[Cite as *Gorajewski v. Douglas*, 2014-Ohio-1296.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Elizabeth Gorajewski	Court of Appeals No. L-13-1050
Appellant	Trial Court No. CI0201105486
v.	
Brian Douglas, et al.	**DECISION AND JUDGMENT**
Appellee	Decided: March 28, 2014

* * * * *

Mark A. Davis, for appellant.

Margaret Mattimoe Sturgeon, Philip B. Phillips and Jennifer L. Neumann, for appellee Johnson Controls, Inc.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, in which the trial court granted a motion for summary judgment filed by appellee, Johnson Controls, Incorporated ("JCI"), and denied a summary judgment motion and dismissed the sexual harassment complaint filed by appellant, Elizabeth Gorajewski.

Appellant also appeals from a judgment in which the trial court found that Brian Douglas, one of appellant's former supervisors, is not liable in damages for sexual harassment and intentional infliction of emotional distress. For the following reasons, we affirm the judgments of the trial court.

{¶ 2} At all times relevant to this appeal, JCI operated a factory in Northwood, Ohio, that manufactures components used in various models of automobiles. Appellant was placed as a temporary worker at JCI by Kelly Services. Her period of employment began on August 22, 2010, when she was assigned to place cables on a vehicle assembly line. Brian Douglas was the floor supervisor during appellant's shift.

{¶ 3} When appellant suffered a workplace injury in September 2010, Douglas walked her to the infirmary and told her to text him when she was ready to return to work. Appellant complied with Douglas' request, which gave him access to her cell phone number. According to appellant, after obtaining her number, Douglas began sending her sexually suggestive text messages.

{¶ 4} On October 14, 2010, appellant voiced her concerns about Douglas to JCI manager Bernardo Salaiz, who was on temporary assignment from another plant. Salaiz told appellant to report her concerns to her employer, Kelly Services. On October 15, 2010, appellant filed a complaint with Kelly Services, in which she accused Douglas of sexual harassment. Specifically, appellant reported that Douglas was sending her suggestive text messages, and that he stared at her while she was working, which made her uncomfortable. Appellant also stated that Douglas told her he would help her obtain

permanent employment at JCI if she became his girlfriend, and implied that she would be fired if she refused.

{¶ 5} Before appellant returned to work after filing her complaint, JCI suspended Douglas, pending an investigation. Several days after the complaint was made, appellant notified Kelly Services that she quit working at JCI. Douglas was ultimately terminated, effective November 1, 2010.

{¶ 6} Appellant filed a complaint with the Ohio Civil Rights Commission, in which she accused JCI of "engaging in an unlawful discriminatory practice." However, the commission found no probable cause existed to support the complaint, and the matter was dismissed on September 8, 2011. On September 15, 2011, appellant filed a complaint, in the Lucas County Court of Common Pleas, setting forth claims of sexual harassment and intentional infliction of emotional distress against JCI and Douglas, and negligent supervision, hiring and retention against JCI. In addition to ordinary damages, costs, attorney fees, and pre-and post-judgment interest, the complaint sought punitive damages from both defendants. JCI filed an answer on October 13, 2011.

{¶ 7} On November 29, 2011, a motion was filed in the trial court to consolidate this case with another sexual harassment case brought against Douglas and JCI by Erin Osborne (case No. CI0201101945). On December 19, 2011, appellant filed a motion for default judgment against Douglas on grounds that he had not filed a timely response to the complaint. On December 22, 2011, the motion to consolidate was denied. On January 12, 2012, the trial court entered a default judgment against Douglas in this case.

{¶ 8} JCI filed a motion for summary judgment and a brief in support on May 2, 2012, in which it argued that appellant presented insufficient evidence to support her claims of sexual harassment. Specifically, JCI argued that Douglas' alleged conduct did not constitute actionable sexual harassment because appellant did not suffer a tangible employment action, and the company exercised reasonable care to prevent harassment and to provide a method for employees to report harassment. JCI further claimed that, once it became aware of appellant's complaint, it took prompt action to investigate the allegations, which ultimately resulted in the termination of Douglas' employment. Accordingly, the company could not be held liable for either quid pro quo harassment or the creation of a hostile work environment. JCI also argued that appellant's claims of intentional infliction of emotional distress should fail because Douglas' behavior was not "extreme and outrageous" and appellant did not demonstrate that she suffered debilitating emotional distress as result of Douglas' alleged behavior. JCI further argued that appellant's claims of negligent hiring, retention and supervision fail as a matter of law because her claims that JCI had prior knowledge of Douglas' propensity to harass female workers was based on nothing but rumor and innuendo. Finally, JCI argued that appellant is not entitled to punitive damages as a matter of law because she did not demonstrate that JCI's actions were motivated by malice and, in any event, JCI acted promptly to investigate and discharge Douglas once his actions became known to the company.

{¶ 9} Several documents were attached to JCI's brief in support of summary judgment. They included copies of JCI's "No Harassment Policy," the affidavit of its Human Resources Manager, Mary Yvonne Hambright, a written statement by Bernard Salaiz, appellant's initial written complaint to Kelly Services, a summary of JCI's investigation of appellant's allegations against Douglas, and Douglas' statement in response to those allegations, documentation of Douglas' termination, an internal complaint against Douglas that was filed by Jesse Molina on November 11, 2009, the Ohio Civil Rights Commission's written dismissal of appellant's complaint, and appellant's medical record.

{¶ 10} JCI's No Harassment Policy stated that the company would not tolerate sexual harassment in any form, and instructed employees who experienced sexual harassment to "immediately report the matter to their Department manager, Plant/Facility manager, Local Human Resources Manager [sic]." The policy promised confidentiality, prompt investigation and corrective action where appropriate.

{¶ 11} In her affidavit, Hambright stated that appellant "voluntarily ceased coming to work" in late October 2010 and, upon learning of appellant's complaint, "JCI immediately suspended Douglas, before Gorajewski arrived for her next shift." Hambright also stated that a previous hotline complaint against Douglas that was filed by Jesse Molina did not involve sexual harassment; nevertheless, the company placed Douglas on a "permanent improvement plan" and altered his job duties.

{¶ 12} Salaiz stated in his affidavit that, on October 14, 2010, appellant told him she was being sexually harassed by Douglas. He told appellant that he would report the problem to his own supervisor, which he did after speaking to appellant.

{¶ 13} In her written complaint to Kelly Services, appellant stated that Douglas repeatedly texted her and asked her out after she was injured at work. She stated that the texts became "more and more personal" when she refused to respond. Appellant said that she changed her cell phone number at one point, after which Douglas became "rude" and added to her job responsibilities. Appellant stated that she believed Douglas was trying to "get rid" of her.

{¶ 14} Hambright's investigation report contained statements made by JCI employees that included appellant's uncle, Darryl Wagoner, and Alfred Ajegba. Wagoner stated that appellant told him Douglas was trying to get her phone number and that Douglas made appellant uncomfortable. Ajegba stated that appellant told him she was being harassed. In response, Ajegba said he told appellant not to quit her job, and to tell someone in management about Douglas. Ajegba denied seeing the texts Douglas allegedly sent to appellant.

{¶ 15} JCI's investigative report contained a summary of appellant's allegations against Douglas. The report stated that no witnesses saw the texts, and appellant was unable to provide the investigator with copies of the texts or her phone records. The report further stated that Douglas admitted texting appellant at times when he should not have done so; however, he denied saying anything "inappropriate" in those texts. He also

admitted asking appellant out to breakfast. In his statement to the investigators, Douglas said that appellant initially texted him, and that he did not send any "sexually related" texts to appellant. He denied asking appellant on a date. He stated that most of the texting was done at lunch time or after work. He expressed regret and concern that his job was in jeopardy.

{¶ 16} In his written internal complaint about Douglas, Jesse Molina stated that Douglas was threatening him at work. The complaint did not contain allegations of sexual harassment.

{¶ 17} Appellant filed a memorandum in opposition and a cross-motion for summary judgment on May 11, 2012, in which she argued that her claims should survive summary judgment because JCI knew or should have known that Douglas sexually harassed female employees in the past. Appellant also argued that JCI had respondeat superior liability for Douglas' actions because of the default judgment entered against him. In addition, appellant argued that the evidence supports a quid pro quo claim of sexual harassment, and the creation of a hostile work environment by Douglas, for which JCI is liable in damages. Finally, appellant argued that her claim for intentional infliction of emotional distress should survive summary judgment because she presented evidence of "severe stress and psychological damage" caused by Douglas, and summary judgment should be granted to her on the negligent supervision and retention claims because of the evidence presented through numerous JCI employees that Douglas was allowed to do "whatever he wanted in the Plant with impunity."

{¶ 18} In support of her arguments, appellant relied on her own deposition testimony, as well as the affidavits and depositions of Aaron Schultz, Vince Waldron, Jesse Molina, Marjorie Cramer, Sarah Douglas, Tiffany DeMoss, and Erin Osborne.

{¶ 19} Appellant testified in her deposition that she was placed at JCI in August 2010 by Kelly Services, and that her job involved "placing cable" during the second shift. Appellant stated that she had no sexual harassment training at JCI, but she knew the company had a no-tolerance policy. Although she did not know about the hotline to report harassment, appellant said "people on the line and [her] mother" told her to report Douglas' behavior. Appellant acknowledge filing a complaint with the Ohio Civil Rights Commission, but denied knowing that the complaint was dismissed.

{¶ 20} Appellant stated that she met Douglas when she was injured at work, and that he was not her direct supervisor. She also stated that Douglas began texting her after she texted to him that "my boyfriend told me to get my butt back to work." Thereafter, Douglas began texting her several times a day, and the content of his messages made her feel "like he was after sex." Appellant testified that her cell phone provider offered to retrieve records of the text messages between herself and Douglas, but she declined.

{¶ 21} Appellant stated that, in addition to texting her, Douglas made comments at work regarding her looks, and he would stand behind her and stare at her while she worked. She also reported hearing her name mentioned "in a whisper" by other employees. Appellant said that she responded carefully to Douglas so that he would not be offended. When she did not respond to his texts, Douglas would say she was "just a

temp" who could be replaced. She stated that, because of Douglas' stares, she wore jackets and shirts with higher necklines to work.

{¶ 22} Appellant testified that other workers would tell her that "Brian's watching you" and laugh. She also testified that Douglas asked her out twice by text, and she let her then-boyfriend read the texts. She stated that Douglas made her feel like "a piece of meat." She said that other workers were aware of his "womanizing," and that Douglas was not punished for his actions in the past because he was the "pet" of Brenda Leggett, the plant manager. She stated that she was told by management that her complaint against Douglas was the first. She characterized her decision to quit working at JCI in October 2010 as a "spur of the moment decision," because she was so stressed out she could no longer work around Douglas. Although she did not know exactly what Douglas said about her to the other employees, appellant said that it was "degrading" because people who were talking to Douglas would "start laughing."

{¶ 23} Appellant testified that Douglas gave her extra work tasks "on purpose." She said she had no trouble completing those extra tasks, but had no idea why they were assigned to her. She also said that Douglas sent her a text in which he promised her job security if she would be "his girl." She stated that she was never disciplined, there were no changes in her work hours, and her pay was not reduced in retaliation for resisting Douglas' advances. She denied being inappropriately touched by Douglas. Appellant said that she was told by other JCI employees that Leggett would protect Douglas; however, none of those employees ever filed a complaint against Douglas, and none of

them reported being harassed by Douglas. She said that, as a result of Douglas' comments, the other employees who were Douglas' friends called her a "slut" and a "whore" behind her back.

{¶ 24} Appellant said that she never spoke in person to Erin Osborne, who filed a separate complaint against Douglas, but the two women did speak on the phone for two or three minutes. Appellant said that she did not know what the testimony of JCI employees Aaron Schultz, Vince Waldron and Jesse Molina would be, even though all of them were on her witness list.

{¶ 25} As to her damages, appellant testified that, as a result of Douglas' harassment, she suffered lost wages, medical expenses, and a reduced salary at Tim Horton's where she is currently employed. In addition, she is forced to take anxiety medication and something to help her sleep. A review of appellant's medical records, which were attached to her deposition, showed that she reported sleep problems before working at JCI. The records also showed that appellant was taking Zoloft, which was somewhat successful in elevating her mood. Nevertheless, appellant reported still experiencing "stress" in December 2011, and stated that, if JCI had "taken care of Brian Douglas" earlier, this "would not have happened" to her. She denied receiving counseling, and stated that the stress she experienced was from making less money after she quit working at JCI.

{¶ 26} Aaron Schultz stated in an affidavit that, generally, Douglas made advances to women who worked at JCI, and that management would ignore complaints of such

behavior. In his deposition, Schultz testified that Douglas sent inappropriate texts to Schultz's girlfriend, Brandi Minish. Otherwise, Schultz denied having any direct knowledge of how Douglas treated other employees. Schultz also stated that, despite having a sexual harassment policy, JCI's management did not attempt to stop Douglas' behavior.

{¶ 27} Waldron stated in an affidavit that he "personally observed" Douglas making rude comments to Erin Osborne, who brought a sexual harassment claim against Douglas and JCI after appellant in this case complained about Douglas. Waldron also stated that, on one occasion, Douglas was suspended for sending out an "erotic and perverted email" addressed to JCI supervisor Sarah Frost that was mistakenly sent to all JCI employees. In his deposition, Waldron testified that he heard Douglas say that he wanted to have sex with female employees, and that Douglas would make comments to women and then "chuckle," however, he never complained about Douglas to management. Waldron also stated that, in his opinion, Brenda Leggett protected Douglas in spite of his behavior. However, Waldron did not know which, if any, JCI employees had complained to management about Douglas. Waldron also stated that he knew Douglas was asking female workers for dates because he was able to "lip read."

{¶ 28} Jesse Molina stated in an affidavit that Douglas would sometimes swear and call people names at work. Molina stated that he complained about Douglas' degrading comments to management, but he was ignored. In his deposition, Molina

testified that he thought that appellant was "fired" because she reported Douglas' behavior to management. He characterized Douglas' behavior as "unprofessional."

{¶ 29} Hambright testified that the company has a hotline to report harassment of all types, including the time Douglas called a co-worker "rat boy." Hambright also testified that she had no knowledge of the "erotic email" that Douglas attempted to send to Sarah Frost. She stated that "[t]here's no other sexual harassment claims on file for Brian Douglas other than Erin Osborne and Elizabeth Gorajewski's."

{¶ 30} DeMoss testified that she has worked under Douglas, who she described as an "ass" who is arrogant, loud and talks down to other people. She stated that Douglas is generally disliked and likes to "do things his own way." DeMoss stated that she knew about the "email" that Douglas attempted to send to Frost. She said that Osborne's claim was not reported to management until after appellant complained about Douglas. She further stated that she never witnessed Douglas degrading women at work, and that he was "rude to everyone equally." She stated that other workers may have complained about Douglas about things such as unsafe working conditions.

{¶ 31} Cramer testified in her deposition that she knew Douglas and plant manager Brenda Leggett had a relationship before either one came to work at the Northwood facility. She was not aware of the attempted email to Frost, and she did not remember Molina's complaint against Douglas.

{¶ 32} Sarah Frost testified that she and Douglas were married for a time while they both worked at JCI. Frost stated that she never saw the sexually suggestive message

sent by Douglas, which she said was a "text," not an "email," and she forgave him for sending it. Frost said that Douglas was suspended for two weeks for that incident. She stated that she did not divorce Douglas because he was cheating on her, and she was not aware of any sexual harassment claims against Douglas.

{¶ 33} Erin Osborne testified in her deposition[1] that she was sexually harassed by Douglas, who said "sexual things" to her, including comments about her appearance, and made statements that he would like to have sex with her. Osborne also testified that JCI has a sexual harassment policy and a hotline to report complaints. However, she did not report Douglas' objectionable behavior until after she heard that appellant complained about Douglas. Osborne also made various statements about things she heard other employees say about Douglas while she was working at JCI, however, such statements are hearsay and are therefore inadmissible in this case.

{¶ 34} On September 12, 2012, the trial court issued a judgment entry in which it found that appellant did not present sufficient evidence to establish that JCI was liable for quid pro quo sexual harassment, or for allowing Douglas to create a hostile work environment. In addition, the trial court dismissed appellant's sexual harassment claim pursuant to R.C. 4112.02, after finding that JCI took reasonable care to prevent sexual harassment in the workplace by creating a sexual harassment policy and establishing a hotline for workers to report sexual harassment. The trial court also noted that, once

[1] The depositions of Osborne, Waldron, Molina, Cramer, DeMoss, Hambright, Frost, and Schultz were originally filed in Osborne's sexual harassment case against Douglas and JCI, case No. CI0201101945, and were refiled in this case.

appellant reported Douglas' behavior to Kelly and JCI, he was immediately suspended and she was not required to work with, or see him, again. The trial court further found that appellant's claim of intentional infliction of emotional distress was improperly supported only by her own testimony, which was not corroborated by expert medical testimony or even other lay testimony. Finally, the trial court found that appellant did not present any admissible evidence to support her claims of negligent hiring, retention and supervision against JCI. Accordingly, the trial court granted JCI's motion for summary judgment and dismissed appellant's claims on that basis. Appellant's cross-motion for summary judgment was denied

{¶ 35} A hearing was held on January 14, 2013, on the remaining issue of the assessment of damages against Douglas pursuant to the default judgment obtained on January 12, 2012. Testimony was presented at the hearing by Phillip Blossom, and appellant.

{¶ 36} Blossom, a private investigator, testified that he tried unsuccessfully to serve Douglas with notice of the damages hearing, therefore, it was necessary to obtain service by publication. Appellant testified as to Douglas' behavior while she worked at JCI, which she characterized as sexual harassment. Appellant then stated that, even after Douglas was fired, rumors were spread around the plant that made her so uncomfortable she could not continue to work there. Appellant claimed that, a result of quitting her job at JCI, she was forced to take another job, at Tim Horton's, for less hourly pay. Appellant stated that economic damages due to her reduced salary totaled $6,831.54, plus

an additional $927.20 that was lost due to her reduced work schedule during the initial training period at Tim Horton's. Appellant further testified that she suffered emotional distress, insomnia and anxiety attacks during and after her employment at JCI, for which she began taking doctor-prescribed medication.

{¶ 37} On March 1, 2013, the trial court issued a judgment entry in which it found that appellant was not entitled to a damage award from Douglas. Specifically, the trial court found that Count 1 of the complaint which alleged unlawful discriminatory practices pursuant to R.C. 4122.02, did not set forth an individual cause of action against Douglas. Similarly, the trial court found that appellant's claims for negligent supervision, retention and hiring "do not state claims against Douglas [individually]." As to appellant's claim of intentional infliction of emotional distress, the trial court found that the record contained no "guarantee of genuineness" to insure that appellant's claimed injury was serious enough to be compensable. In addition, the trial court found that appellant presented insufficient evidence to establish that she suffered "severe and disabling emotional distress" as a result of Douglas' conduct. Therefore, the trial court stated that:

> even assuming under the law applicable to default judgment that Douglas' conduct was indeed extreme and outrageous and that he intended to emotionally harm Plaintiff, the evidence is unrefuted that Plaintiff has failed to establish that she has, in fact, suffered debilitating emotional distress of the type compensable in Ohio.

{¶ 38} Based on the foregoing, the trial court found that appellant was not entitled to receive damages from Douglas. Appellant filed a timely notice of appeal from the trial court's two judgment entries on March 27, 2013.

{¶ 39} We note at the outset that an appellate court reviews a trial court's granting of summary judgment de novo, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 40} Initially, the party seeking summary judgment bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The motion may be filed "with or without supporting affidavits[.]" Civ.R. 56(A). Thereafter, the burden shifts to the non-moving party to show why summary judgment is inappropriate. Civ.R. 56(E). "If the non-movant fails to respond, or fails to support its response with evidence of the kind required by Civ.R. 56(C), the court may enter summary judgment in favor of the moving party." *Snyder v. Ford Motor Co.*, 3d Dist. Allen No. 1-05-41, 2005-Ohio-6415, ¶ 11; Civ.R. 56(E). A fact is "material" if it is "one

that would affect the outcome of the suit under the applicable substantive law." *Stachura v. Toledo*, 177 Ohio App.3d 481, 2008-Ohio-3581, 895 N.E.2d 202, ¶ 23 (6th Dist.), quoting *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist.1999).

{¶ 41} On appeal, appellant sets forth five assignments of error, which we will consider in the order in which they are presented in appellant's brief.

Assignment of Error No. 1

The Trial Court Erred By Ignoring Controlling Case Law[.]

{¶ 42} In support of her first assignment of error, appellant argues that the trial court erroneously "disregarded" the United States Supreme Court's decision in *Burlington Indus. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). According to appellant, in *Burlington*, the United States Supreme Court held that "a claimant of Quid Pro Quo sexual harassment does not have to prove an adverse employment action."

{¶ 43} In *Burlington*, the United States Supreme Court stated that a plaintiff has established "quid pro quo" sexual harassment where he or she "proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands * * *." *Id.* at 753. Conversely, a plaintiff establishes a "hostile workplace environment" where the "claim involves only unfulfilled threats * * * which requires a showing of severe or pervasive conduct." *Id.*

{¶ 44} In *Peterson v. Buckeye Steel Casing*, 133 Ohio App.3d 715, 729 N.E.2d 813 (10th Dist.1999), the Tenth District Court of Appeals held that:

> Employer liability [under title VII] for hostile work environment harassment varies depending upon whether the alleged harasser is a supervisor or a co-worker. When the alleged harasser is a supervisor, the employer may be vicariously liable. * * *. Under this scenario, when harassment by a supervisor with authority over the employee culminates in a tangible employment action against the plaintiff, the employer is subject to vicarious liability and the analysis ends. * * * Where no tangible employment action was taken, but a hostile work environment was created, the employer may avail itself of an affirmative defense to liability. *Id*., citing *Burlington, supra*, at 763-765.

{¶ 45} On consideration, we find that appellant has erroneously attempted to combine the concept of "quid pro quo" harassment with the *Burlington* court's holding concerning the shifting burden needed to establish a hostile work environment claim. Appellant's first assignment of error is not well-taken.

Assignment of Error No. 2

> [The] Trial Court Erred By Finding No Genuine Issue of Material Fact Existed Concerning [Appellant's] Quid Pro Quo Sexual Harassment Claim[.]

{¶ 46} In support of her second assignment of error, appellant asserts that the trial court erroneously concluded that she was not subjected to a tangible employment action. In support, appellant argues that she did suffer a tangible employment action because Douglas humiliated her and caused damage to her reputation, which had the potential to keep her from being hired as a permanent employee at JCI. We disagree, for the following reasons.

{¶ 47} As stated in *Peterson*, *supra*, pursuant to R.C. 4112.02(A) and Title VII of the Civil Rights Act of 1964, Section 701 et seq., as amended, 42 U.S.C.A. 2000e et seq. ("Title VII"), sexual harassment that constitutes discrimination on the basis of sex is generally categorized as either a quid pro quo claim or a hostile work environment claim. The terms "quid pro quo" and "hostile work environment" serve to distinguish roughly between cases in which threats are carried out (quid pro quo) and cases in which threats are not carried out or are absent altogether (hostile work environment). *Burlington*, *supra*, 524 U.S. at 751-755, 118 S.Ct. 2257, 141 L.Ed.2d 633, and *Peterson*, *supra*, 133 Ohio App.3d at 722-723, 729 N.E.2d 813. Generally, a claim involves quid pro quo harassment if "the sexual advances are directly linked to the grant or denial of a tangible economic benefit." *West v. Curtis*, 7th Dist. Belmont No. 08 BE 28, 2009-Ohio-3050, ¶ 41.

{¶ 48} This court has held that there must be a showing that the adverse employment action has a "causal link" to the alleged harassment. *Hann v. Perkins Twp.*, 6th Dist. Erie No. E-03-025, 2004-Ohio-3445, ¶ 17. Such determinations are to be made

on a case-by-case basis. *Id*. at ¶ 18, citing *Tessmer v. Nationwide Life Ins. Co.*, 10th Dist. Franklin No. 98AP-1278, 1999 WL 771013 (Sept. 30, 1999). In addition, we note that:

> [a]n adverse employment action involves "significantly diminished material responsibilities," including "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices that might be unique to a particular situation." *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 886 (C.A.6, 1996). The adverse action need not result in pecuniary loss, but must materially affect the terms and conditions of the plaintiff's employment. *Peterson, supra*." *Hann* at ¶ 18.

{¶ 49} Excluding the inadmissible hearsay, innuendo and unsupported commentary offered by appellant as evidence in this case, the record can be summarized as follows. Appellant was placed at JCI in August 2010 by Kelly Services, where she worked as a temporary employee until October 2010. During her first several weeks at JCI, appellant was relatively unaware of Douglas' presence, since he was not her immediate supervisor. However, after appellant was injured at work in September 2010, Douglas obtained her cell phone number and began sending her text messages which appellant alleges were sexual in nature. In addition to the text messages, which were not placed into evidence, appellant states that Douglas held out the possibility of permanent employment if she became his "girlfriend." In October 2010, appellant reported the alleged sexual harassment to another JCI employee and, the next day, filed a similar

internal complaint with Kelly Services. Her internal complaint was relayed to JCI, and Douglas was immediately suspended pending an investigation. He was later fired. Appellant did not come into contact with Douglas after her complaint was filed, but she resigned her position a few days later, apparently due to embarrassment and humiliation that she claims impaired her ability to do her job.

{¶ 50} On consideration, we find that the record contains no admissible evidence to demonstrate that appellant suffered an adverse employment action that was legally sufficient to deprive her of a tangible employment benefit. In addition, even assuming that Douglas made inappropriate and/or demeaning comments to or about appellant, the record does not establish a causal connection between such actions and appellant's ability or inability to obtain permanent employment at JCI. Finally, the record does not show that appellant's sudden decision to quit working at JCI was based on anything other than her own subjective feelings. Accordingly, the trial court did not err by finding, as a matter of law, that the record did not contain evidence to support appellant's claim of quid pro quo harassment, and granting JCI's motion for summary judgment on that basis. Appellant's second assignment of error is not well-taken.

Assignment of Error No. 3

[The] Trial Court Erred By Finding No Genuine Issue of Material Fact Existed Concerning [Appellant's] Negligent Supervision Claim[.]

Assignment of Error No. 4

[T]he Trial Court Erred By Finding No Genuine Issue of Material Fact Existed Concerning [Appellant's] Negligent Retention Claim[.]

{¶ 51} In support of her third assignment of error, appellant argues that the trial court erroneously concluded that JCI did not know about Douglas' behavior and, therefore, was not liable for negligent supervision. Similarly, in support of her fourth assignment of error, appellant argues that the trial court erred by finding that JCI was not negligent for failing to fire Douglas, and by allowing him to have "free reign to act abusively towards [sic] employees, including sexual harassment of [appellant]." Because appellant's third and fourth assignments of error are related, they will be considered together.

{¶ 52} In order to successfully establish a claim for negligent retention and/or supervision, a plaintiff must show:

> (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's actual or constructive knowledge of such incompetence, (4) the employer's act or omission causing plaintiff's injuries, and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Peterson*, 133 Ohio App.3d at 729, 729 N.E.2d 813.

{¶ 53} Ohio courts have held that sexual harassment amounts to incompetence in the context of a claim for negligent retention and/or supervision. *Silvey v. Washington Sq. Chiropractic Clinic*, 11th Dist. Geauga No. 2011-G-3047, 2012-Ohio-6214, ¶ 36.

{¶ 54} It is undisputed that appellant and Douglas both were employed by JCI at the time the alleged sexual harassment occurred. Construing the evidence presented in appellant's favor, as required on summary judgment, it is at least arguable that some of Douglas' actions toward appellant could have constituted sexual harassment. However, as set forth above, the record contains nothing other than reported innuendo, guesses, speculation, and appellant's own statements regarding what her co-workers must have deduced from Douglas' actions, to show that JCI had actual or even constructive knowledge that Douglas was sexually harassing appellant before she made a formal accusation.

{¶ 55} The record contains some evidence that Erin Osborne told DeMoss about a vulgar comment made by Douglas after Osborne was accused of falsifying her time sheets. However, when giving a discovery deposition in her own case against JCI, Osborne could not remember whether she repeated the accusation to anyone at her suspension meeting. The record further shows that Osborne did not raise the issue again until one year after her termination which, coincidentally, was after Douglas was fired in response to appellant's accusations. Otherwise, the record contains no evidence that anyone reported sexual harassment by Douglas, either by calling the harassment hotline or by speaking to a supervisor. Finally, although several witnesses reported that they

either experienced ill treatment or knew of others who were, in their opinion, mistreated by Douglas, only Molina reported Douglas by calling the hotline to complain. Molina testified that his complaint did not involve sexual harassment, and he did not work with appellant.

{¶ 56} On consideration of the foregoing, we find that the record contains insufficient evidence to establish that JCI knew or should have known that Douglas was sexually harassing appellant, or that such failure was the cause of any alleged injuries suffered by appellant. Accordingly, appellant's claim of negligent hiring, supervision and retention fails as a matter of law, and her third and fourth assignments of error are not well-taken.

Assignment of Error No. 5

The Trial Court Erred By Denying Damages Against [sic] Douglas in Default[.]

{¶ 57} In support of her fifth assignment of error, appellant argues that the trial court erred by not ordering Douglas to pay damages for intentional infliction of emotional distress. Appellant asserts that Douglas should be held personally liable because: (1) a default judgment was entered against Douglas, and (2) a claim for intentional infliction of emotional distress is not limited solely to employers.

{¶ 58} As to whether appellant is entitled to damages solely because a default judgment was entered against Douglas, the Supreme Court of Ohio has held that "'[a]n answering party must be afforded the opportunity to controvert evidence admitted at a

default hearing in subsequent proceedings against that party.'" *Archacki v. [Greater Cleveland] Regional Transit Auth.*, 8 Ohio St.3d 13, 15, 455 N.E.2d 1285 (1983), quoting *Archacki v. [Greater Cleveland] Regional Transit Auth.*, 8th Dist. Cuyahoga No. 43681, 1982 WL 2526 (Nov. 10, 1982), paragraph two of the syllabus. At a minimum, where a default judgment is sought in a tort action, the plaintiff must present proof of his or her damages that were caused by the defendant's actions. *Casalinova v. Solaro*, 9th Dist. Summit No. 14052, 1989 WL 111942 (Sept. 27, 1989). Accordingly, appellant is not entitled to damages solely because a default judgment was entered against Douglas.

{¶ 59} As to appellant's second argument, R.C. 4112.02 states, in pertinent part, that:

> It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the race, color, religion, sex, military statute, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment. * * *

{¶ 60} The statute further defines an "employer" as "any person acting directly or indirectly in the interest of an employer."

{¶ 61} In *Genaro v. Cent. Transport, Inc.*, 84 Ohio St.3d 293, 703 N.E.2d 782 (1999), the Ohio Supreme Court held that, for purposes of R.C. Chapter 4112, both a

supervisor/manager and his or her employer may be held liable for discriminatory conduct of the supervisor/manager that violates R.C. Chapter 4112. Accordingly, under the proper circumstances, Douglas could be held liable for damages due to intentional infliction of emotional distress that result from his conduct. However, the plaintiff's burden to prove damages and causation still remains.

{¶ 62} In order to establish a claim for intentional infliction of emotional distress a plaintiff must show that:

> (1) the defendant either intended to cause emotional distress, or knew or should have known that his actions would result in serious emotional distress; (2) defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency, and would be considered utterly intolerable in a civilized community; (3) defendant's actions proximately caused injury to plaintiff; and (4) the mental anguish plaintiff suffered is serious and of such a nature that no reasonable person could be expected to endure. *Jackson v. Saturn of Chapel Hill, Inc.*, 5th Dist. Stark No. 2005 CA 00067, 2005-Ohio-5302, ¶ 23, citing *Ashcroft v. Mt. Sinai Med. Ctr.*, 68 Ohio App.3d 359, 588 N.E.2d 280 (8th Dist.1990).

{¶ 63} The Ohio Supreme Court has held that "severe emotional distress" includes "traumatically induced neurosis, psychosis, chronic depression, or phobia." *Finley v. First Realty Property Mgt., Ltd.*, 185 Ohio App.3d 366, 2009-Ohio-6797, 924 N.E.2d 378 (9th Dist.). In order to establish such a claim, the plaintiff's injury must "be of such

magnitude that 'a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.'" *Jones v. White*, 9th Dist. Summit No. 18109, 1997 WL 669737 (Oct. 15, 1997), quoting *Carney v. Knollwood Cemetery Assn.*, 33 Ohio App.3d 31, 40, 514 N.E.2d 430 (8th Dist.1986). Generally, Ohio courts do not require a plaintiff to submit expert medical testimony to establish serious emotional distress; however, he/she must present some evidence in addition to his or her "own testimony to establish severe emotional distress." *Buckman-Peirson v. Brannon*, 159 Ohio App.3d 12, 822 N.E.2d 830, 2004-Ohio-6074, ¶ 47 (2d Dist.2004).

{¶ 64} In this case, only appellant testified at the damages hearing as to her economic loss. As set forth above, appellant testified as to the nature of Douglas' behavior, which included sexual innuendo and lewd comments he allegedly made during work hours. Appellant stated that, as a result of Douglas' behavior, she experienced anxiety and loss of sleep. While appellant stated that she took medication prescribed by a doctor for those conditions, she did not seek psychological counseling. She further testified as to lost wages due to her change in employment, which resulted in a lower hourly wage. No testimony was presented by appellant's doctors or any other person who could corroborate her claims of serious emotional distress or loss of financial compensation.

{¶ 65} This court has reviewed the entire record in this case, including appellant's deposition testimony and the testimony she gave at the damages hearing. Upon

consideration thereof, we find that the record contains no evidence, other than appellant's uncorroborated testimony, to establish that she experienced severe emotional distress as a result of Douglas' behavior. Accordingly, as a matter of law, appellant has failed to meet her burden to present evidence establishing either the causation or the severity of her claimed injuries. Appellant's fifth assignment of error is not well-taken.

{¶ 66} On consideration whereof, this court finds further that there remain no genuine issues of material fact and, after construing all the evidence most strongly in favor of appellant, JCI is entitled to summary judgment as a matter of law, and the trial court properly awarded no damages to appellant at the default judgment damages hearing. The judgments of the Lucas County Court of Common Pleas are hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE