

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

CHRISTOPHER G. CIROTTO

Plaintiff-Appellant

-vs-

HEARTBEATS OF LICKING COUNTY,  
ET AL.

Defendants-Appellees

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 10-CA-21

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of  
Common Pleas, Case No. 09CV01704

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

September 7, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendants-Appellees

CHRISTOPHER G. CIROTTO, PRO SE  
24 Dellenbaugh Loop  
Pataskala, Ohio 43062

ROBERT J. BEGGS  
DANNY L. CAUDILL  
Beggs Caudill, LLC  
1675 Old Henderson Road  
Columbus, Ohio 43220-3644

And

C. DANIEL HAYES  
Hayes Law Offices  
195 E. Broad St., P.O. Box 958  
Pataskala, Ohio 43062

*Hoffman, J.*

{¶1} Plaintiff-Appellant Christopher G. Cirotto appeals the January 28, 2010 Judgment Entry entered by the Licking County Court of Common Pleas, which granted the motions to dismiss of Defendants-Appellees Heartbeats of Licking County and Arinda Brooks.

#### STATEMENT OF THE CASE AND FACTS

{¶2} On September 29, 2009, Appellant filed a Complaint in the Licking County Court of Common Pleas, naming Appellees as defendants. Appellant's Complaint alleged claims of unlawful discriminatory practices based upon gender, unlawful discriminatory practices based upon religion, slander or defamation, and intentional infliction of emotional distress. Appellees filed Civ.R. 12(B)(6) motions to dismiss on October 27, 2009. Prior to responding to Appellees' motions, Appellant requested leave to file an amended complaint, which the trial court granted. On December 4, 2009, Appellant filed his memorandum contra Appellees' motions to dismiss.

{¶3} As background, Appellee Heartbeats of Licking County is a non-profit organization for which Appellant had performed volunteer work. Appellee Brooks was the Executive Director of Heartbeats at the time of the events alleged in Appellant's Complaint. Appellant alleged, as a result of his volunteer work, Appellee Heartbeats, specifically Appellee Brooks, began to recruit him for a position as a donor developer. According to Appellant Appellee Brooks told him Heartbeats was planning on expanding and creating a donor development position. Appellee Brooks also advised Appellant he was very qualified for the position. Ultimately, Appellant was not hired, and Heartbeat never created the donor developer position. In his Complaint, Appellant alleges he was

not hired because of his gender and/or because he was not “sufficiently outwardly religious.” Prior to filing the Complaint in the Licking County Court of Common Pleas, Appellant filed a Complaint with the Ohio Civil Rights Commission, which he voluntarily dismissed.

{¶4} Relevant to this appeal are paragraphs 9-13 of Appellant's Amended Complaint. Those paragraphs read, in relevant part:

{¶5} “9. Ms. Brooks described some of the duties that I, as a Heartbeats of Licking County Donor Developer, would be involved in. Some of the duties included: For me to promote Heartbeats of Licking County to a larger audience, \* \* \* contact inactive, previous donors and/or volunteers and get them back on the active roll [,] \* \* \* contact current donors and review, (and hopefully improve and/or reinforce), their current commitment of monetary and/or volunteerism support [,] \* \* \* contact past and current donors/volunteers to initiate discussion that they consider giving a philanthropic monetary gift \* \* \* Ms. Brooks relayed to me that she did not feel comfortable doing some of these things, and that she could just not find the time to do many of them properly with her other Executive Director responsibilities. \* \* \* With Ms. Brooks' knowledge, approval, and encouragement I began to immediately accomplish some of these duties. Again, there was a continuous meeting of the minds between Ms. Brooks and myself, (Plaintiff Cirotto), that the expanded and extended work I was performing was being done entirely for the purpose of securing employment as a Donor Developer \* \* \* Ms. Brooks, \* \* \* indicated directly to me that she was creating a donor developer position, to commence for the next fiscal budget and fiscal year which would commence in and around June or July 2009, and that I was very qualified for that position. Ms.

Brooks made these indications to me over a 2-3 month period \* \* \* Ms. Brooks and I had a continuous meeting of the minds that there WAS a donor developer position available at the time I applied, and that the position would commence at the beginning of the *very soon to be* next fiscal year.

{¶6} “10. From early February 2009 on, numerous discussions took place between Ms. Brooks and me concerning my coming to work for Heartbeats of Licking County as a Donor Developer. \* \* \* Arinda Brooks, affirmed and praised the expanded and extended work I was doing that went over and above my original purposes for the Golf Outing. This involved many expanded and extended functions and responsibilities that directly related to what a Donor Developer’s duties are. Ms. Brooks was fully aware of, and approved, and encouraged all such undertakings. All of these expanded and extended Donor Developer activities that I was involved in were approved by Ms. Books \* \* \* Again, there was continuous meeting of the minds between Ms. Brooks and myself, (Christopher Cirotto), that the expanded and extended work I was performing was being done entirely for the purpose of securing employment as a Donor Developer for Heartbeats of Licking County. Ms. Brooks, the Executive Director and Agent for Heartbeats of Licking County, indicated directly to me that she was creating a donor developer position, to commence for the next fiscal budget and fiscal year which would commence in and around June or July 2009, and that I was very qualified for that position. Ms. Brooks made these indications to me over a 2-3 month period where there was a meeting of the minds concerning the creation of this position for me. Ms. Brooks and I had a continuous meeting of the minds that there WAS a donor developer

position available at the time I applied, and that the position would commence at the beginning of the *very soon to be* next fiscal year.

{¶7} “11. Ms. Brooks made a number of comments concerning her belief that I was very qualified, that she had not doubt in my abilities to make a Donor Developer position a success, and that my being at Heartbeats of Licking County at that particular time was perfect timing for a Donor Developer position to be created within the new yearly budget. \* \* \* Ms. Brooks, the Executive Director and Agent for Heartbeats of Licking County, indicated directly to me that she was creating a donor developer position, to commence for the next fiscal budget \* \* \* Ms. Brooks and I had a continuous meeting of the minds that there WAS a donor developer position available at the time I applied \* \* \*

{¶8} “12. On one or more occasions Ms. Brooks informed Plaintiff Cirotto that, as Executive Director, she could do what she wanted and that she had authority and decision making capabilities to hire me as a Donor Developer. On more than one occasion Ms. Brooks informed me that she was interested in me being employed by Heartbeats to increase Donor and Volunteer participation. On more than one occasion Ms. Brooks informed me that she was investigating and developing and appropriate compensation package for me.

{¶9} “13. Towards the end of March 2009, Ms. Brooks requested that I submit an application for employment, submit a spiritual gift/psychological test, submit a resume, and submit a completed criminal background check for the purposes of employment \* \* \* On April 6, 2009 I sent Ms. Brooks, via email, an advanced copy of the cover letter to my resume where I signed it Future Director of Donor Relations \* \* \* my

presence, Ms. Brooks read this letter and stated, 'That I seemed pretty confident about getting the job.' \* \* \* During this meeting Ms. Brooks initiated discussion concerning as much as \$4,000.00 per month salary, and expense account for donor lunches and dinners, as well as mileage reimbursement for the Donor Developer position. During all of February, March, and most of April 2009, Ms. Brooks insinuated, implied, and indicated that she was in the process of creating a Donor Developer position for me and that she had the authority to do so. \* \* \* indicated directly to me that she was creating a donor developer position, to commence for the next fiscal budget and fiscal year \* \* \* Ms. Brooks and I had a continuous meeting of the minds that there WAS a donor developer position available at the time I applied, and \* \* \*

**{¶10}** Appellant's First Amended Complaint, ¶9-13.

**{¶11}** Via Judgment Entry filed January 28, 2010, the trial court granted Appellees' motions to dismiss, and dismissed Appellant's First Amended Complaint. The trial court found Appellant failed to establish a prima facie case he suffered adverse employment action because of unlawful discrimination. The trial court also found Appellant could not establish his claims of slander and defamation as the statements made by Appellees in response to Appellant's complaint with the Ohio Civil Rights Commission were protected by absolute privilege. Finally, the trial court found Appellant failed to allege sufficiently outrageous conduct on the part of Appellees, and also failed to establish the requisite severe mental distress suffered as a result therefrom.

**{¶12}** It is from this judgment entry Appellant appeals, raising the following assignments of error:

{¶13} “I. THE TRIAL COURT ERRORED [SIC], TO THE PREJUDICE OF ME, CHRISTOPHER CIROTTO, IN ITS RULING THAT A DONOR DEVELOPER EMPLOYMENT POSITION DID NOT EXIST AT THE TIME I APPLIED FOR IT. THE TRIAL COURT CONTINUED TO ERROR ON THIS POINT BY CONCLUDING THAT BECAUSE OF THIS, I HAD NOT DEMONSTRATED THAT THERE WAS ANY ADVERSE EMPLOYMENT ACTION AGAINST ME.

{¶14} “II. THE TRIAL COURT ERRORED [SIC], TO THE PREJUDICE OF ME, CHRISTOPHER CIROTTO, IN ITS RULING THAT DEFENDANT-APPELLANTS ARE ENTITLED TO ‘ABSOLUTE PRIVILEGE’ [SIC], CONCERNING INTENTIONAL AND MALICIOUS MISREPRESENTATIONS AND FABRICATIONS THAT WERE SUBMITTED IN A WRITTEN PUBLICATION TO THE OHIO CIVIL RIGHTS COMMISSION, (OCRC), THAT ARE NOW PART OF PUBLIC RECORD AND EASILY ACCESSIBLE FOR EVERYONE TO REVIEW AND THAT HAVE ALSO MADE THEIR WAY INTO THIS INSTANT LAWSUIT.

{¶15} “III. THE TRIAL COURT ERRORED [SIC], TO THE PREJUDICE OF ME, CHRISTOPHER CIROTTO, IN ITS RULING THAT MY CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, (IIED), WAS NOT SUFFICIENTLY ALLEGED IN MY FIRST AMENDED COMPLAINT.”

I, II, III

{¶16} Because our disposition of Appellant’s assignments of error require similar analysis, we shall address said assignments of error together. In his first assignment of error, Appellant asserts trial court erred in finding he failed to demonstrate any adverse employment action taken against him. In his second assignment of error, Appellant

submits the trial court erred in finding the statements made by Appellees to the Ohio Civil Rights Commission were protected by absolute privilege. Finally, Appellant contends the trial court erred in finding he did not sufficiently allege a prima facie case of intentional infliction of emotional distress.

{¶17} Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greely v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 605 N.E.2d 378, 1992-Ohio-73. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd. v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584.

{¶18} We find much of Appellant's First Amended Complaint to be a series of legal conclusions, particularly his repeated reference to a "meeting of the minds" and Ms. Brooks having "legal authority". A legal conclusion cannot be accepted as true for purposes of ruling on a motion to dismiss. *Ashcroft v. Iqbal* (2009), U.S. , 129 S.Ct. 1937, 1950. Although Appellant's alleged facts may arguably support a theory of breach of contract or promissory estoppel, his First Amended Complaint did not seek relief based upon such claims.

{¶19} Appellant's first four claims all relate to gender and/or religious discrimination. Claims five and six assert causes of action for slander, libel, and defamation. Appellant's remaining two claims assert causes of action for intentional and negligent infliction of emotional distress. The allegations set forth in support of



Appellant's four discrimination claims do not demonstrate Appellees took adverse employment action against Appellant. The allegations as set forth in Appellant's Complaint relative to his slander, libel, and defamation claims, themselves establish the existence of the affirmative defense of absolute privilege. Finally, the allegations in support of Appellant's infliction of emotional distress claims do not sufficiently allege outrageous conduct or severe mental distress. We adopt the trial court's well reasoned decision as our own and incorporate it herein.

{¶20} Appellant's first, second, and third assignments of error are overruled.

{¶21} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman  
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin  
HON. W. SCOTT GWIN

s/ Patricia A. Delaney  
HON. PATRICIA A. DELANEY

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CHRISTOPHER G. CIROTTO

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HEARTBEATS OF LICKING COUNTY,  
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JUDGMENT ENTRY

Case No. 10-CA-21

For the reasons stated in our accompanying Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman  
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin  
HON. W. SCOTT GWIN

s/ Patricia A. Delaney  
HON. PATRICIA A. DELANEY