[Cite as *Tenney v. Gen. Elec. Co.*, 2007-Ohio-3367.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

BARRY P. TENNEY,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2005-T-0119**
- vs -	:	
GENERAL ELECTRIC COMPANY, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 00 CV 1792.

Judgment: Affirmed in part, reversed in part, and remanded.

Thomas A. Sobecki, 520 Madison Avenue, Suite 811, Toledo, OH 43604 (For Defendant-Appellant).

Gregory V. Mersol and *Kelly M. King*, 3200 National City Center, 1900 East Ninth Street, Cleveland, OH 44114 (For Defendants-Appellees).

WILLIAM M. O'NEILL, J.

{¶1} Appellant, Barry P. Tenney, appeals the entry of summary judgment by the Trumbull County Court of Common Pleas with respect to his claim for intentional/reckless infliction of emotional distress. That court entered summary judgment in favor of defendants-appellees, General Electric Company ("General Electric"), Joanne Deibold nka O'Neil, Bill Callahan, and Terry Larson. For the following reasons, we reverse the judgment entry of the court below as it pertains to

General Electric and to O'Neil. The judgment entry as it pertains to Larson is affirmed.

{¶2} Tenney has been an employee of General Electric at its Niles/Mahoning Glass Plant since 1973. Tenney, who is a homosexual, has experienced harassment on account of his sexual orientation during the course of his employment with General Electric.

{¶3} On September 29, 2000, Tenney filed a three-count complaint against General Electric, O'Neil (the plant nurse), Callahan (a plant employee and former union president), Larson (a plant foreman), and Lanette Harbin (a plant employee). Count one of Tenney's complaint alleged tortious interference with an employment relationship, count two alleged intentional/reckless infliction of emotional distress, and count three alleged discrimination based on sexual orientation under Ohio law. The claims against Harbin were eventually dismissed due to a bankruptcy filing by her.

{¶4} Appellees filed Civ.R. 12(B)(6) motions to dismiss the complaint for failure to state a claim upon which relief can be granted. On March 6, 2001, the trial court granted the appellees' motions with respect to all of Tenney's claims. Tenney appealed to this court from the trial court's dismissal of the latter two of his three claims (i.e. intentional/reckless infliction of emotional distress, and discrimination based on sexual orientation under Ohio law). He did not appeal the dismissal of the first count, dealing with tortious interference with an employment relationship.

{¶5} In *Tenney v. Gen. Elec. Co.*, this court affirmed the dismissal of Tenney's claim for discrimination based on sexual orientation under Ohio law.[1] This court reversed the dismissal of the claim for intentional/reckless infliction of emotional distress, "[s]ince it [did] not appear beyond doubt that [Tenney] can prove no set of facts which would entitle him to relief," and remanded this cause for further proceedings.[2]

{¶6} Following remand to the trial court, General Electric filed a motion for summary judgment, as did O'Neil, Callahan, and Larson, regarding the intentional/reckless infliction of emotional distress claim. Tenney opposed the motions filed by General Electric, O'Neil, and Larson, but not the motion filed by Callahan. On September 15, 2005, the trial court granted appellees' motions for summary judgment.

{¶7} Tenney timely appeals and raises the following single assignment of error:

{¶8} "The trial court committed reversible error in granting the motions for summary judgment filed by appellees General Electric Company, Terry Larson and Joanne O'Neil."

{¶9} Pursuant to Civ.R. 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (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 that conclusion is adverse to the party against whom the motion for summary judgment is

1. *Tenney v. Gen. Elec. Co.*, 11th Dist. No. 2001-T-0035, 2002-Ohio-2975, at ¶18.
2. Id. at ¶11.

made, that party being entitled to have the evidence *** construed most strongly in the party's favor."

{¶10} A trial court's decision to grant a motion for summary judgment is reviewed by an appellate court under a de novo standard of review.[3] A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision.[4]

{¶11} The sole claim before the trial court was Tenney's claim for intentional/reckless infliction of emotional distress.

{¶12} "One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress."[5]

{¶13} "In a case for intentional infliction of emotional distress, a plaintiff must prove (1) that the defendant intended to cause the plaintiff serious emotional distress, (2) that the defendant's conduct was extreme and outrageous, and (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress."[6]

{¶14} With respect to the requirement that the conduct alleged to be "extreme and outrageous," the Supreme Court of Ohio has adopted the following position:

3. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.
4. (Citation omitted.) *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711.
5. *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.* (1983), 6 Ohio St.3d 369, paragraph one of the syllabus.
6. *Phung v. Waste Mgt., Inc.* (1994), 71 Ohio St.3d 408, 410.

{¶15} "'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. *** 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.'"[7]

{¶16} Tenney's claims are based on the following incidents.

{¶17} In 1996, Tenney was working with General Electric employees, Diane Lissi and Denise Hivick, inspecting glass lenses for use in automobile headlights. Each employee was inspecting lenses at separate tables. Tenney testified that he was hit in the chest "real hard" by a stack of glass. When he looked up, Tenney saw Lissi and Hivick laughing and looking at him. About eight minutes later, Tenney was hit by another stack of glass. This time, some of the glass hit his groin area causing his penis to bleed. Again, Lissi and Hivick were looking at Tenney and laughing. Tenney asked the women why they had hurt him. According to Tenney, Lissi replied to the effect that, if she were going to cut off his penis, she would use a knife, not glass.

{¶18} Tenney reported the incident to a foreman but, to Tenney's knowledge, no disciplinary action was taken against Lissi or Hivick. Tenney testified that, as a

7. (Citation omitted.) *Yeager v. Local Union 20*, *Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, supra, at 375.

result of the attack, he suffers from a continuous injury in his groin. Tenney also testified that the attack terrorized and humiliated him so that he is afraid to work at the plant.

{¶19} Also in 1996, Tenney's partner, Larry Carr, came to the plant because of an emergency at home. When Larson, Tenney's foreman, saw Carr he told Carr to leave. Larson then berated Tenney, calling him a "motherfucker" and other obscenities, and warning Tenney that Carr should not ever come to the plant again.

{¶20} Tenney went to Doug Lowery, who works in the offices at General Electric, and complained about Larson's behavior. Tenney believed Larson's conduct was discriminatory, because he has seen the foreman's wife visit him at the plant. Tenney explained that, although he and Carr cannot be married, their relationship is like that of husband and wife. Tenney referred to Carr as his "mate."

{¶21} About a half-an-hour later, Tenney noticed Larson and Lowery running in and out of the men's restroom and laughing. Tenney went inside and found graffiti to the following effect: "[c]ome to Barry's ship of fools. You can F him up the -- and he'll give you blow jobs and he'll be your first mate."

{¶22} Tenney then told a supervisor about the graffiti. Thereupon, the bathroom door was locked and the graffiti was painted over within a few hours.

{¶23} Other testimony in the record demonstrates that graffiti, generally about homosexuals, including references to AIDS, was common in the plant's bathrooms. Some of the graffiti was directed specifically against Tenney. One piece of graffiti read: "It's Adam and Eve, *** not Adam and Eve and Steve and Barry." This graffiti remained on the bathroom walls for several months before being painted over.

{¶24} Tenney testified that in 1996 or 1997, two General Electric employees ridiculed him by making pig noises and simulating homosexual sex. Tenney testified that this was done in front of his shift supervisor, John Ealy. Another General Electric employee, Daniel Thomas Robbins, testified that an employee named Greg Dominic continued to make pig noises around Tenney for "quite a while" and "definitely more than four or five times" before being told to stop by management.

{¶25} Tenney testified to other instances where General Electric employees referred to him as "fag" or "queer."

{¶26} In 1999, Tenney went to see the plant nurse, O'Neil, about obtaining replacement safety glasses. Tenney testified that O'Neil made several offensive remarks to him on this occasion. According to Tenney, O'Neil recalled telling her pregnant daughter to talk to her fetus so that the child would not become a homosexual. O'Neil also allegedly told Tenney that a man becomes a homosexual if he is raped as a child and that if Tenney had better parents, he would not have been raped and would not be a homosexual.

{¶27} Tenney filed a grievance with the union about O'Neil's behavior. Tenney filed a second grievance against O'Neil for talking to one of Tenney's co-workers about the facts underlying the first grievance. Tenney also complained of O'Neil's behavior to several members of General Electric's human resources office and was assured that O'Neil would not accost him in the future.

{¶28} Later in 1999, Tenney went to O'Neil because he had chest pains. Tenney testified that O'Neil apologized for her previous comments and asked if she could give Tenney a "motherly hug." Tenney agreed, since O'Neil was blocking the

doorway. Tenney testified that O'Neil gave him an erotic embrace, pressing her breasts into him, putting her lips to his neck and his ear, and rubbing her hands up and down his back and "tailbone." Tenney told O'Neil that he wanted to return to work, but O'Neil pressed into him harder and pushed him backwards. Tenney tried to break free and O'Neil kissed his neck and ear and told him that she loved him and that God had sent him to her. Finally, O'Neil allowed Tenney to leave. Tenney described the incident as a "full sexual encounter." After this second incident with O'Neil, Tenney filed a third grievance.

{¶29} An investigation of these incidents occurred. O'Neil denied making the statements Tenney attributed to her. In addition, the co-worker with whom O'Neil allegedly discussed the matter also denied the conversation with O'Neil. General Electric concluded that neither the labor agreement nor the company's policy on sexual harassment had been violated. General Electric reaffirmed its policy against sexual harassment and discussed it with O'Neil. General Electric stated that it would go over its policy with both management and the hourly workforce. Tenney denies that General Electric has tried to communicate the substance of its policy to its employees.

{¶30} Tenney has testified that these incidents have depressed him, made him suicidal, and have caused extreme psychological distress. He has had to see a therapist and a psychiatrist, who prescribed medication for his anxiety.

{¶31} We will begin by addressing the claims against the individual defendants, Larson and O'Neil.

{¶32} Tenney alleges that Larson shouted obscenities at him without cause and was involved in writing graffiti about Tenney on the bathroom wall, ridiculing his homosexuality. By themselves, these actions do not rise to the level of "extreme and outrageous conduct" that would support a claim for intentional infliction of emotional distress. The law is clear that liability does not attach to mere insults and indignities, such as Larson's conduct.[8]

{¶33} "[T]he Ohio courts have stringently applied the intentional infliction standards in employment actions. *** Mere harassment is not enough; neither is humiliation or embarrassment."[9]

{¶34} Accordingly, the courts have failed to find offensive and insulting conduct actionable even when directed at a particular individual and when sexual or racial in character.[10]

{¶35} For the foregoing reasons, the trial court's grant of summary judgment in favor of Larson is affirmed.

{¶36} Tenney's claims against O'Neil arise from derogatory comments she made about homosexuals and from her groping of Tenney. O'Neil's comments that homosexuality is the result of childhood rape and that she hoped her grandchild would not be a homosexual are not actionable for the reasons stated above.

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8. *Yeager v. Local Union 20*, *Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, supra, at 375.

9. (Citation omitted.) *Anthony v. TRW, Inc.* (N.D.Ohio 1989), 726 F.Supp. 175, 181.

10. See *Mowery v. Columbus*, 10th Dist. No. 05AP-266, 2006-Ohio-1153, at ¶50 (racial comments and jokes not actionable); *McCafferty v. Cleveland Bd. of Edn.* (1999), 133 Ohio App.3d 692, 708 (insulting comments regarding a person's age not actionable); *Retterer v. Whirlpool Corp.* (1996), 111 Ohio App.3d 847, 856 (ridicule involving blow-up dolls, cartoons, and an item labeled a "penis warmer" not actionable).

Although offensive, they are not so outrageous as to be deemed "utterly intolerable in a civilized community."[11]

{¶37} O'Neil's groping of Tenney presents a different issue. This is the kind of conduct that is truly "extreme and outrageous." Tenney's claim that O'Neil groped him, put her lips to his neck and ear, rubbed up against him and pushed into him in an erotic manner, if proven to be true, exceed all possible bounds of decency in a civilized society, whether committed by a male or a female. Clearly, such actions toward Tenney would constitute intentional acts of offensive touching. Although she claimed she gave Tenney a "motherly hug," O'Neil's embrace as described by Tenney was erotic. In Tenney's words, "my mother never crawled up my body *** never put [her] lips on my neck and my ear. *** She was making me physically ill and she was pushing into my sexual body parts." Tenney testified that O'Neil continued to hold him after he tried to pull away and told O'Neil that he wanted to leave. Moreover, the fact that O'Neil was aware of Tenney's homosexuality demonstrates the inherently offensive nature of the contact.

{¶38} Tenney's claim against O'Neil was pled as a claim for intentional/reckless infliction of emotional distress. However, the trial court found that the conduct constituted battery and that the claim was, therefore, time-barred. The Supreme Court of Ohio has repeatedly affirmed that a court, when considering the claims before it, must consider:

{¶39} "[T]he actual nature or subject matter of the case, rather than *** the form in which the action is pleaded. The grounds for bringing the action are the

11. (Citation omitted.) *Yeager v. Local Union 20*, *Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, supra, at 375.

determinative factors, the form is immaterial."[12] *** A person is subject to liability for battery when he acts intending to cause a harmful or offensive contact *** [that is, contact which is] offensive to a reasonable sense of personal dignity[13] *** and [such harmful contact results]."[14]

{¶40} In *Doe v. First United Methodist Church*, the Supreme Court of Ohio concluded that acts of sexual abuse "were clearly intentional acts of offensive touching,"[15] and, thus, constituted battery.[16] "The fact that appellant pled *** intentional infliction of emotional distress cannot be allowed to mask or change the fundamental nature of appellant's causes of action which are predicated upon acts of sexual battery."[17]

{¶41} In *Doe*, a minor was sexually abused by a teacher. As stated by the Supreme Court:

{¶42} "Specifically, the claims asserted against Masten were premised upon Masten's having repeatedly initiated and engaged in homosexual contacts with appellant without appellant's consent. Masten's repeated acts of sexual contact with appellant were clearly intentional acts of offensive touching--sexual abuse is not something that occurs by accident. The sexual conduct allegedly forced upon appellant occurred on two hundred to three hundred separate occasions and continued for a three-year period."[18]

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12. *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183.
13. See Restatement of the Law 2d, Torts (1965) at 35, Section 19.
14. *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99.

15. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 536.
16. Id.
17. Id. at 537.
18. Id. at 536.

{¶43} Thus, the facts in *Doe* demonstrate a series of unwelcome sexual encounters initiated by an adult against a juvenile student. There is not even a suggestion of sexual harassment in those criminal encounters.

{¶44} By contrast, in the instant matter, a review of the "actual nature or subject matter" of the contact between these two adult individuals demonstrates that O'Neil's conduct is readily distinguishable from the facts in *Doe*. More importantly, O'Neil's acts are continued evidence of sexual harassment, for purposes of summary judgment, wherein all relevant evidence is construed most favorably toward the non-moving party. A sexual battery can be evidence of sexual harassment even though the statute for battery has expired. This allows the matter to proceed to the jury.

{¶45} In *Doe*, the actions complained of constituted actual sexual conduct and abuse as defined by statute. In the instant matter, we have a female nurse openly mentally torturing a gay male. The offensive conduct is mental far more than physical and, thus, the "actual nature or subject matter" is the intentional infliction of emotional distress, and not battery.

{¶46} When viewed in that light, it is clear the nurse was not seeking personal sexual gratification for herself, as was the case in *Doe*, but was instead deliberately humiliating and inflicting emotional distress on a fellow worker. The touching was incidental to the mental abuse in this case. In contrast, the sexual assault was the primary "nature" of the encounter in *Doe*. The *Doe* case was predicated upon a series of sexual encounters directed at a vulnerable individual. The instant matter was predicated upon a series of mental assaults directed at a vulnerable individual. The distinction is striking.

{¶47} Looking at the "actual nature or subject matter" of the instant case leads to the conclusion that O'Neil's actions were primarily an intentional infliction of emotional distress and, secondarily, a battery. Thus, it was error for the trial court to impose the one-year battery statute of limitation on the intentional infliction of emotional distress cause of action against Nurse O'Neil.

{¶48} The remaining claim to consider is Tenney's claim against General Electric for intentional/reckless infliction of emotional distress. General Electric does not contest that it had knowledge of the relevant incidents of which Tenney complained.

{¶49} General Electric argues that it cannot be held liable for the conduct of its employees toward Tenney because such conduct was outside the scope of their employment. General Electric relies on the Supreme Court of Ohio decision in *Byrd v. Faber*, which held: "[i]t is well-established that in order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of employment."[19]

{¶50} Shortly after the *Byrd* decision, however, the Supreme Court of Ohio decided *Kerans v. Porter Paint Co.*, wherein the court qualified its prior statement:

{¶51} "An employer has a duty to provide its employees with a safe work environment and, thus, may be independently liable for failing to take corrective action against an employee who poses a threat of harm to fellow employees, *even where the employee's actions do not serve or advance the employer's business goals.*"[20]

19. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58.
20. (Emphasis added.) *Kerans v. Porter Paint Co.* (1991), 61 Ohio St.3d 486, 493.

{¶52} Under *Kerans*, General Electric could be held liable for failing to take corrective action regarding the harassment of Tenney where such failure rose to the level of intentional conduct and was of such an extreme and outrageous character as to be utterly intolerable in a civilized community.[21]

{¶53} General Electric counters that *Kerans* is inapposite because it involved a claim for sexual harassment and because it involved harassing conduct by a manager, not fellow employees. We reject both arguments. The plaintiff's complaint in *Kerans* included an allegation against the employer for intentional infliction of emotional distress.[22] The Supreme Court of Ohio specifically held that the trial court erred in entering summary judgment on this part of the complaint.[23] Additionally, the Supreme Court noted that a genuine issue of material fact existed as to whether the harassing employee in *Kerans* held a supervisory position over the plaintiff.[24] Finally, that court held that this issue was not determinative, because the employer could be found liable for failing to provide a safe work environment regardless of the harassing employee's status vis-à-vis the plaintiff.[25]

21. Id. at 492-493.
22. Id. at 487.
23. Id. at 494.
24. Id. at 491.
25. Id. at 493.

{¶54} As between the *Byrd* and *Kerans* decisions, the *Kerans* decision is more on point, because the plaintiff in *Kerans* was an employee of the defendant-employer, whereas the plaintiff in *Byrd* was not an employee of the organization sought to be held liable for its employee's conduct.[26] Thus, in *Kerans*, the court considered an employer's responsibility for providing a safe work environment, which entails regulating the conduct of its employees when they pose a threat of harm to other employees, even though their conduct does "not serve or advance the employer's business goals."[27]

{¶55} General Electric further argues that Tenney's claims are pre-empted by Section 301 of the Labor Management Relations Act and by the Ohio Workers' Compensation Act. We reject both propositions.

{¶56} Section 301 of the Labor Management Relations Act provides as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act *** may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."[28]

26. *Byrd v.* Faber, supra, at 56; *Kerans v. Porter Paint Co.*, supra, at 487.
27. *Kerans v. Porter Paint Co.*, supra, at 493.
28. Section 185(a), Title 29, U.S.Code.

{¶57} The United States Supreme Court interpreted this section as providing federal-court jurisdiction over controversies involving collective-bargaining agreements and "authoriz[ing] federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements."[29]

{¶58} In later decisions, the United States Supreme Court has held that section 301 mandates recourse to federal law in the interpretation of collective-bargaining agreements, thereby precluding state-law causes of action based on the interpretation of such agreements.[30] In other words:

{¶59} "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law *** is pre-empted and federal labor-law principles *** must be employed to resolve the dispute."[31]

{¶60} General Electric did not submit the relevant collective bargaining agreement into the record. However, it argues that Tenney's claim is premised on matters covered by the collective bargaining agreement, "such as work assignments, job duties, and his right to overtime opportunities," and that it is impossible to determine whether the alleged conduct was "extreme and outrageous" without recourse to the collective bargaining agreement. We disagree.

29. *Textile Workers Union of Am. v. Lincoln Mills of Alabama* (1957), 353 U.S. 448, 451, 456-457.
30. See, e.g., *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.* (1962), 369 U.S. 95, 103-104 and *Lingle v. Norge Division of Magic Chef, Inc.* (1988), 486 U.S. 399, 404-406.
31. *Lingle v. Norge Division of Magic Chef, Inc.*, supra, at 405-406.

{¶61} Tenney was subjected to insulting and offensive behavior as a result of his sexual orientation over a 25-year period. In his words, Tenney felt that his sexuality had become "a big joke" to his fellow employees and the company. Contrary to General Electric's assertions, it is not necessary to consult the collective bargaining agreement to determine whether belittling someone as a "fag" or a "queer" is extreme and outrageous conduct. Nor is the collective bargaining agreement necessary to determine whether tolerance of such behavior by General Electric is extreme and outrageous. Therefore, Tenney's claim is not pre-empted by Section 301 of the Labor Relations Act.[32]

{¶62} Moreover, Tenney's claims are not barred by the Ohio Workers' Compensation Act.

{¶63} R.C. 4123.74 provides, in pertinent part, as follows:

{¶64} "Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law *** for any injury *** received *** by any employee in the course or arising out of his employment."

32. See *Farmer v. United Bhd. of Carpenters and Joiners of Am.* (1977), 430 U.S. 290, 302.

{¶65} The Supreme Court of Ohio in *Kerans* rejected the argument that the workers' compensation statutes barred claims, including claims for the infliction of emotional distress, arising from sexual harassment in the workplace.[33] Though the *Kerans* decision dealt with a sexual harassment claim instead of intentional infliction of emotional distress, the rationale of the court focused on the employer's duty to provide a safe work environment rather than the substance of the underlying claim.[34] Moreover, the court cited a section of the Restatement in support of its holding that speaks generically of a duty "'to prevent [an employee] from intentionally harming others.'"[35]

{¶66} In *Bunger v. Lawson Co.*, the Supreme Court of Ohio held that the workers' compensation statutes did not bar claims against an employer for "purely psychological injuries."[36]

{¶67} Finally, in *Johnson v. BP Chemicals, Inc.*, that court reiterated its prior holdings that the workers' compensation statutes do not exempt employers from liability for "intentional tortious conduct."[37] Accordingly, Tenney's claim for intentional infliction of emotional distress is not barred by the Ohio workers' compensation statutes.

33. See *Kerans v. Porter Paint Co.*, supra, at paragraph one of the syllabus.
34. Id. at 493.
35. Id. at 491.
36. *Bunger v. Lawson Co.* (1998), 82 Ohio St.3d 463, syllabus.
37. (Citations omitted.) *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 304.

{¶68} Turning to the merits of Tenney's claim against General Electric, we find that a genuine issue of material fact exists as to whether its conduct regarding harassment of Tenney was extreme and outrageous. The incident that stands out is the sexual groping of Tenney by O'Neil, which is the very definition of "extreme and outrageous." This court has previously held that a single incident is sufficient to overcome a motion for judgment notwithstanding the verdict with respect to an intentional infliction of emotional distress.[38] In addition, other more benign incidents, when considered in their totality, reflect a pattern of inaction by General Electric with respect to the incidents committed against Tenney. General Electric stood by when Tenney was struck by glass in the incident involving Lissi and Hivick; it allowed sexually explicit graffiti to remain on its walls for months; it allowed some employees to make pig noises at Tenney for months before putting a stop to it; and, finally, the incident in which O'Neil gave her obtuse opinions about Tenney's homosexuality. These multiple acts over a period of time and General Electric's inaction or finding no violations of its policies cumulatively create evidence of outrageous conduct on behalf of an employer for purposes of summary judgment.

38. *Cooper v. Metal Sales Mfg. Corp.* (1995), 104 Ohio App.3d 34, 45.

{¶69} We acknowledge the argument of General Electric that only those incidents that took place within the four-year statute of limitations[39] for acts that constitute intentional infliction of emotional distress are cognizable by the trial court. Therefore, an incident that occurred in 1975 is beyond the statute of limitations, but a review of the record cannot establish whether the incidents that occurred in 1996 are more or less than four years prior to the filing of Tenney's complaint on September 29, 2000. Construing the evidence most strongly in Tenney's favor, we find that all but the 1975 incident is relevant for this analysis.

{¶70} General Electric may not have officially condoned the actions against Tenney, but it allowed the actions to persist and accumulate over the years Tenney has been employed there. We are struck by the similarity in attitude to that of the Porter Paint Company in the *Kerans* case, where the employer was "entirely unconcerned" about harassing conduct toward one of its employees. Substituting the facts of this case for the facts in the *Kerans* case makes this attitude manifest:

{¶71} "Construing this evidence in the light most favorable to the nonmoving party, [Tenney], there is a genuine issue of material fact as to whether [General Electric] knew or through the exercise of reasonable care should have known of the danger which [certain employees] posed to [Tenney]. The evidence suggests that [General Electric] management knew of as many as five different employees [who] had victimized [Tenney] on a total of at least eight separate occasions. The evidence further suggests that [General Electric] management trivialized these reports and was entirely unconcerned with the threat which [certain employees] posed to the safety of

39. R.C. 2305.09(D). See *Yeager v. Local 20*, *Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, supra, at 375.

[Tenney]. Finally, there is nothing in the record which suggests that the management ever fired, demoted, transferred, or even meaningfully disciplined [certain employees] in response to these reports. Consequently, we hold that the trial court erred in granting summary judgment[.]"[40]

{¶72} For the foregoing reasons, Tenney's assignment of error is with merit to the extent indicated. The judgment of the Trumbull County Court of Common Pleas is affirmed as it pertains to Larson, and reversed as it pertains to O'Neil and General Electric, and this matter is remanded for further proceedings consistent with this opinion.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., concurs in part, dissents in part, with Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in part, and dissents in part, with a Dissenting Opinion.

{¶73} I concur in the majority's opinion as to the affirmation of summary judgment in favor of defendants-appellees Bill Callahan and Terry Larson. I respectfully dissent from the opinion as to the reversal of summary judgment against the General Electric Company and Joanne Deibold nka O'Neil.

{¶74} Contrary to the majority's opinion, General Electric's conduct does not, as a matter of law, rise to the level of extreme and outrageous conduct necessary to

40. *Kerans v. Porter Paint Co.*, 61 Ohio St.3d at 494.

sustain a viable claim of intentional infliction of emotional distress. Cf. *Anthony v. TRW, Inc.* (N.D. Ohio 1989), 726 F.Supp. 175, 181 ("[m]ere harassment is not enough; neither is humiliation or embarrassment").

{¶75} If "mere harassment" is not enough to sustain an intentional infliction of emotional distress claim, it is impossible to understand how mere temporary tolerance of mere harassment is sufficient.

{¶76} The most that can be said of General Electric's response to the harassment of Tenney is that it was dilatory. As the majority acknowledges, General Electric never condoned the harassment of Tenney. Graffiti may have remained on the wall for months, but it was eventually removed. An employee may have harassed Tenney for months, but the employee was made to stop.

{¶77} The majority identifies the incident "that stands out" as O'Neil's alleged sexual groping of Tenney. Assuming this incident occurred, there is no evidence that General Electric was responsible for it, could have prevented it, or that General Electric failed to investigate it. The evidence is undisputed that Tenney filed a grievance and the incident was fully investigated. O'Neil denied making the statements, White denied that O'Neil made any statements to her about the incident, and Tenney was unable to offer any corroborating evidence. Nonetheless, General Electric "reminded" O'Neil of its policy against harassment and of her obligation "to fully abide by it." While this court must accept Tenney's allegations as true, General Electric is under no such obligation. There is simply nothing intolerable about the way in which General Electric responded to the allegations regarding O'Neil.

{¶78} The majority also relies on the incident where Tenney's co-workers allegedly pushed a stack of glass lenses on him, causing permanent injury to his penis. Although Tenney complained of the incident, he did not inform anyone of his alleged physical injury or seek medical treatment for his alleged physical injury.

{¶79} At most, there is evidence that Tenney was threatened by another employee. The failure to discipline that employee, even considered with the failure to immediately remove bathroom graffiti or discipline another co-worker for harassing Tenney, does not rise to the level of extreme and outrageous conduct.

{¶80} This conclusion is compelled by consideration of the case law. In *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 1997-Ohio-219, the defendant-employer was alleged to have physically threatened an employee for reporting OSHA violations, threatened the employee's co-workers that they would "go down" with him for associating with him; placed eleven disciplinary write-ups in his personnel file in four months, secretly videotaped him, and, ultimately, terminated his employment. Id. at 135-136. The Ohio Supreme Court concluded, as did the trial court and this court, "that even after viewing the evidence in a light most favorable to appellant, the record does not support a claim for intentional infliction of emotional distress under standards set forth in *Yaeger v. Local Union 20* (1983), 6 Ohio St.3d 369, 374-375." Id. at 163. Cf. *Kulch v. Structural Fibers, Inc.* (Feb. 10, 1995), 11th Dist. No. 93-G-1824, 1995 Ohio App. LEXIS 504, at *14 ("even if a supervisor threatened to 'punch the lights out' of appellant, there is no evidence that this was anything more than an isolated incident by someone acting on his own rather than on behalf of [the employer]"), affirmed in part and reversed in part by 78 Ohio St.3d 134.

{¶81} The case relied on the by the majority, *Kerans v. Porter Paint Co.* (1991), 61 Ohio St.3d 486, is easily distinguishable. In that case, the Ohio Supreme Court held as follows: "Where a plaintiff brings a claim against an employer predicated upon allegations of workplace sexual harassment by a company employee, and where there is evidence in the record suggesting that the employee has a past history of sexually harassing behavior about which the employer knew or should have known, summary judgment may not be granted in favor of the employer, even where the employee's actions in no way further or promote the employer's business." Id. at paragraph two of the syllabus.

{¶82} In contrast to *Kerans*, the incidents perpetuated against Tenney were not the work of a single employee with a known history of harassment. Rather, Tenney alleges a number of isolated and independent acts committed by various persons. Lissi was alleged to have pushed the lenses on Tenney and threatened to cut off his penis. Yet Lissi and Tenney continued to work at General Electric for years thereafter without incident. Tenney's co-worker Greg Dominick made "pig noises" around Tenney, but was told to stop by General Electric and the behavior was discontinued. As noted above, the incidents involving O'Neil have been fully investigated.

{¶83} Moreover, the offending employee in *Kerans* had a known history of actually molesting other female employees. In the present case, as the majority acknowledges, the incidents Tenney complains of are primarily insults, indignities, and harassment, by themselves not actionable as intentional infliction of emotional

distress. The underlying conduct in the present case and in *Kerans* is not comparable.

{¶84} Finally, the employer in *Kerans* excused the offending employee's behavior, by claiming that "boys will be boys" and by taking the employee on trips "to get his rocks off." In contrast, as the majority also acknowledges, General Electric has never condoned the harassment of Tenney.

{¶85} As to the claims against O'Neil, the majority goes to great lengths to demonstrate that the "actual nature or subject matter" of O'Neil's alleged groping was mental torture, rather than sexual assault, despite the fact that O'Neil's comments to Tenney do not rise to the level of intentional infliction of emotional distress. The majority somehow divines that O'Neil "was not seeking personal sexual gratification *** but was *** deliberately humiliating and inflicting emotional distress on a fellow worker." The basis for the majority's conclusions about O'Neil's motivation is unclear. Ultimately, however, O'Neil's motivation for groping Tenney is irrelevant.

{¶86} A person is liable for battery when they act intending to cause a harmful or offensive contact, that is, "offensive to a reasonable sense of personal dignity," and such harmful or offensive contact results. *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99. In *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 1994-Ohio-531, the Ohio Supreme Court concluded that acts of sexual abuse "were clearly intentional acts of offensive touching," and, thus, constituted battery. Id. at 536. "The fact that appellant pled *** intentional infliction of emotional distress cannot be allowed to mask or change the fundamental nature of appellant's causes of action which are predicated upon acts of sexual battery." Id. at 537.

{¶87} O'Neil's actions toward Tenney were intentional acts of offensive touching. Although she claimed she would give Tenney a "motherly hug," O'Neil's embrace was erotic. In Tenney's words, "my mother never crawled up my body *** never put [her] lips on my neck and my ear. *** She was making me physically ill and she was pushing into my sexual body parts." Tenney testified that O'Neil continued to hold him after he tried to pull away and told O'Neil that he wanted to leave. Tenney understood the nature of O'Neil's conduct as a "full sexual encounter."

{¶88} Since O'Neil's conduct constituted battery, Tenney may not recover against O'Neil under a theory of infliction of emotional distress. Nor is Tenney able to recover for battery, since the complaint was filed past the one-year statute of limitations for battery.[41] *Doe*, 68 Ohio St.3d 531, at paragraph one of the syllabus ("[a] cause of action premised upon acts of sexual abuse is subject to the one-year statute of limitations for assault and battery"); *Love*, 37 Ohio St.3d 98, at syllabus ("[w]here the essential character of an alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery governs"); *Waters v. Allied Machine & Engineering Corp.*, 5th Dist. Nos. 02AP040032 and 02AP040034, 2003-Ohio-2293, at ¶63 ("[a]s [plaintiff's] claim for intentional infliction of emotion distress *** is premised on the sexual assault, the applicable statute of limitations is one year"); *Vandiver v. Morgan Adhesive Co.* (1998), 126 Ohio App.3d 634, 639 (applying the one-year statute of limitations for assault and battery where "the essential nature of [plaintiff's] claim involves intentional acts of offensive contact").

41. The incident with O'Neil occurred on or before April 29, 1999. Tenney's complaint was filed September 29, 2000.

{¶89} By reversing the grant of summary judgment against O'Neil and allowing Tenney's claims to go forward under the theory of intentional infliction of emotional distress, the majority establishes precedent whereby any claim of harmful or offensive physical contact could be pursued as a claim for infliction of emotional distress, since any sexual assault is humiliating to the victim. Thus, the express holding of *Doe* and the intent of *Love* are circumvented. *Love*, 37 Ohio St.3d at 100 ("by utilizing another theory of law, the assault and battery cannot be [transformed] into another type of action subject to a longer statute of limitations") (citation omitted).

{¶90} For the foregoing reasons, the trial court's grant of summary judgment against General Electric and O'Neil should be affirmed.