[Cite as *Karcher v. Ohio Dept. of Transp.*, 2003-Ohio-7121.]

IN THE COURT OF CLAIMS OF OHIO

ROGER F. KARCHER, et al.	:	
Plaintiffs	:	CASE NO. 2002-08491 Judge Joseph T. Clark
v.	:	DECISION
OHIO DEPARTMENT OF TRANSPORTATION	:	
Defendant	:	

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{¶1} On July 29, 2003, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On September 25, 2003, the court granted plaintiffs a 30-day extension of time to file a response. On October 27, 2003, plaintiffs filed a memorandum in opposition to defendant's motion for summary judgment. The case is now before the court for a non-oral hearing on the motion for summary judgment. Civ.R. 56(C) and L.C.C.R. 4.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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. No evidence or stipulation may be considered except as stated in this rule. 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 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. ***" See, also, *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶4} The Tenth District Court of Appeals has stated:

{¶5} "The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of fact on a material element of one or more of the nonmoving party's claims for relief. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. If the moving party satisfies this initial burden by presenting or identifying appropriate Civ.R. 56(C) evidence, the nonmoving party must then present similarly appropriate evidence to rebut the motion with a showing that a genuine issue of material fact must be preserved for trial. *Norris v. Ohio Standard Oil Co.* (1982), 70 Ohio St.2d 1, 2. The nonmoving party does not need to try the case at this juncture, but its burden is to produce more than a scintilla of evidence in support of its claims. *McBroom v. Columbia Gas of Ohio, Inc.* (June 28, 2001), Franklin App. No. 00AP-1110." *Nu-Trend Homes, Inc., et al. v. Law Offices of DeLibera, Lyons & Bibbo et al.*, Franklin App. No. 01AP-1137, 2003-Ohio-1633.

{¶6} Plaintiffs allege that they were discriminated against on the basis of sex when they were denied equal employment opportunities with defendant because of defendant's nepotism policy. In addition, plaintiff, Roger Karcher, alleges discrimination based upon age. Plaintiffs also set forth claims of

breach of contract, and negligent and intentional infliction of emotional distress by reason of the same nepotism policy.

{¶7} Defendant's nepotism policy provides in relevant part:

{¶8} "PURPOSE

{¶9} "To establish a statewide policy to ensure that hiring and supervision in state government is conducted in a manner which enhances public confidence in government and prevents situations which give the appearance of partiality, preferential treatment, improper influence, or a conflict of interest. In accordance with this objective, the following sets forth the State of Ohio's policy on hiring and supervision.

{¶10} "POLICY

{¶11} "All public officials and state employees are prohibited from authorizing or using the authority or influence of his/her position to secure the authorization of employment or benefit (including a promotion or preferential treatment) for a person closely related by blood, marriage, or other significant relationship, including business associates. This includes, but is not limited to, the following circumstances:

{¶12} "***

{¶13} "SUPERVISION

{¶14} "A. No public official or employee shall supervise, directly or indirectly, any person closely related by blood, marriage, or other significant relationship, including business associates.

{¶15} "B. Should a supervision conflict arise, the Department shall work expeditiously to relocate or transfer one of the individuals to eliminate the conflict. This relocation or transfer

should be to a comparable position with minimal inconvenience for the transferring employee."

{¶16} The term "closely related by blood or marriage" is defined in the policy as follows:

{¶17} "2. 'Closely related by blood or marriage' is defined to include, but is not limited to spouse, children (whether dependent or independent), parents, grandparents, siblings, aunts, uncles, in-laws, steps and other persons related by blood or marriage who reside in the same household."

{¶18} The issue in this case is whether the application of defendant's nepotism policy resulted in any legally compensable injury to plaintiffs.

{¶19} Plaintiffs have not attached to their complaint or provided the court with any written employment agreement. Consequently, there is no evidence to support plaintiffs' claim that application of defendant's nepotism policy constitutes a breach of a written employment contract.

{¶20} Plaintiffs also allege that defendant's nepotism policy violates R.C. 4112.02 which prohibits employment discrimination on the basis of age or sex. Ohio follows the federal standard in the area of discrimination law. *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm.* (1991), 61 Ohio St.3d 607, 609-610. Under that law, plaintiffs may provide direct evidence of discrimination or establish a prima facie case of discrimination indirectly by following the standard established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817; *Byrnes v. LCI Communications Holdings Co.*, 77 Ohio St.3d 125, 128, 1996-Ohio-307. Where no direct evidence of discrimination exists, a plaintiff must establish a prima facie case of discrimination by

showing: (1) he belongs to a protected class; (2) he was qualified for the position that he held; (3) he was terminated despite his qualifications; and (4) he was replaced by someone outside the protected class. *McDonnell Douglas Corp.*, supra at 802. The establishment of a prima facie case of discrimination under *McDonnell Douglas* creates a presumption that the employer unlawfully discriminated against the employee. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.ED. 2d 207. Once the person seeking relief establishes a prima facie case of handicap discrimination, the burden then shifts to the employer to set forth some legitimate, nondiscriminatory reason for the action taken. *Hood v. Diamond Products*, 74 Ohio St.3d 298, 302, 1996-Ohio-259, citing *Plumbers & Steamfitters Comm. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192, 197. If the employer establishes a nondiscriminatory reason for the action taken, then the person seeking relief must demonstrate that the employer's stated reason was a pretext for impermissible discrimination. *Hood* at 302, citing *Plumbers & Steamfitters*, at 198.

{¶21} In *State, ex rel. Bloomingdale v. City of Fairborn* (1982), Second District App. No. 81CA50, the court rejected plaintiff's claims that a city nepotism policy violated plaintiff's equal rights protection of the law and substantive due process under the Ohio or United State Constitution. In so holding, the court stated that a person's "relatives" are not a suspect class and that public employment was not a fundamental right.

{¶22} In *Wright v. MetroHealth Medical Center* (C.A. 6, 1995), 58 Fed.3d 1130, the issue for the court was whether defendant's nepotism policy which prohibited married persons from working at

the same facility violated plaintiff's constitutional rights or resulted in a legally compensable harm to plaintiff under one of several tort theories. The Sixth Circuit Court of Appeals affirmed summary judgment in favor of defendant because it found that defendant's nepotism policy did not violate plaintiff's fundamental right to marry and that the policy was rationally related to the legitimate governmental interest of avoiding conflicts of interest and the appearance of favoritism. The court also affirmed the district court's dismissal of plaintiff's tort claims including plaintiff's claim for intentional infliction of emotional distress, because plaintiff failed to state a claim upon which relief could be granted. Id.

{¶23} Although *Wright*, supra, and *State, ex. rel. Bloomingdale*, supra, involved a challenge to a nepotism policy based on constitutional grounds, those cases are instructive herein since they properly identify the nature of claims in this case. While plaintiffs claim that defendant's policy discriminates against them on the basis of age and/or sex, the true reason that plaintiffs were treated differently is that they were married and were living in the same household as their spouse. Indeed, the nepotism policy at issue is completely age and sex neutral. Consequently, even if the court were to conclude that plaintiffs have produced evidence to establish a prima facie case of age or sex discrimination, defendant has established a legitimate, nondiscriminatory reason for the disparate treatment.

{¶24} In response, plaintiffs claim that defendant has selectively enforced its nepotism policy in the past and defendant's enforcement or threatened enforcement of the policy against plaintiffs is merely a pretext designed to hide

defendant's true discriminatory intent. However, upon review of the deposition testimony submitted in conjunction with the motion for summary judgment, the court does not find any support for plaintiffs' claims. Indeed, the only reasonable conclusion to draw from the evidence is that plaintiffs were not discriminated against on the basis of sex or age.

{¶25} Similarly, defendant's enforcement of a nepotism policy cannot possibly be construed as "extreme and outrageous conduct" as that term is defined in tort law. See *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375. Therefore, defendant is not liable to plaintiffs for intentional infliction of emotional distress, as a matter of law. *Yeager*, supra. Finally, Ohio law does not recognize a claim for negligent infliction of emotional distress under the circumstances of this case. See *Paugh v. Hanks* (1983), 6 Ohio St.3d 72.

{¶26} For the foregoing reasons, the court finds that defendant cannot be found liable to plaintiffs under any of the legal theories alleged in the complaint. Consequently, there are no genuine issues of material fact for trial and defendant is entitled to judgment as a matter of law.

{¶27} Defendant's motion for summary judgment is hereby GRANTED and judgment shall be rendered in favor of defendant.

{¶28} On another matter, J. Vincent Buchanan's October 27, 2003, motion to withdraw as counsel for plaintiffs is in compliance with L.C.C.R. 19 and is hereby GRANTED.

{¶29} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of

defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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JOSEPH T. CLARK
Judge

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LP/cmd
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