[Cite as *Strausbaugh v. Ohio Dept. of Transp.*, 2001-Ohio-6991.]

IN THE COURT OF CLAIMS OF OHIO

BEEMON STRAUSBAUGH	:	
Plaintiff	:	**CASE NO. 99-15013**
v.	:	**DECISION**
OHIO DEPARTMENT OF TRANSPORTATION	:	**Judge Fred J. Shoemaker**
Defendant	:	

: : : : : : : : : : : : : : : : :

Plaintiff brings this action against defendant alleging sexual harassment, intentional infliction of emotional distress and negligent supervision. The case was tried to the court on the sole issue of liability.

Plaintiff is employed by defendant, Ohio Department of Transportation (ODOT), as a highway maintenance worker. Paul Corcoran, ODOT District Nine Transportation Manager supervised plaintiff at all times relevant hereto.[1] The testimony in this case establishes that plaintiff and Corcoran had a good working relationship and were considered friends by their co-workers prior to the summer of 1999. However, their relationship soured

[1]**Following an evidentiary hearing, the court ruled that Corcoran is entitled to civil immunity for his conduct in this case.**

during the course of two substantial highway maintenance projects undertaken in the summer of 1999.

On numerous occasions the two men engaged in verbal altercations where obscene language was used. Although they had commonly engaged in these type of exchanges in the past, it was always in a joking fashion. However, the exchanges became tinged with anger. According to plaintiff, on several occasions during the summer of 1999 Corcoran blew kisses to him and/or patted him on the buttocks. On other occasions, Corcoran approached plaintiff while he was working and pushed plaintiff's head towards his [Corcoran's] crotch to simulate a sex act. When those incidents occurred, plaintiff normally pushed Corcoran's hand away and told him to stop. On one occasion, plaintiff attempted to "bust him [Corcoran] right between the legs." According to plaintiff, when plaintiff asked Corcoran to stop this behavior, Corcoran would snicker and laugh.

Plaintiff alleges that he was subject to a sexually hostile work environment in violation of R.C. 4112.02(A):

> In order to establish a claim of hostile-environment sexual harassment, the 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 v. Food Ingredients Specialties* (2000), 89 Ohio St.3d 169.

R.C. 4112.02(A) protects men as well as women from all forms of sex discrimination in the workplace, including discrimination consisting of same-sex harassment. *Hampel, supra*.

Corcoran admitted blowing kisses and patting plaintiff on the buttocks on two occasions, but denied the other incidents. However, the testimony of several other ODOT employees corroborates plaintiff's allegations regarding the other incidents, and the court finds that these incidents did occur.

There is no dispute that Corcoran was plaintiff's immediate supervisor. Additionally, plaintiff testified that Corcoran's words and conduct were unwelcomed; that he repeatedly told Corcoran to stop. The testimony of plaintiff's co-workers supports plaintiff's contentions and the court, therefore, finds that the harassment was unwelcome.

The more difficult issue for the court is whether the harassment was sufficiently severe and pervasive as to alter the terms and conditions of plaintiff's employment. There is no question that the words and conduct directed at plaintiff by Corcoran were both hostile and abusive. However, in the context of a claim for sexual harassment based upon a hostile work environment, the determination whether such conduct qualifies as severe and pervasive must be made in light of the particular work environment. Hampel, *supra*.

Defendant argues that the environment in ODOT district nine was such that comments and conduct such as Corcoran's were commonplace; that the employees, including plaintiff, engaged in this type of horseplay on a daily basis.

> In order to determine whether the harassing conduct was 'severe or pervasive' enough to affect the conditions of the plaintiff's

> environment, the trier of fact, or the reviewing court, must view the work environment as a whole and consider the totality of all the facts and surrounding circumstances, including the cumulative effect of all episodes of sexual or other abusive treatment. *Hampel, supra* at syllabus, note #5.

Each of the ODOT district nine employees who testified in this case acknowledged that profanity, vulgarity and other socially unacceptable behavior were common in the district nine garage. The employees explained that off-color language was used either in a joking fashion, as an expression of anger or frustration, as an insult, or to humiliate and embarrass fellow employees. The testimony further established that plaintiff himself was one of the most willing participants in this type of behavior. Indeed, plaintiff's reputation for vulgarity and profanity were well-known to fellow employees and his supervisors. Justine Smith testified that she had seen plaintiff grab his own crotch in response to a sexual joke or reference by another employee. Jamie Stewart stated that she saw plaintiff grab his crotch while telling another employee: "I've got your lunch right here." Several employees recalled that plaintiff once lost a bet that he could refrain from using the word "fuck" for one hour. Plaintiff was also observed using profanity towards Corcoran both in anger and in a joking fashion.

Nevertheless, 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 the 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." *Hampel, supra*, at 182.

In this case, measuring the severity of Corcoran's harassment of plaintiff is complicated by the fact both that similar words and conduct occurred in the district nine garage every day and that plaintiff himself was one of the leading purveyors of vulgarity and profanity. While the harassment perpetrated upon plaintiff by Corcoran would be considered severe in almost any other working environment the court does not find it to be sufficiently severe in this case. Although plaintiff may not have welcomed the harassment directed toward him, under the circumstances that existed at the time, it was no more severe than the conduct exhibited by plaintiff towards others. Plaintiff simply did not prove that the terms and conditions of his employment were altered by the harassment. Moreover, even if the harassment in this case could be considered severe and pervasive, plaintiff must prove that the harassment was based upon his sex in order to recover. *Hampel, supra*, at 183-185. In *Hampel*, the plaintiff was a cook in a large commercial kitchen. When he complained to his supervisor about working conditions, his supervisor responded with a string of explicit and obscene references to oral sex. The supervisor made these vulgar comments in front of plaintiff's co-workers. When plaintiff later complained to the supervisor about his comments, he was told to quit if he didn't like it. *Id.* at 171.

In the view of the court, Corcoran's behavior towards plaintiff in this case is similar to that which was considered by the court in *Hampel, supra*. There is no doubt that Corcoran's words and actions toward plaintiff were sexually graphic and

offensive. Indeed, every one of plaintiff's co-workers testified that Corcoran harassed plaintiff. However, none of these employees believed that the harassment was based upon sex. The court agrees.

Corcoran's comments and actions toward plaintiff, although graphically sexual in nature, were not directed at plaintiff because he was a male. Rather the evidence overwhelmingly supports the conclusion that Corcoran's comments and actions were directed at plaintiff because Corcoran harbored a personal animosity towards plaintiff. Indeed, numerous fellow employees characterized the exchanges between plaintiff and Corcoran as two brothers not getting along. The court finds this testimony to be credible and persuasive. There was also no credible or persuasive evidence that Corcoran harbored any animosity towards men in general. Rather, as was the case in *Hampel, supra*, the evidence in this case overwhelmingly supports the conclusion that Corcoran harassed plaintiff simply because he had personal issues with him. R.C. 4112.02(A) does not proscribe this type of workplace harassment. *Hampel, supra.*

Turning to plaintiff's claim for intentional infliction of emotional distress, plaintiff must prove that:

> (a) *** the actor either intended to cause emotional distress or knew or should have known that actions taken would result in emotional distress to the plaintiff;
>
> (b) *** the actor's conduct was extreme and outrageous, that it went beyond all possible bounds of decency and that it can be considered as utterly intolerable in a civilized community;

> (c) *** the actor's actions were the proximate cause of the plaintiff's psychic injury; and
>
> (d) *** the mental anguish suffered by plaintiff is serious and of a nature that no reasonable person could be expected to endure it. *Pyle v. Pyle* (1983), 11 Ohio App.3d 31.

The Ohio Supreme Court, in *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, borrowed from the Restatement of the Law of Torts, 2d § 46, comment (d) in describing what constitutes extreme and outrageous conduct:

> 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. *** 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!' *** The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.
>
> *** *The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.* There is no occasion for the law to intervene in every case where some one's feelings are hurt. *Yeager, supra*, at 374-375. (Emphasis added.)

As noted above, the type of language commonly used in the district nine garage is "rough," at best. Similarly, the conduct of the employees, including plaintiff, was more than occasionally "inconsiderate and unkind." It is within this "community" that the court must judge whether Corcoran's words and actions were "extreme and outrageous." In this particular working environment, Corcoran's conduct is not extreme and outrageous. Similarly, in the context of plaintiff's working environment it cannot be said that plaintiff was forced to endure more than mere insults and indignities. Thus, plaintiff has failed to prove this critical element of his claim for emotional distress.

Plaintiff's final claim for relief is for negligent supervision. However, plaintiff's only injuries in this case are emotional in nature. Having determined that Corcoran's conduct was commonplace harassment rather than sexual harassment and having also determined that such conduct did not amount to an intentional tort, it stands to reason that defendant may not be held liable for purely emotional injuries based upon a claim of negligent supervision. See *Paugh v. Hanks* (1983), 6 Ohio St.3d 72. Moreover, even if the law would support a claim for negligent supervision under these circumstances, plaintiff failed to prove that defendant was negligent in the supervision of Corcoran. There had been no prior complaints by any district nine employees, including plaintiff, about Corcoran's language or conduct. Corcoran acknowledged that he had attended mandatory training regarding sexual harassment before these incidents occurred. Most significantly, following an internal investigation of this matter, Corcoran was reprimanded and given a three-day suspension without pay. In short, the evidence does

not support a finding that defendant breached its duty to supervise Corcoran.

For the foregoing reasons, plaintiff has failed to satisfy his burden of proof on any of the claims alleged in his complaint. Judgment will be rendered in favor of defendant.

_____

FRED J. SHOEMAKER
Judge

[Cite as *Strausbaugh v. Ohio Dept. of Transp.*, 2001-Ohio-6991.]
IN THE COURT OF CLAIMS OF OHIO

BEEMON STRAUSBAUGH	:	
Plaintiff	:	CASE NO. 99-15013
v.	:	JUDGMENT ENTRY
OHIO DEPARTMENT OF TRANSPORTATION	:	Judge Fred J. Shoemaker
Defendant	:	

: : : : : : : : : : : : : : : : :

This case was tried to the court on the sole issue of liability. The court has considered the evidence, and for the reasons set forth in the decision filed concurrently herewith, 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.

_____
FRED J. SHOEMAKER
Judge

Entry cc:

Barry A. Mentser — Attorney for Plaintiff
122 East Main Street
3rd Floor
Columbus, Ohio 43215

Larry Y. Chan — Assistant Attorney General
65 East State St., 16th Fl.

Columbus, Ohio 43215

LP/cmd
Filed 11-21-2001/Jr. Vol. 687, Pg. 129/To S.C. reporter 12-19-2001