RENDERED: December 27, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-0623-MR

DANNY THOMAS FRANCE — APPELLANT

V.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JUDGE
ACTION NO. 94-CI-307

AHLSTROM FILTRATION, INC. and NORMAN JOHNSON — APPELLEES

OPINION
AFFIRMING

* * * * * * * *

BEFORE: GARDNER, JOHNSON and KNOPF, Judges.

GARDNER, JUDGE: Appellant, Danny France (France), appeals from an opinion and order of the Hopkins Circuit Court granting summary judgment for the appellees in this action seeking recovery under the tort of outrage. After reviewing the record and the applicable law, we affirm the circuit court's judgment.

Appellee, Ahlstrom Filtration (Ahlstrom), operates a manufacturing plant in Madisonville, Kentucky. The other appellee, Norman Johnson (Johnson), is the plant's maintenance supervisor. Ahlstrom temporarily shuts down the operations at the plant annually so that maintenance and repairs can be performed. During this annual shutdown, Ahlstrom utilizes in part temporary workers

employed by Manpower, Inc. (Manpower). France was employed by Manpower and assigned to work at the Madisonville plant during its temporary annual shutdowns between October 1988 and October 1991.[1] During this time, Johnson supervised France's work.

France has alleged that he was subjected to outrageous conduct by Johnson. He has alleged that he was forced to do personal favors or jobs for Johnson such as purchasing him liquor, mowing his yard and cleaning his car. He also alleged that Johnson on one occasion called him profane names over the intercom and ordered him not to leave at the end of the day with other employees, and on another occasion called him a profane name in front of other employees while he was on break in the plant's break room. France maintained that on yet another occasion, Johnson called him another profane name in front of other workers when Johnson believed that France had failed to tighten some bolts which loosened and resulted in a delay of the plant's operations. France related several occasions in which Johnson allegedly treated him badly including an incident where Johnson told France to pay him $100 in order to keep his job but later returned it, and another incident during which Johnson ordered him to crawl between two large rollers at the plant and berated him when he expressed reluctance to do this. One of the final incidents related by France involved Johnson directing him in front of other employees to place his nose in a circle drawn on a piece of paper and leave

[1]France applied several times during this period for permanent employment at the plant.

it there. France declined and told him using obscene language that he would not do it. Johnson's behavior was reported and an investigation conducted by company officials outside the Madisonville plant began. Johnson was suspended for two weeks without pay. France did not work at the plant after this time.

In May 1994, France filed a complaint against Ahlstrom and Johnson in circuit court. He contended that Johnson's behavior was outrageous and caused him to suffer severe emotional distress and that Ahlstrom was liable under the theory of respondeat superior. He sought compensatory and punitive damages. Discovery proceeded, and appellees later moved for summary judgment. The circuit court in an order of January 31, 1996, granted summary judgment for the appellees. The circuit court found that France had failed to show that Johnson's behavior constituted outrageous conduct as set out in Kentucky law and that he had suffered severe emotional distress. This appeal has followed.

France first argues on appeal that the trial court did not properly apply the test for summary judgment, and therefore erred in granting the appellees' motion for summary judgment. He also contends that the court did not apply the correct law regarding the tort of outrage that is recognized in Kentucky. We have found no error by the trial court.

Kentucky recognized the tort of outrageous conduct in Craft v. Rice, Ky. 671 S.W.2d 247 (1984). Kentucky adopted the test for outrageous conduct established in Restatement (Second) of Torts § 46 (1965), which provides,

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

See also Whittington v. Whittington, Ky. App., 766 S.W.2d 73 (1989); Pierce v. Commonwealth Life Ins. Co., 825 F.Supp. 783 (E.D. Ky. 1993). The elements necessary to prove this tort are:

> (1) [t]he wrongdoer's conduct must be intentional or reckless; (2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and (4) the emotional distress must be severe.

Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1, 2-3 (1990), quoting Craft v. Rice, 671 S.W.2d at 249; Pierce v. Commonwealth Life Ins. Co., 825 F.Supp. at 788. See also The Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61 (1996). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Humana of Kentucky, Inc. v. Seitz, 796 S.W.2d at 3, quoting Restatement (Second) of Torts, § 46, comment d. See The Kroger Co. v. Willgruber, 920 S.W.2d at 65; Webster v. Allstate Ins. Co., 689 F.Supp. 689 (W.D.Ky. 1986). The court is to make the initial determination as to whether the conduct complained of can reasonably be regarded as so extreme and outrageous as to permit recovery. Whittington v. Whittington, 766 S.W.2d at 74,

citing Restatement (Second) of Torts, comment h; Pierce v. Commonwealth Life Ins. Co., 783 F.Supp. at 788. It has been held that it takes more than bad manners or friction between an employee and his supervisor to constitute outrageous conduct. Webster v. Allstate Ins. Co., 689 F.Supp. at 693. Cf. The Kroger Co. v. Willgruber, 920 S.W.2d at 65.

Summary judgment should only be used to terminate litigation when as a matter of law it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his or her favor against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991), quoting Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985); Farmer v. Heard, Ky. App., 844 S.W.2d 425, 427 (1992). Summary judgment is properly granted only when there is no genuine issue as to any material fact; and the movant is entitled to prevail as a matter law. Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245, 247 (1992); Kentucky Rule of Civil Procedure (CR) 56.03. The movant bears the burden of showing that there is no genuine issue of material fact. Id. The court must review the record in the light most favorable to the party opposing the motion. Id.; Farmer v. Heard, 844 S.W.2d at 427.

In the case at bar, the trial court applied the correct standard for summary judgment and the correct legal standards for the tort of outrageous conduct in granting a summary judgment for the appellees. The court correctly determined that even considering the evidence in the light most favorable to France, the

actions of Johnson while crude and offensive, simply did not rise to outrageous behavior that is intolerable in that it offended the generally accepted standards of morality and decency. The standard for the tort of outrageous conduct is very stringent, and after considering the other Kentucky cases which have considered complaints alleging the commission of this tort, it is clear that Johnson's behavior in this case did not meet the necessary elements of the tort. Byle v. Anacomp, Inc., 854 F.Supp 738 (D.Kan. 1994); ITT Rayonier, Inc. v. McLaney, 420 S.E.2d 610 (Ga. App. 1992), and comments to § 46 of the Restatement (Second) of Torts, considered by the court below show that Johnson's behavior did not rise to the level necessary for the commission of the tort of outrage. France's argument that the trial court applied the wrong standard of law or another state's standard is simply unfounded.

Finally, France argues that the trial court erred in granting summary judgment by relying on the conclusion that he failed to present any evidence that he had suffered severe emotional distress because of Johnson's conduct. This argument clearly lacks merit.

Two of the necessary elements of the tort of outrageous conduct are that there must be a causal connection between the wrongdoer's conduct and the emotional distress, and the emotional distress must be severe. See The Kroger Co. v. Willgruber, 920 S.W.2d at 65; Humana of Kentucky, Inc. v. Seitz, 796 S.W.2d at 3. The law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it; severe

distress must be proven. Restatement (Second) of Torts, § 46, comment j. It is for the court to determine whether considering the evidence, severe emotional distress can be found; it is for the jury to determine whether on the evidence, it has in fact existed. Id. Thus, the court in the instant case correctly determined that France had failed to show any evidence that would prove severe emotional distress, a necessary element of the tort. In fact, there was simply no evidence of the injury of severe emotional distress. We decline to disturb the circuit court's decision.

For the foregoing reasons, the judgment of the Hopkins Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING. I concur in the result reached by the Majority Opinion, but choose to state my reasoning separately. I would affirm the summary judgment based on France's failure to present any evidence that his emotional distress was severe. This is a necessary element of this tort.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF FOR APPELLEE:

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