[Cite as *Jones v. Ohio Veteran's Home*, 2004-Ohio-5456.]

IN THE COURT OF CLAIMS OF OHIO

GINI JONES :

Plaintiff : CASE NO. 2002-03775
Judge Joseph T. Clark

v. :
DECISION

OHIO VETERAN'S HOME :

Defendant :
: : : : : : : : : : : : : : : : : :

{¶ 1} Plaintiff brought this action against defendant alleging claims of sexual harassment in violation of R.C. 4112.02 and intentional infliction of emotional distress. The issues of liability and damages were bifurcated and the case proceeded to trial on the issues of both liability and civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶ 2} In August 1999, plaintiff was employed by defendant as a nurse's aide and assigned to work the third shift from 11:00 p.m. to 7:00 a.m. in the area known as "three south." Adam Blackshear, a nurse's aide who was also assigned to three south, worked for defendant on the second shift from 3:00 p.m. to 11:30 p.m. Plaintiff and Blackshear occasionally worked together during the half-hour "overlap" between the shifts and when Blackshear worked overtime on the third shift. Plaintiff alleges that Blackshear engaged in behavior that constituted sexual harassment and created a hostile work environment. Specifically, plaintiff asserts that Blackshear made unwelcome comments and, on two occasions, touched her inappropriately.

{¶ 3} Plaintiff testified that the first incident involving unwelcome touching occurred during the week of July 3, 2000. Plaintiff testified that she was beginning her shift when she and Tracy Kellem, another nurse's aide, stopped to talk to a resident who was sitting in his wheelchair. As plaintiff leaned forward to speak with the resident, Blackshear came up behind her, put his hand up the back of her shorts, and touched her from the middle of her leg to her "underwear line."

According to plaintiff, Blackshear commented to the resident "would you like some of that?" Plaintiff testified that she turned and cursed at Blackshear and that he smiled and laughed as he walked away.

{¶ 4} Kellem testified that she observed the incident but did not hear plaintiff make any comment in response to Blackshear's conduct. Kellem testified that she spoke to plaintiff that evening and advised her that she should report the incident. Plaintiff testified that she reported the incident to Kirby Brown, the unit supervisor, the following day. According to plaintiff, she told Brown that she did not want to work with Blackshear and that she was afraid to talk to him.

{¶ 5} The second incident occurred on July 12, 2000, when plaintiff encountered Blackshear during the "shift overlap." Plaintiff testified that Blackshear was walking behind her and Sharon Green when he stated that he "liked walking behind you guys to watch your asses shake." Blackshear then put his arm on plaintiff's shoulder and told her that she would be doing her "rounds" with him. Green pushed Blackshear's arm from plaintiff's shoulder and stated that she was working with plaintiff.

{¶ 6} Diane Murawski, the house supervisor, also witnessed the July 12, 2000, incident between plaintiff and Blackshear. Murawski testified that she could tell that plaintiff was uncomfortable during the encounter and that she talked to plaintiff after the incident. According to Murawski, plaintiff became tearful and talked about other incidents with Blackshear. Based upon her conversation with plaintiff, Murawski decided to make a report to management. Murawski explained that she did not have the authority to discipline Blackshear; however, Murawski believed she had a duty to report the incident and she submitted her narrative statement to Mike Adelman, defendant's assistant director of nursing. (Plaintiff's Exhibit 2.) Murawski also testified that she supervised nurse's aides who worked on the third floor and that her position was the same "level" as a unit supervisor position.

{¶ 7} On July 14, 2000, Adelman met with plaintiff and Deb DeRose, defendant's director of nursing. DeRose assured plaintiff that she would not have to work with Blackshear again. On that same date, plaintiff made a report to Robert Day, defendant's human resources administrator and

Equal Employment Opportunity (EEO) officer. Day conducted interviews and gathered statements from plaintiff, Kellem, Green, Murawski, and Blackshear. As a result of Day's investigation, a predisciplinary meeting was held and Blackshear was subsequently notified that his employment was to be terminated for just cause effective August 1, 2000.

{¶ 8} Initially, the court must determine whether Blackshear is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86. R.C. 2743.02(F) provides, in part: "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶ 9} R.C. 9.86 provides, in part: "*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.* ***" (Emphasis added.)

{¶ 10} "[I]f the state employee acts manifestly outside the scope of his or her employment or acts with malicious purpose, in bad faith, or in a wanton or reckless manner, the employee will be liable in a court of general jurisdiction. 'It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment.' Even if an employee acts wrongfully, it does not automatically take the act outside the scope of the employee's employment even if the act is unnecessary, unjustified, excessive, or improper. The act must be so divergent that its very character severs the relationship of employer and employee." *Thomson v. University of Cincinnati College of Medicine* (Oct. 17, 1996), Franklin App. No. 96API02-260. (Citations omitted.)

{¶ 11} The Tenth District Court of Appeals has observed that as a general rule, sexual harassment is not conduct within the scope of employment because the harassing employee often acts for personal motives that are unrelated and even antithetical to the objectives of the employer. *Oye v. Ohio State University*, Franklin App. No. 02AP-1362, 2003-Ohio-5944, at ¶8, citing *Burlington Industries Inc. v. Ellerth* (1998), 524 U.S. 742, 757.

{¶ 12} Although Blackshear was on duty when the incidents occurred, there is no evidence that his inappropriate actions in any way furthered defendant's interests. The court finds that his actions bore no relationship to the conduct of defendant's business. Based upon the totality of the evidence presented, the court finds that Blackshear acted outside the scope of his employment with defendant during the incidents at issue. Consequently, Blackshear is not entitled to personal civil immunity pursuant to R.C. 9.86 and 2743.02(F) regarding his conduct toward plaintiff.

{¶ 13} Plaintiff claims that Blackshear's conduct was sufficiently severe and pervasive to constitute hostile environment sexual harassment. Defendant asserts that plaintiff cannot prevail because she failed to report her claim to defendant's management and because there was no objective basis to conclude that sexual harassment occurred.

{¶ 14} R.C. 4112.02 provides: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the *** sex *** of any person, to discharge without just cause, to refuse to hire, or otherwise discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Under R.C. 4112.02(A), an employer is prohibited from engaging in sexual discrimination against an employee. *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App.3d 715, 722. The Supreme Court of Ohio has held that "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n* (1981), 66 Ohio St.2d 192, 196.

{¶ 15} Pursuant to R.C. 4112.02(A), there are two types of actionable 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, 2000-Ohio-128, paragraph one of the syllabus.

{¶ 16}Of the two recognized forms of sexual harassment, plaintiff has alleged only a "hostile environment" situation. In order to establish such a claim, plaintiff must show: 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*, supra.

{¶ 17} Plaintiff must prove each of these elements by a preponderance of the evidence. With regard to the first element, plaintiff testified that prior to the first incident she informed Blackshear that some of his comments were unwelcome and she told him not to call her "baby." Plaintiff also testified that she cursed at Blackshear when he inappropriately touched her during the week of July 3, 2000, and that she became fearful of him. Murawski corroborated plaintiff's testimony that Blackshear's conduct was unwelcome. Murawski testified that plaintiff was visibly shaken, upset, and crying after the second incident occurred. The court finds that plaintiff has established the conduct complained of was unwelcome.

{¶ 18} With regard to the second element of the prima facie case, there is no question that Blackshear's conduct was based on sex. Both the comments made to the resident at the time of the first incident and the comments that were made to plaintiff and Green on July 12, 2000, were overtly sexual. The court finds that the testimony regarding Blackshear's comments and the nature of the unwelcome touching was sufficient to show that the harassment was based on sex.

{¶ 19} The third element of plaintiff's claim concerns whether the harassment was sufficiently severe and pervasive as to alter the terms and conditions of her employment. Not all

conduct in the employment context that can be construed as having sexual connotations can be classified as harassment in violation of the statute. *Vitatoe v. Lawrence Industries, Inc.*, 153 Ohio App.3d 609, 2003-Ohio-4187 ¶36, citing *Meritor Savings Bank v. Vinson* (1986), 477 U.S. 57. The conduct at issue must be severe or pervasive enough to create an environment that is abusive or hostile on a subjective basis by the individual, as well as abusive or hostile by a reasonable person. Id., citing *Harris v. Forklift Systems, Inc*. (1993), 510 U.S. 17. Therefore, conduct that is offensive but is not severe or pervasive under the subjective and objective standard is not actionable. Id.

{¶ 20} Defendant maintains that Blackshear's conduct was not severe or pervasive because defendant's nursing assistants occasionally engaged in "some horseplay and sexual banter." However, in *Hampel*, supra, the court rejected the notion that sexually abusive work behavior is somehow excusable because it is commonplace. Id. at 181. "[W]hile the social context in which particular behavior occurs and is experienced by its target is a relevant factor in judging the objective severity of harassment, sexual harassment that meets the statutory requirements is not excusable solely because it consists of conduct that is commonplace." Id. at 182. The issue of whether a work environment is hostile or abusive must be determined by examining the totality of the circumstances. Id. at 180. Sexual innuendo or vulgar language that is trivial or only annoying is not enough to establish sexual harassment. *Davis v. City of Columbus* (June 15, 1999), Franklin App. No. 98AP-1058.

{¶ 21} In this case, the court finds that Blackshear's conduct during the week of July 3, 2000, was particularly offensive and humiliating for plaintiff. Additionally, the court finds that Blackshear's harassing verbal and physical conduct was patently abusive because it was explicit and occurred in view of a resident and plaintiff's co-workers. Although defendant contends that "horseplay" was common between second and third shift employees, the court finds that the testimony and evidence did not show that Blackshear's inappropriate conduct was commonplace. As discussed above, witnesses corroborated plaintiff's testimony that she became fearful of Blackshear and that she tried to avoid working with him. Plaintiff also testified that she took time off work and sought medical help to address the stress that resulted from the harassment. The court finds

plaintiff's testimony regarding her reaction to the harassment to be credible. The court concludes that Blackshear's sexual harassment had the effect of unreasonably interfering with plaintiff's work performance and created an intimidating, hostile and offensive working environment.

{¶ 22} The remaining element necessary to establish liability on the part of defendant is whether defendant's agents knew or should have known of the harassment and failed to take remedial action. There is no dispute that, after Murawski reported the July 12, 2000, incident, defendant acted reasonably in order to "promptly" correct the offensive behavior. Defendant asserts that plaintiff failed to report the initial incident to either management personnel or the EEO officer in accordance with its policy.

{¶ 23} Under Title VII of the Civil Rights Act, an employer may assert an affirmative defense regarding his or her liability or damages in a sexual harassment claim. The defense comprises two necessary elements: first, that the defendant exercised reasonable care to prevent and correct any sexually harassing behavior, and second, that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the defendant or to avoid harm otherwise. *Peterson v. Buckeye Steel Casings*, supra, at 723.

{¶ 24} Trial testimony revealed that plaintiff became aware of defendant's sexual harassment policy during her orientation training in 1999. Plaintiff, her husband (Bradley Jones), Kirby Brown, and Robert Day each testified that plaintiff was instructed to notify a supervisor if she was subjected to harassment. (Plaintiff's Exhibit 3.) Although plaintiff testified that she notified Brown of the first incident because he was the third-floor supervisor, defendant contends that neither Brown nor Murawski had the authority to act on plaintiff's sexual harassment complaint because they were not "management" personnel with power to hire or fire employees. Nevertheless, the court finds that both Brown and Murawski had a duty to report any alleged harassment to management and that defendant had constructive knowledge of the incidents when plaintiff's supervisors were informed. In her trial testimony, Murawski acknowledged that she believed she had a duty to report the July 12, 2000, incident. The court also finds plaintiff's testimony that she informed Brown of the first incident to be credible. Accordingly, the court finds that plaintiff put defendant on notice of the

sexual harassment when she notified Kirby Brown, her immediate supervisor, of Blackshear's conduct during the week of July 3, 2000.

{¶ 25} Based upon the totality of the evidence presented, the court finds that plaintiff reasonably notified defendant of the sexual harassment in accordance with defendant's policy and that defendant failed to timely exercise reasonable care to take remedial action before the July 12, 2000, incident occurred. Accordingly, the court finds that plaintiff has proven her claim of sexual harassment by a preponderance of the evidence.

{¶ 26} Plaintiff's complaint also alleges a claim for intentional infliction of emotional distress. To prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove: "1) that the [defendant] 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 [defendant'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 [defendant'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.'" *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 34. (Citations omitted.)

{¶ 27} The Supreme Court of Ohio has emphasized that "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient to give rise to a claim of intentional infliction of emotional distress. *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375. However, at least one court has held that sexual harassment in the workplace is an intentional infliction of emotional distress. *Johnson v. Cox* (Mar. 28, 1997), Adams App. No. 96CA622. In *Hampel*, supra, the Supreme Court of Ohio observed that all relevant evidence that was presented in support of the sexual harassment claim in that case was also relevant and admissible with regard to the intentional infliction of emotional distress claim. *Hampel*, at 740.

{¶ 28} However, if a tort is intentional, "the behavior giving rise to the tort must be 'calculated to facilitate or promote the business for which the servant is employed.'" *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 329. "[A]n employer is not liable for independent self-serving acts

of his employees which in no way facilitate or promote his business." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 59.[1] Having determined that Blackshear was not acting within the course and scope of his employment at the time of the incidents, the court finds that defendant cannot be held liable for an intentional tort based upon the harassing conduct. Although defendant failed to correct the harassing behavior immediately after it was reported to plaintiff's supervisor, the court finds that defendant did not ratify Blackshear's conduct by failing to discipline him immediately. Therefore, plaintiff's claim for intentional infliction of emotional distress must be denied.

{¶ 29} For the foregoing reasons, judgment shall be rendered in favor of plaintiff.

IN THE COURT OF CLAIMS OF OHIO

GINI JONES :

Plaintiff : CASE NO. 2002-03775
Judge Joseph T. Clark

v. :
JUDGMENT ENTRY

OHIO VETERAN'S HOME :

Defendant :
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This case was tried to the court on the issue of liability and to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, the court finds that Adam Blackshear is not entitled

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Although the Tenth District Court of Appeals has distinguished the facts in *Byrd*, supra, from the facts in a case involving sexual harassment by a supervisor, the court finds that the holding in *Byrd* is applicable to this case. *Davis v. Black* (1991), 70 Ohio App.3d 359. Unlike the facts in *Davis*, plaintiff's claim of intentional infliction of emotional distress resulted from the sexual harassment alone and not from defendant's response to plaintiff's complaint.

to immunity pursuant to R.C. 9.86 and 2743.02(F). Therefore, the courts of common pleas have jurisdiction over civil actions against Adam Blackshear based upon the allegations in this case.

In addition, judgment on the issue of liability is rendered in favor of plaintiff in an amount to be determined subsequent to a trial on the issue of damages. The court shall issue an entry in the near future scheduling a date for the trial on the issue of damages.

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JOSEPH T. CLARK
Judge

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