[Cite as *Moore v. Impact Community Action*, 2013-Ohio-3215.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alisha Moore,	:	
Plaintiff-Appellant,	:	
		No. 12AP-1030
v.	:	(C.P.C. No. 10CV08-11771)
Impact Community Action,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 23, 2013

Duncan Simonette, Inc., and *Brian K. Duncan*, for appellant.

Ice Miller, LLP, *Paul L. Bittner* and *Angela M. Courtwright*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Plaintiff-appellant, Alisha Moore, appeals from judgments of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Impact Community Action ("IMPACT"), on her claims arising from the termination of her employment with IMPACT. For the following reasons, we affirm those judgments.

I. Factual and Procedural Background

{¶ 2} IMPACT is a community action agency devoted to reducing poverty and helping low-income families. As part of that goal, IMPACT offers various programs, including a Home Weatherization Assistance Program. In March 2009, appellant began working at IMPACT as a customer service representative in the home weatherization

program. Appellant's employment with IMPACT was at all times as an at-will employee. Her work day began at 7:00 a.m. and ended at 5:30 p.m. During the first few months of her employment, appellant arrived at work late a number of times. This conduct led her supervisor to place appellant on an Attendance Improvement Plan in September 2009. The plan informed her that she could be fired if she had two more chargeable instances related to attendance in the next three months. Unfortunately for appellant, she was late to work a number of times in those three months and, as a result, was let go from her position with IMPACT in December 2009.

{¶ 3} After her firing, appellant filed a complaint in the trial court which alleged a number of claims against IMPACT. Specifically, she alleged that IMPACT wrongfully terminated her employment in violation of its handbook and policies and intentionally or negligently caused her emotional distress. An amended complaint subsequently added a claim for promissory estoppel. IMPACT requested summary judgment in its favor on all of appellant's claims, arguing that her claims failed either as a matter of law or because there were no issues of material fact. Appellant disagreed, arguing that genuine issues of material fact in each of her claims precluded summary judgment. The trial court agreed with IMPACT and eventually awarded it summary judgment on all of appellant's claims.

II. The Appeal

{¶ 4} Appellant appeals and assigns the following errors:

> 1. The trial court erred in granting defendant's motion for summary judgment with respect to the wrongful termination claim because plaintiff has demonstrated actions by defendant that are against the employee handbook and general public policy.
>
> 2. The trial court erred in granting defendant's motion for summary judgment with respect to the negligent infliction of emotional distress claim because there were genuine issues of material fact relating to the outrageous behavior by defendant, including but not limited to whether plaintiff was being subjected to a hostile work environment through inappropriate remarks and unequal disciplinary actions.
>
> 3. The trial court erred in granting defendant's motion for summary judgment with respect to the intentional infliction of emotional distress claim because plaintiff has sufficiently pled allegations which raise a genuine issue of material fact as

> to whether defendant's outrageous actions have caused plaintiff severe mental distress, and the alleged conduct goes beyond all bounds of decency.
>
> 4. The trial court erred in granting defendant's supplemental motion for summary judgment with respect to the promissory estoppel claim because defendant made a clear and unambiguous promise to plaintiff, upon which she reasonably relied, to her detriment.

A. Standard of Review

{¶ 5} Appellant's assignments of error all involve the trial court's decision to award IMPACT summary judgment. Appellate review of summary judgment motions is de novo. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). " 'When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court.' " *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶ 11 (10th Dist.), quoting *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6.

B. Appellant's Wrongful Discharge in Violation of Public Policy Claim

{¶ 6} Appellant argues in her first assignment of error that the trial court improperly awarded IMPACT summary judgment on her wrongful discharge in violation of public policy claim. We disagree.

{¶ 7} Traditionally, an employer could terminate the employment of any at-will employee for any cause, at any time whatsoever, even if the termination was done in gross or reckless disregard of the employee's rights. *Collins v. Rizkana*, 73 Ohio St.3d 65, 67 (1995). However, in *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228 (1990), paragraph one of the syllabus, the Supreme Court of Ohio recognized an exception to the employer's plenary right to discharge an at-will employee. Departing from the traditional at-will employment rule, the Supreme Court held that "the right of

employers to terminate employment at will for 'any cause' no longer includes the discharge of an employee where the discharge * * * contravenes public policy." *Id.* at paragraph two of the syllabus. If an employer discharges an employee in violation of public policy, the employee can seek recovery against the employer through an action in tort. *Id.* at paragraph three of the syllabus.

{¶ 8} To assert a viable claim for wrongful discharge in violation of public policy, a plaintiff must establish each of the following four elements:

> 1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).
>
> 2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).
>
> 3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).
>
> 4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).

Kulch v. Structural Fibers, Inc., 78 Ohio St.3d 134, 151 (1997).

{¶ 9} Here, the trial court concluded that appellant's claim failed as a matter of law because she did not show a "clear public policy" from a proper source. We agree. To satisfy the clarity element of a claim of wrongful discharge in violation of public policy, a terminated employee must articulate a clear public policy by citation of specific provisions in the federal or state constitution, federal or state statute, administrative rules and regulations, or common law. *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, ¶ 24; *Leininger v. Pioneer Natl. Latex*, 115 Ohio St. 3d 311, 2007-Ohio-4921, ¶ 8; *Crase v. Shasta Beverages, Inc.*, 10th Dist. No. 11AP-519, 2012-Ohio-326, ¶ 35.

{¶ 10} Appellant argues that her termination violated IMPACT's "Time Clock Policy" found in its employee handbook which provided for a seven-minute "grace period" if employees occasionally showed up late to work. An employee handbook is not a proper source to determine a clear public policy for purposes of a claim for wrongful discharge in violation of public policy. *Poland Twp. Bd. of Trustees v. Swesey*, 7th Dist. No. 02 CA

185, 2003-Ohio-6726, ¶ 22. Because appellant did not establish a clear public policy from a proper source, the trial court did not err by granting IMPACT summary judgment on this claim. *Dohme* at ¶ 25; *Hout v. Jess Howard Electric Co.*, 10th Dist. No. 07AP-971, 2008-Ohio-5061, ¶ 16. We overrule appellant's first assignment of error.

C. Appellant's Intentional and Negligent Infliction of Emotional Distress Claims

{¶ 11} Appellant contends in her second and third assignments of error that the trial court erred by awarding IMPACT summary judgment on her claims for infliction of emotional distress. We disagree.

1. Negligent Infliction of Emotional Distress

{¶ 12} The Supreme Court of Ohio has held that " 'recovery for negligent infliction of severe emotional distress has typically been limited to instances where the plaintiff has either witnessed or experienced a dangerous accident and/or was subjected to an actual physical peril.' " *Meek v. Solze*, 6th Dist. No. OT-05-055, 2006-Ohio-6633, ¶ 17, quoting *Kulch at* 163. Appellant did not allege either of these limited instances. Additionally, Ohio courts, including this one, have refused to recognize a separate tort for negligent infliction of emotional distress in the employment context. *See, e.g., Tschantz v. Ferguson*, 97 Ohio App.3d 693, 724 (8th Dist.1994); *Peitsmeyer v. Jackson Twp. Bd. of Trustees,* 10th Dist. No. 02AP-1174, 2003-Ohio-4302, fn. 3. There appears to be a limited exception to that general rule in situations when a plaintiff brings claims of sexual harassment against another employee who had a history of such harassment, and the evidence demonstrates that the employer knew or should have known about the employee's history of sexual harassment. *Browning v. Ohio State Hwy. Patrol*, 151 Ohio App.3d 798, 2003-Ohio-1108, ¶ 78-80 (10th Dist.), citing *Kerans v. Porter Paint Co.*, 61 Ohio St.3d 486 (1991), paragraph two of the syllabus (noting that case law interpreting this exception has limited it to the facts of *Kerans*). Appellant makes no such demonstration here. Accordingly, the trial court did not err by awarding IMPACT summary judgment on appellant's negligent infliction of emotional distress claim. We overrule appellant's second assignment of error.

2. Intentional Infliction of Emotional Distress

{¶ 13} Intentional infliction of emotional distress was first recognized as a separate claim for relief by the Supreme Court of Ohio in *Yeager v. Local Union 20*, 6 Ohio St.3d 369 (1983), where the court stated: "One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Id.* at syllabus. To assert a claim for intentional infliction of emotional distress, a plaintiff is required to show that: (1) defendant intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress; (2) defendant's conduct was extreme and outrageous; (3) defendant's action proximately caused plaintiff's psychic injury; and (4) the mental anguish plaintiff suffered was serious. *Sultaana v. Giant Eagle*, 8th Dist. No. 90294, 2008-Ohio-3658, ¶ 25, citing *Mitnaul v. Fairmount Presbyterian Church*, 149 Ohio App.3d 769, 2002-Ohio-5833 (8th Dist.).

{¶ 14} Appellant argues that genuine issues of fact exist regarding whether the treatment she received while at work constituted extreme and outrageous conduct. We disagree.

{¶ 15} Liability for intentional infliction of emotional distress " 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' " *Mowery v. Columbus*, 10th Dist. No. 05AP-266, 2006-Ohio-1153, ¶ 49, quoting *Yeager* at 375. Rather, liability is found only where the conduct is "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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " *Id.*, quoting Restatement of the Law 2d, Torts (1965) 71, Section 46(1). *See also Strausbaugh v. Ohio Dept. of Transp.*, 150 Ohio App.3d 438, 2002-Ohio-6627, ¶ 15 (10th Dist.) ("Only conduct that is truly outrageous, intolerable, and beyond the bounds of decency is actionable; persons are expected to be hardened to a considerable degree of inconsiderate, annoying, and insulting behavior."). Whether conduct is extreme and outrageous is a question of law for the court. *Morrow v. Reminger & Reminger Co.*,

L.P.A., 183 Ohio App.3d 40, 2009-Ohio-2665, ¶ 48 (10th Dist.); *Scarabino v. E. Liverpool City Hosp.*, 155 Ohio App.3d 576, 2003-Ohio-7108, ¶ 11 (7th Dist.).

{¶ 16} To support her claim, appellant argues that her supervisor subjected her to a hostile work environment because of inappropriate remarks and unequal disciplinary actions. In her affidavit, appellant claimed that her supervisor, Patricia Williams, repeatedly belittled her through derogatory comments, including a comment that appellant was "mentally challenged." Appellant's Affidavit, at ¶ 5. Appellant also claimed that Williams treated other employees differently. We first note that evidence of a hostile work environment is not necessarily sufficient to support a claim for intentional infliction of emotional distress. *Mowery* at ¶ 51. Considering appellant's allegations, we conclude as a matter of law that no reasonable jury could find that the conduct alleged rises to the level of extreme and outrageous conduct necessary to sustain a claim for intentional infliction of emotional distress. *Surry v. Cuyahoga Comm. College*, 149 Ohio App.3d 528, 2002-Ohio-5356, ¶ 34-35 (8th Dist.). The alleged conduct here falls far short of the outrageous conduct required to support a claim for intentional infliction of emotional distress.

{¶ 17} For these reasons, we conclude that the trial court did not err in awarding IMPACT summary judgment on appellant's intentional infliction of emotional distress claim. We overrule appellant's third assignment of error.

D. Appellant's Promissory Estoppel Claim

{¶ 18} Lastly, appellant claims that the trial court also erred in awarding IMPACT summary judgment on her promissory estoppel claim. Again, we disagree.

{¶ 19} A claim of promissory estoppel requires the following four elements: (1) a clear and unambiguous promise, (2) reliance by the party to whom the promise was made, (3) the reliance is reasonable and foreseeable, and (4) the party relying on the promise must have been injured by the reliance. *Reif v. Wagenbrenner*, 10th Dist. No. 10AP-948, 2011-Ohio-3597, ¶ 42, citing *Callander v. Callander*, 10th Dist. No. 07AP-746, 2008-Ohio-2305, ¶ 33.

{¶ 20} Appellant claims that the seven-minute grace period included in the "Time Clock Policy" found in her employee handbook was a clear promise that she would not be

fired if she was less than seven minutes late to work.[1] We disagree. First, we point out that the handbook provides that nothing in it creates a contract of employment or alters the employment at-will status of its employees, including appellant. The handbook also provides that IMPACT may fire an employee at any time and for no reason. *See Fennessey v. Mt. Carmel Health Sys., Inc.*, 10th Dist. No. 08AP-983, 2009-Ohio-3750, ¶ 14. More specifically, the language of IMPACT's "Time Clock Policy" does provide for a seven-minute grace period for employees who occasionally are late to work. That policy does not, however, clearly or unambiguously promise continued employment or even that no adverse job actions will occur for continual and repeated tardiness. In fact, the policy does the opposite, when it states that "[e]very department employee has assigned working hours. This document will not change those assignments. We expect you to 'clock-in' on or before your 'start-time * * * "[c]ontinual and/or repeated deviations from assigned working hours will be grounds for disciplinary action. These deviations include * * * tardiness * * *."

{¶ 21} Without a clear and unambiguous promise that supports this claim, the trial court did not err in awarding IMPACT summary judgment on appellant's promissory estoppel claim. *Taylor v. J.A.G. Black Gold Mgmt., Co.*, 10th Dist. No. 09AP-209, 2009-Ohio-4848, ¶ 17. Accordingly, we overrule appellant's fourth assignment of error.

III. Conclusion

{¶ 22} The trial court did not err in awarding IMPACT summary judgment on all of appellant's claims. Accordingly, we overrule appellant's four assignments of error and affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

TYACK and BROWN, JJ., concur.

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[1] Appellant also alleges that she relied on IMPACT's treatment of other employees who were late to work and who were not disciplined or disciplined less severely. However, she does not support these allegations with any evidence.