Ohio Supreme Court has described the outrageous behavior that supports this type of claim as requiring something beyond a "tortious or even criminal" intent to cause harm. *Yeager v. Local Union 20,* (1983) 6 Ohio St.3d 369, 374-75, 453 N.E.2d 666 (1983), abrogated on other grounds by *Welling v. Weinfeld,* 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051. It is not sufficient for a plaintiff to set forth facts tending to prove that the defendant's "conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Id.*

{¶77} Appellant, in his brief, argues that his discharge came without any warning and caused him to experience loss of sleep, extreme nervousness and emotional distress. However, there is no evidence in the record supporting such assertions. As is stated above, appellant, before he was terminated, received numerous warnings and was disciplined on several occasions. As is stated above, he received two separate

three day suspensions that he admitted were appropriate. Moreover, appellant was informed on or about March 2, 2006 that his job was in jeopardy and that any further disciplinary problems would result in his termination. As noted by the trial court, appellant's "termination cannot have reasonably come to a surprise to him, as, even after he received the [March 2, 2006] Letter of Concern, he was involved in an altercation with another employee." We concur that appellant has failed to set forth facts showing that appellee's conduct in terminating appellant based on his extensive disciplinary record and altercations was so extreme and outrageous as to go beyond all possible bounds of decency, and would be considered utterly intolerable in a civilized community. Finally, we note that appellant, when asked during his deposition to explain the basis for his intentional infliction of emotional distress claim, testified that he was picked on "just about" every day and that this was the basis for his claim. There is no testimony to the effect that appellant suffered nervousness, loss of sleep or emotional distress.

{¶78} Based on the foregoing, we find that the trial court did not err in granting appellee summary judgment on appellant's intentional infliction of emotional distress claim.

{¶79} Appellant's sole assignment of error is, therefore, overruled.

{¶80} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

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JUDGES

JAE/d0508

[Cite as *Steadman v. Sterilite Corp.*, 2010-Ohio-3391.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ALFONZA STEADMAN	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
STERILITE CORP.	:	
Defendant-Appellee	:	CASE NO. 2009 CA 00280

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES