[Cite as *Gaskins v. Mentor Network-REM*, 2010-Ohio-4676.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94092

JOYCE GASKINS

PLAINTIFF-APPELLANT

vs.

THE MENTOR NETWORK-REM, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-671400

BEFORE: Stewart, J., Rocco, P.J., and McMonagle, J.

RELEASED AND JOURNALIZED: September 30, 2010

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MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, Joyce Gaskins, pro se, appeals the decision of the Cuyahoga County Common Pleas Court granting summary judgment in favor of defendants-appellees, The Mentor Network-REM and five of its employees named in their official capacities (collectively "REM" or "appellees"). For the reasons stated below, we affirm.

{¶ 2} Gaskins was hired by REM in 1992 as a part-time direct care coordinator at one of the company's group homes for developmentally disabled men. One of Gaskins's job responsibilities was to pass medications to the residents of the home. On August 5, 2007, Gaskins passed the medications but failed to sign the medication book indicating that the medications had been distributed. When the procedural error was discovered, REM issued

error reports against Gaskins relating to the incident. Gaskins refused to sign the error reports and wrote on them that there would be no more errors made by her because she "will no longer pass meds effective 8/17/07."

{¶ 3} Despite being told by her supervisors that passing medications was an important part of her job and that she could not refuse to do so, Gaskins continued to refuse to pass medications. On September 8, 2007, Gaskins met with Eileen Kisela, the new program director for REM. Kisela discussed with Gaskins her refusal to pass medications. Kisela told Gaskins that passing medications was one of her job responsibilities and that REM counted on her passing medications when scheduled because other workers were not certified to do that task. Gaskins continued to refuse to pass medications without giving a reason for her refusal. On September 13, 2007, Kisela left Gaskins a voicemail to confirm that Gaskins would pass medications as assigned on September 15 and 16, 2007. Instead, when Gaskins reported for work on those days, she arranged for another worker to pass the medications and Gaskins's name was crossed off the assignment schedule. On September 20, 2007, Kisela left Gaskins another voicemail, this time informing her that she was terminated for refusing to pass medications.

{¶ 4} Gaskins subsequently filed this civil action against appellees alleging three separate claims relating to the termination of her employment:

retaliation in violation of public policy; intentional infliction of emotional distress; and negligent infliction of emotional distress.

{¶ 5} On July 31, 2009, appellees moved for summary judgment on all counts. Gaskins opposed the motion. On September 16, 2009, the trial court granted judgment in favor of appellees on all of the claims against them. Gaskins timely filed this appeal.

{¶ 6} Initially, we note that Gaskins has failed to comply with the requirements of Rule 16 of the Ohio Rules of Appellate Procedure. Pursuant to App.R. 16(A)(3) and (4), an appellate brief must contain a statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected, as well as a statement of the issues presented for review. Additionally, App.R. 16(A)(7) states that an appellant's brief shall include an argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. Gaskins's brief fails to state an assignment of error and also fails to provide the legal or factual citations required under the rule.

{¶ 7} Pursuant to App.R. 12(A)(2), an appellate court may disregard an assignment of error because of such "lack of briefing." *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 519 N.E.2d 390. Moreover, it is not the duty of an

appellate court to search the record for evidence to support an appellant's argument as to any alleged error. *State v. Anderson*, 8th Dist. No. 87828, 2007-Ohio-5068.

{¶ 8} The appellate rules are applicable to all parties regardless of whether they proceed on a pro se basis. We are mindful that the above stated omissions authorize this court to either strike Gaskins's brief or sua sponte dismiss her appeal for failure to comply with App.R. 16. However, in the interests of justice, we will review the merits of Gaskins's claim that the trial court erred in granting summary judgment.

{¶ 9} This court reviews the granting of summary judgment under a de novo standard. We afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Summary judgment is appropriate if (1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d

832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 10} The party moving for summary judgment carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264. "When a motion for summary judgment is made and supported as provided in Civ.R. 56, the nonmoving party may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing that there is a genuine triable issue." *State ex rel. Mayes v. Holman*, 76 Ohio St.3d 147, 148, 1996-Ohio-420, 666 N.E.2d 1132. If the opposing party does not so respond, "summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E).

{¶ 11} Appellees moved for summary judgment on all of appellant's claims and supported the motion with testimony and exhibits from appellant's deposition. Thereafter, it was incumbent upon appellant to identify specific factual issues and to present some evidence with respect to those elements that she had the burden of proving at trial. Appellant failed to do so. In opposing summary judgment, appellant merely restated the allegations of her complaint and argued that these allegations would be proven during trial "by means of evidence that will be presented, as well as

witness testimony." Accordingly, we review to determine whether, based upon the evidence in the record, summary judgment was appropriate.

Retaliation

{¶ 12} "Unless otherwise agreed, either party to an oral employment-at-will agreement may terminate the employment relationship for any reason which is not contrary to law." *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 483 N.E.2d 150, paragraph one of the syllabus. An exception to the employment-at-will doctrine exists where the employee's discharge violates public policy. *Painter v. Graley* (1994), 70 Ohio St.3d 377, 639 N.E.2d 51. "To state a claim of wrongful discharge in violation of public policy, a plaintiff must allege facts demonstrating that the employer's act of discharging him contravened a 'clear public policy.' *(Greeley v. Miami Valley Maintenance Contractors, Inc.* [1990], 49 Ohio St.3d 228, 551 N.E.2d 981, affirmed and followed.)" Id., paragraph two of the syllabus.

{¶ 13} To establish a prima facie claim of wrongful discharge in violation of public policy, the employee must demonstrate the following four elements: (1) a clear public policy existed and was manifested in a state or federal constitution, statute, or administrative regulation, or in the common law (clarity element); (2) dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (jeopardy element); (3) dismissal was motivated by conduct related to the

public policy (causation element); and (4) employer lacked overriding legitimate business justification for the dismissal (overriding justification element). *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70, 1995-Ohio-135, 652 N.E.2d 653.

{¶ 14} The clarity and jeopardy elements are questions of law to be decided by the court, and the causation and overriding justification elements are questions of fact, to be decided by the fact-finder. *Collins* at 70.

{¶ 15} Gaskins's allegations with regard to the clarity element are generally that "[i]t is against public policy for an employer to retaliate against any individual for expressing opposition to a practice that he/she reasonably and in good faith believes violates the provisions of the Ohio Human Rights Act." Since Ohio does not have a Human Rights Act, we assume Gaskins means the "Ohio Civil Rights Act." However, she makes no argument as to how the Act — which covers race, religion, sex, national origin, disability, age, and ancestry — applies to her claim. Gaskins also lists numerous and varied provisions of the Ohio Revised Code and the Ohio Administrative Code generally relating to nurses training and nursing practices, but fails to make specific reference to any of these provisions or to indicate how they support her argument.

{¶ 16} In her complaint, Gaskins alleged that she was fired for objecting to and refusing to continue to administer medications without being duly

certified to do so. Gaskins's own testimony expressly contradicts this contention. Gaskins testified that it was not until months *after* her discharge that she discovered she was not certified. She testified that she contacted the Ohio Department of MRDD in December 2007 and found out that their records showed her certification had lapsed in November 2005. Evidence submitted with REM's motion for summary judgment showed that Gaskins became certified to administer medications in 1992, after she completed the necessary 14 hours of training, and that she completed the two-hour annual continuing education training necessary to maintain her certification through 2007. Thus, in August and September 2007, when Gaskins refused to comply with company directives to administer medications as part of her job responsibilities, neither she nor REM had any idea that there might be something amiss with her certification.

{¶ 17} In order to establish the "jeopardy" element, Gaskins had to demonstrate that REM was put on notice of the policy considerations inherent in her refusal to act. "[A]lthough complaining employees do not have to be certain that the employer's conduct is illegal or cite a particular law that the employer has broken, the employee must at least give the employer clear notice that the employee's complaint is connected to a governmental policy." *Jermer v. Siemens Energy & Automation, Inc.* (C.A.6, 2005), 395 F.3d 655, 658. The employee's statements "must indicate to a

reasonable employer that he is invoking governmental policy in support of, or as the basis for, his complaints." Id.

{¶ 18} Gaskins testified, "I never stated to anyone any specific reasons, as to why I was refusing. I just refused to pass medications." Under these facts, a reasonable employer would not be put on notice that there was an underlying statutory or public policy reason behind Gaskins's refusal to perform one of the requirements of her job. Accordingly, Gaskins has failed to show that her dismissal under these circumstances would "jeopardize" public policy. Because Gaskins failed to demonstrate the first two elements of a prima facie claim of wrongful discharge in violation of public policy, the trial court did not err in granting summary judgment to REM on this claim.

Intentional and Negligent Infliction of Emotional Distress

{¶ 19} "Initially, we note this court has refused to recognize a separate tort for negligent infliction of emotional distress in the employment context. See *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693, 724. Accord *Strawser v. Wright* (1992), 80 Ohio App.3d 751, 754; *Hatlestad v. Consol. Rail Corp.* (1991), 75 Ohio App.3d 184, 191; *Hanly v. Riverside Methodist Hosp.* (1991), 78 Ohio App.3d 73, 83; *Antalis v. Ohio Dept. of Commerce* (1990), 68 Ohio App.3d 650, 653; ad nauseam. As such, appellant's negligent infliction of emotional distress claim does not merit further consideration." *Powers v. Pinkerton, Inc.*, 8th Dist. No. 76333, 2001-Ohio-4119.

{¶ 20} To assert a claim for intentional infliction of emotional distress, a plaintiff is required to 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 action proximately caused plaintiff's psychic injury; and (4) the mental anguish plaintiff suffered was serious." *Sultaana v. Giant Eagle*, Cuyahoga App. No. 90924, 2008-Ohio-3658, at ¶25, citing *Mitnaul v. Fairmount Presbyterian Church*, 149 Ohio App.3d 769, 2002-Ohio-5833, 778 N.E.2d 1093.

{¶ 21} "[A]n action to recover for emotional distress may not be premised upon mere embarrassment or hurt feelings, but must be predicated upon a psychic injury that is both severe and debilitating." *Mitnaul* at 781, quoting *Uebelacker v. Cincom Sys., Inc.* (1988), 48 Ohio App.3d 268, 276, 549 N.E.2d 1210. Indeed, as the Ohio Supreme Court held, "[l]iability 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. [T]he liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 374-375, 453 N.E.2d 666 (overruled on other grounds).

{¶ 22} A plaintiff claiming severe and debilitating emotional injury must present some evidence in support of his or her claim, such as expert evidence or lay witness testimony, to prevent summary judgment in favor of the defendant. *Coleman v. Beachwood*, 8th Dist No. 92399, 2009-Ohio-5560, at ¶48, citing *Sultaana* at ¶26.

{¶ 23} Gaskins's intentional infliction of emotional distress claim is based on the fact that REM terminated her via voicemail, which she argues is not standard procedure. This is simply not the sort of outrageous or egregious behavior contemplated for this intentional tort. Additionally, there is no evidence in the record to support a claim for damages. Appellees supported their motion for summary judgment with Gaskins's deposition testimony in which she testified that she did not seek any medical treatment for emotional distress as a result of her being discharged. Although Gaskins stated in her deposition that friends and family knew of her emotional distress, she failed to oppose summary judgment with affidavits or other Civ.R. 56 evidence in support of this contention. As a result, appellees were entitled to summary judgment on appellant's intentional infliction of emotional distress claim.

{¶ 24} As Gaskins failed to demonstrate that genuine issues of fact remain for trial on any of her claims, the trial court properly granted summary judgment in favor of appellees.

{¶ 25} On a final note, appellees, in the body of their brief, ask this court to deem the appeal frivolous and to require appellant to pay their reasonable costs, including attorney fees expended in defending the appeal. Attorney's fees may be assessed for a frivolous appeal under App.R. 23 and R.C. 2505.35 if "just cause" can be shown. *Society Bank, N.A. v. Cazeault* (1993), 83 Ohio App.3d 84, 88, 613 N.E.2d 1103. However, a request for such sanctions must be the subject of a separately filed motion. "A paragraph in a responsive brief is insufficient to raise the issue of sanctions. A separate motion is necessary." *Wohlabaugh v. Salem Communications Corp.*, 8th Dist. No. 84822, 2005-Ohio-1189, at ¶18. Accordingly, we will not consider appellees' request for attorneys fees.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and

CHRISTINE T. McMONAGLE, J., CONCUR