[Cite as *Bowman v. AK Steel Corp.*, 2010-Ohio-6433.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

DANIEL C. BOWMAN,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-06-141
	:	O P I N I O N
- vs -		12/29/2010
	:	
AK STEEL CORPORATION, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-06-2725

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YOUNG, P.J.

{¶1} Plaintiff-appellant, Daniel C. Bowman, appeals from the decision of the Butler County Court of Common Pleas granting summary judgment to AK Steel Corporation. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} On March 1, 2006, AK Steel, an integrated steel manufacturer, locked out its bargaining unit employees at its Middletown, Ohio facility after negotiations

with the International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 1943, a union representing production and maintenance employees (Union), failed to result in a collective bargaining agreement. As a result of the lockout, AK Steel hired a variety of temporary replacement workers and contracted with other companies, including Pro Maintenance Services, Inc., to provide it with a number of additional replacement workers.

{¶3} In January of 2007, appellant was hired by Pro Maintenance Services to serve as a temporary replacement worker at AK Steel. During this time, appellant was employed as a temporary replacement worker in the blast furnace maintenance department.

{¶4} On March 15, 2007, AK Steel reached an agreement with the Union and subsequently released over 700 of its temporary replacement workers. Appellant, however, retained his position with the blast furnace maintenance department.

{¶5} In June of 2007, AK Steel hired appellant on as a full-time employee with the blast furnace maintenance department. Shortly thereafter, appellant claims a number his co-workers, none of whom he could identify, made "derogatory sexual reference[s]" and "death threats" towards him over company issued walkie-talkies. Specifically, appellant claims that his co-workers stated, among other things, that he "sucks dick," that he is a "fag" and a "scab," that he was a "bonus killer," and that he "f**** [his supervisor] in the ass." In addition, appellant claims that some of his co-workers scrawled "sexually explicit" messages and "death threats" in his work area, on his locker, and in the employee restrooms. Although his work performance did not suffer, appellant sought treatment for depression, claimed that his co-workers made

him "physically sick," and caused him to entertain thoughts of suicide.

{¶6} On March 3, 2008, appellant met with an AK Steel doctor to take a drug and alcohol test. At that meeting, Bowman told the doctor about his co-workers behavior, but "asked him not to say anything because it just makes things worse over there." Choosing to ignore appellant's request, the doctor called Bob Barnes, appellant's "Section Manager," who subsequently informed Jessica Morris, a "Senior Labor Relations Representative," about the alleged harassment.

{¶7} On July 3, 2008, appellant met with Morris to address his concerns and further investigate his allegations. However, appellant was not cooperative during the meeting, refused to provide names of his alleged harassers, and immediately resigned from his position at AK Steel. The next day appellant began a new job working as a full time pipe fitter with United Industrial Piping.

{¶8} Over 11 months later, on June 18, 2009, appellant filed suit against AK Steel alleging sexual harassment in violation of R.C. 4112.02(A) and intentional infliction of emotional distress under the doctrine of respondeat superior. AK Steel subsequently filed a motion for summary judgment on both claims, which the trial court granted on May 27, 2010.

{¶9} Appellant now appeals from the trial court's decision granting AK Steel's motion for summary judgment, raising two assignments of error for review.

{¶10} Assignment of Error No. 1:

{¶11} "THE COURT OF APPEALS ERRED BY GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF DISCRIMINATION BASED ON SEX (O.R.C. § 4112.02) BECAUSE THE COURT FAILED TO CONSIDER THE CONDUCT OF DEFENDANT." [sic]

{¶12} In his first assignment of error, appellant argues that the trial court erred by granting summary judgment to AK Steel in regard to his sexual harassment claim. We disagree.

{¶13} Summary judgment is a procedural device used to terminate litigation when there are no issues in a case requiring a formal trial. *Forste v. Oakview Const., Inc.,* Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. An appellate court's review of a summary judgment decision is de novo. *Creech v. Brock & Assoc. Constr.,* 183 Ohio App.3d 711, 2009-Ohio-3930, ¶9, citing *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 1996-Ohio-336. In applying the de novo standard, a reviewing court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran,* 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. An appellate court must review a trial court's decision to grant or deny summary judgment independently, without any deference to the trial court's judgment. *Bravard,* citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 295.

{¶14} A trial court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The party moving for summary judgment bears the initial burden of demonstrating no genuine issue of material fact exists. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. The nonmoving party must then present evidence to show that there is some issue of

material fact yet remaining for the trial court to resolve. Id. at 293. A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Hillstreet Fund III, L.P. v. Bloom,* Butler App. No. CA2009-07-178, 2010-Ohio-2961, ¶9, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505. In deciding whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Walters v. Middletown Properties Co.,* Butler App. No. CA2001-10-249, 2002-Ohio-3730, ¶10.

{¶15} Pursuant to R.C. 4112.02(A), it shall be an unlawful discriminatory practice "[f]or any employer, because of the * * * sex * * * 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."

{¶16} The Ohio Supreme Court has recognized two types of sexual harassment claims stemming from R.C. 4112.02(A); namely, "quid pro quo" harassment, i.e., harassment that is directly linked to the grant or denial of a tangible economic benefit, and "hostile environment" harassment, i.e., harassment that, while not affecting economic benefits, has the purpose or effect of creating a hostile or abusive working environment. *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 2000-Ohio-128, paragraph one of the syllabus; *Edwards v. Ohio Inst. of Cardiac Care*, 170 Ohio App.3d 619, 2007-Ohio-1333, ¶18. In evaluating sexual harassment claims, "[f]ederal case law interpreting Title VII is generally applicable to cases of alleged violations of R.C. Chapter 4112." *Bowers v. Hamilton City School Dist. Bd. of Educ.*, Butler App. No. CA2001-07-160, at 7, 2002-Ohio-1343.

{¶17} In order to establish a claim of hostile-environment sexual harassment,

something which appellant alleges here, "the plaintiff must show (1) that the harassment was unwelcome, (2) that the harassment was based on sex, (3) that the harassing conduct was sufficiently severe or pervasive to affect the 'terms conditions, or privileges of employment, or any matter directly or indirectly related to employment,' and (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action." *Hampel* at paragraph two of the syllabus; *Jordan v. Ohio Civ. Rights Comm.*, 173 Ohio App.3d 87, 2007-Ohio-3830, ¶18.

{¶18} As noted by the Ohio Supreme Court, "[h]arassment 'because of * * * sex' is the *sine quo non* for any sexual harassment case." (Emphasis sic.) *Hampel* at 178. However, harassment allegedly based on sex need not be "explicitly sexual in nature" nor "motivated by sexual desire" to support an inference of discrimination on the basis of sex. Id. at 178-179. Instead, the plaintiff must demonstrate that "the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex." *Oncale v. Sundowner Offshore Serv., Inc.* (1998), 523 U.S. 75, 81, 118 S.Ct. 998. In other words, in order to constitute harassment based on sex, the plaintiff must prove the harassing conduct was "motivated" by gender. *Sheffield Village v. Ohio Civ. Rights Comm.*, Lorain App. No. 99CA007283, 2000 WL 727551, at *5; *Bell v. Berryman*, Franklin App. No. 03AP-500, 2004-Ohio-4708, ¶58.

{¶19} After a thorough review of the record, including an extensive review of his unnamed co-workers alleged conduct, we find no error in the trial court's decision granting summary judgment to AK Steel in regard to appellant's sexual harassment

claim. While the behavior exhibited by appellant's unnamed co-workers may be insulting and demeaning, we find the record devoid of any evidence indicating their harassing conduct was based on appellant's sex. See, generally, *Smith v. Lebanon City Schools* (Nov. 8, 1999), Warren App. No. CA99-02-024, at 18-19; see, also, *Vickers v. Fairfield Medical Center* (C.A.6, 2006), 453 F.3d 757, 765; *Moren v. Progress Energy, Inc.* (M.D.Fla.2008), 2008 WL 3243860, at *4. As stated by the Ohio Supreme Court, workplace harassment "is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations," but oftentimes "simply expressions of [personal] animosity or juvenile provocation." (Brackets sic.) *Hampel*, 2000-Ohio-128 at paragraph four of the syllabus; *Oncale*, 523 U.S. at 80. Such is the case here.[1] Therefore, because we find no error in the trial court's decision granting summary judgment to AK Steel in regard to appellant's sexual harassment claim, appellant's first assignment of error is overruled.

{¶20} Assignment of Error No. 2:

{¶21} "THE COURT OF APPEALS ERRED BY GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BECAUSE THE COURT FAILED TO CONSIDER THE CONDUCT OF DEFENDANT-APPELLANT." [sic]

{¶22} In his second assignment of error, appellant argues that the trial court erred by granting summary judgment to AK Steel in regards to his claim of intentional infliction of emotional distress under the doctrine of respondeat superior. We

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1. Although not dispositive to our analysis, appellant testified at his deposition that there was no hostility towards men being in the workplace, that the hostility was not directed at him because he was a man, and that he was "harassed" simply because he "was the closest thing to being a scab."

disagree.

{¶23} It is well-established that in order "[f]or an employer to be liable for a tortious act of its employee, that employee must be acting within the scope of employment when [he] commits the tortious act." *North American Herb & Spice Co., LTD, LLC v. Appleton*, Butler App. No. CA2010-02-034, 2010-Ohio-4406, ¶24; *Groob v. Keybank*, 108 Ohio St.3d 348, 2006-Ohio-1189, paragraph two of the syllabus. Moreover, where the tort is intentional, such as the case here, the employee's actions must be "'calculated to facilitate or promote the business for which the servant was employed.'" *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58, quoting *Little Miami RR. Co. v. Wetmore* (1869), 19 Ohio St. 110, 132. In other words, "an employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business." *Byrd* at 59; *Bauman v. Bob Evans Farms, Inc.*, Franklin App. No. 06AP-737, 2007-Ohio-145, ¶13.

{¶24} After a thorough review of the record, and although the behavior allegedly exhibited by appellant's unnamed co-workers may be insensitive and inappropriate, we find it clear that any of the acts committed by appellant's unnamed co-workers were not within the scope of their employment, nor in any way calculated to facilitate or promote the business of AK Steel. See *Armaly v. Wapakoneta*, Auglaize App. No. 2-05-45, 2006-Ohio-3629, ¶46; see, also, *McCauley v. PDS Dental Laboratories, Inc.*, Cuyahoga App. No. 90086, 2008-Ohio-2813, ¶26-28. In turn, while there may be a question as to whether AK Steel could be held liable under a different cause of action, because the record is devoid of any evidence indicating appellant's unnamed co-workers' conduct was designed to promote or facilitate AK Steel's business, the trial court did not err by granting AK Steel's motion for summary

judgment in regard to appellant's intentional infliction of emotional distress claim. Accordingly, appellant's second assignment of error is overruled.

{¶25} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.