[Cite as *Tackett v. Ohio Dept. of Rehab. & Corr.*, 2008-Ohio-3410.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

SAMATHA TACKETT

Plaintiff

v.

DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant
Case No. 2006-06604

Judge J. Craig Wright

DECISION

{¶ 1} On April 15, 2008, defendant filed a motion for summary judgment pursuant to Civ.R. 56. On May 9, 2008, plaintiff filed a motion to "compel discovery and to stay proceedings and/or continue hearing on defendant's motion for summary judgment." On May 20, 2008, plaintiff filed a response to defendant's motion and a motion to strike plaintiff's deposition transcript. Upon review, plaintiff's May 9, 2008 motion and plaintiff's May 20, 2008 motion to strike plaintiff's deposition transcript are DENIED. The case is now before the court for a non-oral hearing on defendant's motion for summary judgment.

{¶ 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 *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} On August 22, 2005, plaintiff, a registered nurse, began her employment with defendant at the Chillicothe Correctional Institution (CCI) in the position of "Nurse 1." Shortly after she began her employment, plaintiff learned that two of her colleagues, Scott Bolte, RN, and Serena Willis, RN, were having a romantic relationship. Plaintiff asserts that after she "implicitly expressed" her disapproval of that relationship, Bolte and Willis conspired with defendant to terminate her employment. Plaintiff asserts that Bolte failed to adequately train her. Plaintiff further asserts that Bolte repeatedly intimidated her by warning her not to ask job-related questions, by advising her to be "overly respectful" to Willis, and to "just fall in the cracks." Plaintiff asserts that Bolte changed her work schedule and job duties without her knowledge and forced her to perform more duties than she was trained to perform.

{¶ 5} On October 10, 2005, plaintiff filed a three-page incident report wherein she set forth her concerns about remarks that Bolte had made to her regarding the security of her continued employment. (Plaintiff's Exhibit C.) In the report, plaintiff also set forth her opinion that Bolte inefficiently managed the schedule for the medical staff. Plaintiff also complained that she had had an insufficient orientation to the position and that she feared retaliation for writing the report.

{¶ 6} Thereafter, Willis was promoted to the position of Health Care Administrator and became plaintiff's supervisor. On November 16, 2005, Willis conducted a "mid probationary evaluation"of plaintiff that was negative. On November 17, 2005, plaintiff was placed on administrative leave and was instructed not to enter the premises without an escort and prior approval from the warden. On November 18, 2005, defendant issued a probationary removal with a letter from Warden Tim Brunsman stating that plaintiff's employment was terminated effective that day.

{¶ 7} Plaintiff asserts claims for wrongful discharge, defamation, tortious interference with her contractual relations, and intentional infliction of emotional distress.

I. Wrongful Discharge

{¶ 8} In her deposition, plaintiff admitted that her first day of employment with defendant was August 22, 2005; that her position as Nurse 1 was governed by a collective bargaining agreement; that her employment was subject to a 90-day period of probation before she was entitled to union representation; and that her last day of employment was November 18, 2005. Defendant asserts that because plaintiff's employment was terminated within the 90-day probationary period, she was not entitled to the protections afforded to union employees under the collective bargaining agreement. Accordingly, defendant asserts that plaintiff was an "at-will" employee subject to discharge for any reason not contrary to public policy or law.

{¶ 9} In her affidavit that was filed with the memorandum in opposition to defendant's motion, plaintiff avers that although she was told that her termination was effective November 18, 2005, the appointing authority did not approve the warden's decision until November 25, 2005, which was after the 90-day probationary period had expired. A party cannot contradict her own prior sworn testimony in an attempt to create a genuine issue of material fact to avoid summary judgment. *Caravella v. West-WHI Columbus Northwest Partners*, Franklin App. No. 05AP-499, 2005-Ohio-6762. However, construing the evidence most strongly in plaintiff's favor, even if an issue of fact exists regarding the date of plaintiff's termination, the court finds that it is not a genuine issue of material fact for the following reasons.

{¶ 10} If plaintiff's termination were effective on November 25, 2005, and if she were entitled to any rights set forth in the collective bargaining agreement, the court would nonetheless lack jurisdiction over her claim for wrongful termination. Any claim for violation of a collective bargaining agreement or claim for a violation of R.C. 4117.10 is not within the jurisdiction of the Court of Claims. *Moore v. Youngstown State University* (1989), 63 Ohio App.3d 238. Suits for violation of collective bargaining agreements must be brought in a court of common pleas pursuant to R.C. 4117.09(B)(1).

{¶ 11} Alternatively, if plaintiff's employment was terminated during the 90-day probationary period, plaintiff was an at-will employee. As a general rule, the

common-law doctrine of employment-at-will governs employment relationships in Ohio. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994. In an at-will employment relationship, either an employer or an employee may legally terminate the employment relationship at any time and for any reason. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 103.

{¶ 12} A public policy exception to the employment-at-will doctrine was first recognized by the Supreme Court of Ohio in *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228. In *Greeley* the court held that "public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute." Id. at 234.

{¶ 13} In *Painter v. Graley*, 70 Ohio St.3d 377, 1994-Ohio-334, the public policy exception was extended, and claims for wrongful discharge were allowed for employment terminations that violated public policy as expressed in sources other than the Ohio Revised Code. Under *Painter*, supra, the public policy exception to the employment-at-will doctrine "is not limited to public policy expressed by the General Assembly in the form of statutory enactments" but "may [also] be discerned by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law." Id. at 384.

{¶ 14} In order to establish a claim for wrongful termination in violation of public policy, plaintiff must prove four elements: 1) a clear public policy manifested in a statute, regulation, or the common law; 2) that discharging an employee under circumstances like those involved would jeopardize the policy; 3) that the discharge at issue was motivated by conduct related to the policy; and 4) that there was no overriding business justification for the discharge. *Kulch v. Structural Fibers, Inc*., 78 Ohio St.3d 134, 151, 1997-Ohio-219.

{¶ 15} Plaintiff has failed to identify a clear public policy manifested in a statute, regulation or common law that was violated by defendant when it terminated her employment. Plaintiff refers to the October 10, 2005 incident report as the basis for her wrongful termination claim. Although plaintiff arguably claims that some of Bolte's comments constituted "sexual harassment" (which is prohibited by R.C. 4112.02), those comments were the following:

{¶ 16} "I also talked to Debbie Basye RN on Oct. 9th , 2005. She said that prior to our hiring Scott Bolte RN was asking her what we looked like, and if we were pretty or not. I feel this was irrelavent [sic] to the job, and is sexual harassment." (Plaintiff's Exhibit C, Page 2.) Even if Bolte had made that comment prior to plaintiff's employment, that comment alone is not evidence that plaintiff's employment was terminated on the basis of sex.

{¶ 17} Moreover, that portion of the incident report wherein plaintiff alleges that she "spoke out against patient care issues" consists of plaintiff's criticism of how Bolte scheduled nurses during different shifts. Upon review of the motion and the memoranda presented, and construing the evidence most strongly in favor of plaintiff, the court finds that reasonable minds could not conclude that plaintiff was wrongfully terminated. Therefore, defendant is entitled to summary judgment on that claim.

II. Defamation

{¶ 18} Plaintiff alleges that the act of terminating her employment at CCI interfered with her later attempts to find employment, and because she believes that her termination was not justified, it amounts to defamation. Plaintiff also asserts that the statements in the evaluation are false and defamatory.

{¶ 19} Defamation, which includes both libel and slander, is a false publication causing injury to a person's reputation, exposing the person to public hatred, contempt, ridicule, shame or disgrace, or affecting the person adversely in his or her trade or business. *Sweitzer v. Outlet Communications, Inc*. (1999), 133 Ohio App.3d 102, 108. The essential elements of a defamation action are that a false statement was made, that the false statement was defamatory, that the false defamatory statement was published, that plaintiff was injured and that defendant acted with the required degree of fault. *Celebrezze v. Dayton Newspapers, Inc.* (1988), 41 Ohio App. 3d 343, 346.

{¶ 20} Plaintiff has not identified any false statement that was published to another party. An adverse employment action is not a "statement," it is an action. *Lawson v. AK Steel Corp.* (1997), 121 Ohio App.3d 251, 257. Conduct, standing alone, does not constitute defamation. *Paolucci v. Robinson Memorial Hospital* (1995), Portage App. No. 94-P-0022.

{¶ 21} In addition, "communications between an employer and an employee, or between two employees, concerning the conduct of a third employee or former employee, are qualifiedly privileged, and thus, even though such a communication contain matter defamatory to such other or former employee, he cannot recover in the absence of sufficient proof of actual malice to overcome the privilege of the occasion." *McKenna v. Mansfield Leland Hotel Co.* (1936), 55 Ohio App. 163, 167. See also *Plouffe v. Ohio State Univ.*, Ct. of Cl. No. 2001-08048, 2004-Ohio-4716, ¶19-21.

{¶ 22} Upon review of the motion and the memoranda presented, and construing the evidence most strongly in favor of plaintiff, the court finds that reasonable minds can come but to one conclusion and that conclusion is adverse to plaintiff regarding her claim of defamation. Therefore, defendant is entitled to summary judgment on that claim.

III. Tortious Interference

{¶ 23} The elements of the tort of tortious interference with contract "are (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 176, 1999-Ohio-260. "The elements of tortious interference with a business relationship are: (1) a business relationship; (2) the tortfeasor's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom." *Diamond Wine & Spirits v. Dayton Heidelberg Distributing Co., Inc.*, 148 Ohio App.3d 596, 2002-Ohio-3932, at ¶23, citing *Geo-Pro Serv. Inc. v. Solar Testing Laboratories, Inc*. (2001), 145 Ohio App.3d 514, 525. The main difference between tortious interference with a contract and tortious interference with a business relationship "is that interference with a business relationship includes intentional interference with prospective contractual relations, not yet reduced to a contract. Such interference must be intentional because Ohio does not recognize negligent interference with a business relationship." *Diamond Wine & Spirits*, supra. (Citations omitted.)

{¶ 24} It is axiomatic that the wrongdoer must be a non-party to the contract. See, e.g., *Kenty v. Transamerica Premium Ins.* (1995), 72 Ohio St.3d 415, 418. Only "outsiders" who maliciously interfere with another's employment are liable for tortious

interference with employment. *Anderson v. Minter* (1972), 32 Ohio St.2d 207, 213. Upon review of the motion and the memoranda presented, and construing the evidence most strongly in favor of plaintiff, the court finds that reasonable minds can come but to one conclusion and that conclusion is adverse to plaintiff regarding her claim of tortious interference with plaintiff's contractual relations. Therefore, defendant is entitled to summary judgment on that claim.

IV. Intentional Infliction of Emotional Distress

{¶ 25} To state a cause of action for intentional infliction of emotional distress, plaintiff must "show that 1) defendant intended to cause emotional distress, or knew or should have known that actions taken would result in serious emotional distress; 2) defendant's conduct was extreme and outrageous; 3) defendant's actions proximately caused plaintiff's psychic injury; and 4) the mental anguish plaintiff suffered was serious." *Hanly v. Riverside Methodist Hospitals* (1991), 78 Ohio App.3d 73, 82, citing *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 34.

{¶ 26} "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. 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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374-375, quoting 1 Restatement of the Law 2d, Torts (1965) 73, Section 46, Comment d.

{¶ 27} The act of terminating employment is not "outrageous" conduct sufficient to form the basis of a claim of intentional infliction of emotional distress. Adverse employment actions, without more, do not meet this standard. *Katterhenrich v. Fed. Hocking Local School Dist. Bd. of Edn.* (1997), 121 Ohio App.3d 579, 590. Upon review of the motion and the memoranda presented, and construing the evidence most strongly in favor of plaintiff, the court finds that reasonable minds can come but to one conclusion and that conclusion is adverse to plaintiff regarding her claim of intentional

infliction of emotional distress. Therefore, defendant is entitled to summary judgment on that claim.

{¶ 28} For the foregoing reasons, defendant's motion for summary judgment shall be granted in its entirety.

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SAMATHA TACKETT	Case No. 2006-06604
Plaintiff	Judge J. Craig Wright
v.	JUDGMENT ENTRY
DEPARTMENT OF REHABILITATION AND CORRECTION	
Defendant	

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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 plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
J. CRAIG WRIGHT
Judge

cc:

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HTS/mdw/cmd
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