

IN THE SUPREME COURT OF OHIO

General Electric Co., et al., : Supreme Court Case No. 2007-1490.
: :
Appellants, : :
: :
v. : On Appeal from the Trumbull
: County Court of Appeals,
Eleventh Appellate District
: :
Barry P. Tenney, : Court of Appeals
: Case No. 2005-T-0119
Appellee. : :
:

MERIT BRIEF OF
APPELLANTS GENERAL ELECTRIC CO. AND JOANNE O'NEIL

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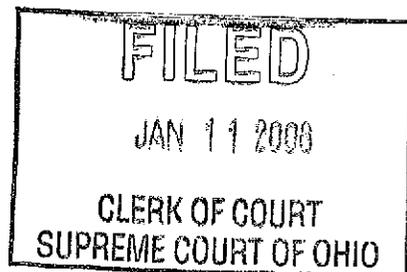


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I. INTRODUCTION

This case raises the issue of whether an appellate court's belief as to a batterer's state of mind can extend the statute of limitations from one year for a battery to four years for intentional infliction of emotional distress.

A divided court of appeals rewrote decades of holdings across the state to find that a party could recast battery claims to avoid the statute of limitations by engrafting a new "intent" element to the analysis. Two judges of the court of appeals below found that the statute of limitations period for intentional infliction of emotional distress applied to a battery claim when it believed that the alleged perpetrator intended to "humiliate" the alleged victim rather than to receive sexual gratification. The majority cited no authority for this position. Instead, as noted by the dissent, it created precedent where any claim of harmful or offensive physical contact can be pursued under intentional infliction of emotional distress, since any alleged sexual contact is humiliating to the victim.

This Court and other Ohio appellate courts have consistently rejected such attempts to manipulate the statute of limitations. If allowed to stand, the decision of the court of appeals would permit plaintiffs to sidestep the limitations period established by the legislature with artful pleading and conclusory statements about a defendant's intent. Because the divided court's opinion contravenes both the statute and this Court's prior holdings, it should be reversed.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Statement of Facts

This is a peculiar case with a long history. Appellee Barry P. Tenney asserts a claim for intentional infliction of emotional distress based on a number of discrete incidents that occurred over the past 30 years during his employment at General Electric.

The crux of Tenney's claim is that he was "harassed" at work because he is openly gay. For purposes of the narrow question this Court has accepted for review, only two of those acts, the primary acts relied upon by the majority, are at issue.

General Electric operates a plant in Niles, Ohio, that manufactures headlights for cars. (Supplement at S-10; Tenney Dep. 19.) Barry Tenney began working for GE in 1973. (S-9; Tenney Dep. 16.) He has worked in a variety of jobs including hand packer, hiker (one who moves raw material), filling-shipping, and janitor. (S-11, 12; Tenney Dep. 22-23.)

In approximately 1975, Tenney told his co-workers that he is gay. (S-13; Tenney Dep. 55.) He has had the same partner, Lawrence Carr, for 24 years and likens their relationship to a marriage. (S-8; Tenney Dep. 9.)

1. A Co-Worker Cuts Tenney's Penis With a Piece of Glass.

In 1996, Tenney was doing inspection work with two co-workers, Diane Lissi and Denise Hivick, next to piles of stacked glass lenses. (S-14; Tenney Dep. 74.) While they were working, one of the stacks fell onto Tenney, striking him in the penis and causing him to bleed. (S-15; Tenney Dep. 75.) When Tenney accused Lissi of pushing the glass onto him intentionally, she laughed and responded "[w]hen and if I decide to cut off your penis, I'm not going to use a piece of glass. I'm going to use a knife." (S-16, S-18-20; Tenney Dep. 76, 91-93.) Tenney suffered a physical injury as a result of the incident. (S-17; Tenney Dep. 77.)

2. The Plant Nurse Groped Tenney.

On August 6, 1999, Tenney visited the plant nurse, appellant Joanne O'Neil, because he was having chest pains. (S-16, 21-22; Tenney Dep. 97-98.) She asked if he was upset. (S-22; Tenney Dep. 98.) According to Tenney, O'Neil then apologized to

him for anything hurtful she may have said to him in the past. At that point, O'Neil began hugging him closely, and pressed her breasts into Tenney while rubbing her hands up and down his back, and putting her lips to his ear. (S-23-25; Tenney Dep. 100-102.) Tenney described her as putting her arms up around his neck, pushing sexually into him, and touching his backside. (S-23; Tenney Dep. 100.) Tenney also stated that O'Neil continued to hold him after he tried to pull away and told O'Neil he wanted to leave. (S-25; Tenney Dep. 102.) He described the incident as a "full sexual encounter." (Id.)

B. Procedural History and Findings

This action was filed on September 29, 2000. (S-1; Complaint.) In the initial Complaint, Tenney asserted claims for alleged harassment on the basis of his sexual orientation and for intentional infliction of serious emotional distress. (Id.) The trial court dismissed both claims on a motion pursuant to Rule 12(B)(6), and Tenney appealed.

On June 14, 2002, the court of appeals reviewed the trial court's dismissal of Tenney's claims for sexual orientation discrimination and for intentional infliction of emotional distress. The court of appeals affirmed the dismissal of his claim for harassment on the basis of his sexual orientation. (Appendix at A-45.) Tenney has not taken any further action with respect to that claim and it is not at issue in this case. The Eleventh District, however, permitted the claim for intentional infliction of emotional distress to go forward despite finding the claim to be a "close call." (Id. at A-43.)

On remand, the trial court granted summary judgment in favor of appellants. (A-36.) The trial court found that Tenney's intentional infliction of emotional distress claims against O'Neil and General Electric were barred on a number of grounds,

including the fact that the allegations did not rise to the requisite level of being extreme and outrageous. (Id. at A-35-36.)

The Trumbull County Court of Appeals, in a two-one decision written by Judge William O'Neill, overturned the trial court's finding with regard to the intentional infliction of emotional distress claims against General Electric and O'Neil. (A-5.) The majority found that Tenney's claim against O'Neil fell within the four-year statute of limitations for intentional infliction of emotional distress claims rather than the one-year statute of limitations for battery claims because it determined that O'Neil was not seeking sexual gratification for herself, but instead (it said) intended to deliberately humiliate and inflict emotional distress upon Tenney. (Id. at A-14, A-16-17.) The majority also found, based primarily upon the two batteries, a genuine issue of material fact to exist regarding whether General Electric's conduct regarding the harassment of Tenney was extreme and outrageous. (Id. at A-23.)

In dissent, Judge Diane Grendell chastised the majority for establishing precedent where any claim of physical conduct could be pursued as a claim for intentional infliction of emotional distress. (Id. at A-31.) The dissent concluded that the majority's new analysis would negate the one-year statute because any sexual assault is humiliating to the victim. (Id.) Judge Grendell found that the O'Neil incident was time-barred and that without it no evidence existed to support an intentional infliction claim. (Id. at A-25-26, 30.)

Appellants General Electric Company and Joanne O'Neil filed their notice of appeal to the Ohio Supreme Court on August 10, 2007. (A-1.) On November 21, 2007,

the Supreme Court granted jurisdiction to hear only appellants' third proposed proposition of law.

III. ARGUMENT

PROPOSITION OF LAW:

A CLAIM OF ASSAULT AND BATTERY MAY NOT BE TRANSFORMED INTO AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ACTION SUBJECT TO A LONGER STATUTE OF LIMITATIONS.

A. Claims of Battery, No Matter How Pleaded, Are Subject To A One Year Statute of Limitations

This case presents an issue of settled law. "A person is subject to liability for battery when he acts intending to cause a harmful or offensive contact, and when a harmful contact results." *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166, 167. The statute of limitations for assault and battery is one year. R.C. 2305.111. In contrast, the statute of limitations for intentional infliction of emotional distress is four years. *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 453 N.E.2d 666; R.C. 2305.09(D).

This Court has already addressed the issue of which statute of limitations applies to actions pleaded as intentional infliction of emotional distress which also constitute another tort. *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 532, 536, 629 N.E.2d 402, 407. In *Doe*, the Court held that it was necessary to determine the true nature or subject matter of the acts giving rise to the complaint to determine which statute of limitations applied. *Id.*, citing *Love*, supra, 37 Ohio St.3d 98, 524 N.E.2d 166, syllabus. Relying on *Love*, the Court reasoned that a plaintiff should not be permitted to mask the fundamental nature of a claim for relief by clever pleading in an attempt to apply a longer statute of limitations. *Doe*, 68 Ohio St. 3d at 537, 629 N.E.2d at 407.

Thus, if a claim of intentional infliction of emotional distress is premised on acts that constitute a claim for relief other than intentional infliction of emotional distress, then the statute of limitations for the other claim for relief governs both that claim and the intentional infliction of emotional distress claim. *Id.* In other words, “[w]hen a party suffers emotional distress which is ‘parasitic’ to another tort, the applicable statute of limitations is the one that applies to action based upon the other tort.” *Manin v. Diloreti* (1994), 94 Ohio App.3d 777, 779-780, 641 N.E.2d 826, 827.

In *Doe*, the defendant sexually abused the plaintiff, who sought recovery on the three theories of battery, negligence, and intentional infliction of emotional distress. 68 Ohio St.3d 532, 536, 629 N.E.2d 402, 407. This Court found that the plaintiff clearly alleged intentional acts of touching, as sexual abuse is not something that occurs by accident. *Id.* “Where the essential character of an alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery governs ***. To hold otherwise would defeat the assault and battery statute of limitations.” *Love*, *supra* at 99, 524 N.E.2d 166, 168. Therefore, all three of *Doe*’s causes of action were subject to the one-year period of limitations for assault and battery, as opposed to the catch-all provision statute of limitations specified in R.C. 2305.09. *Doe* at 536-37, 629 N.E.2d at 406-408.

In spite of the above-referenced case law, the court of appeals below erroneously found that Tenney’s claim of sexual assault by O’Neil was subject to the four-year statute of limitations for intentional infliction of emotional distress claims. While the majority did not contest that O’Neil’s alleged groping constituted intentional, offensive touching, it found O’Neil’s conduct was done with a desire to inflict emotional distress rather than for sexual gratification, and the claim was therefore one of intentional infliction of

emotional distress. (A-16.) Not surprisingly, the court of appeals cited no authority to support its holding that a claim of assault and battery can be transformed into a claim of intentional infliction of emotional distress based on the intent of the alleged offender. Likewise, the majority's analysis disregarded Tenney's own testimony that the incident was "a full sexual encounter." (S-25; Tenney Dep. 102.)

As accurately noted by Judge Grendell in dissent, "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 establish[ed] 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." (A-31.) The Eleventh District's contorted interpretation of nurse O'Neil's subjective mind, the statute, and the *Doe* decision must not be allowed to stand.

B. Artful Pleading Must Not Be Permitted to Defeat Legislative Intent

The general rationale underlying statutes of limitation is fourfold: "to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases." *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 88, 447 N.E.2d 727. Before this case, Ohio cases uniformly upheld the rationale.

With respect to intentional infliction of emotional distress, it was not until *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 453 N.E.2d 666, syllabus, that this Court even recognized intentional infliction of emotional distress as an independent tort. The *Yeager* Court applied a four-year statute of limitations to the plaintiff's claim of

intentional infliction of emotional distress pursuant to R.C. 2305.09(D), which applies to tort actions for which a specific statute of limitations has not been provided for in the Revised Code. *Id.* at 375, 453 N.E.2d at 666.

Yeager involved actions by the defendant that did not constitute another actionable tort. In contrast, “when a party suffers emotional distress that is ‘parasitic’ to another tort, the applicable statute of limitations is the one that applies to actions based upon that other tort.” *Manin v. Diloreti* (1994), 94 Ohio App.3d 777, 641 N.E.2d 826. In *Manin*, the plaintiff claimed that he was only seeking recovery based upon intentional infliction of serious emotional distress. The facts averred in his complaint, however, essentially stated a claim for battery, causing the court to conclude that “any emotional distress plaintiff suffered was caused by the alleged battery and compensatory damages for that distress would be recoverable as part of the damages recoverable for the alleged battery.” *Id.* at 799, 641 N.E.2d 826, 827. Thus, relying on *Doe*, the court held the one-year statute of limitations for battery set forth in R.C. 2305.111 was applicable. *Id.* See also *Blanton v. Alley*, 4th Dist. No. 02CA685, 2003-Ohio-2594, ¶41 (“In this case, appellants’ claims of intentional infliction of emotional distress are based on the assault and battery claims. In other words, absent the assault and battery there is no claim for emotional distress.”).

It is well established that the requirement of “extreme and outrageous” conduct necessary to the tort of intentional infliction of emotional distress is not established by ordinary tortious or even criminal activity. *Yeager*, *supra* at 375, 453 N.E.2d at 671. Were that the case, “untimely claimants for any sort of intentionally tortious actions could easily subvert an applicable statute of limitations simply by entitling their action as

one for intentional infliction of emotional distress. This would clearly contravene the legislative authority which has limited certain actions to be brought within specified times.” *Breno v. City of Mentor*, 8th Dist. No. 81861, 2003-Ohio-4051, ¶15 (citations omitted). “Thus, if the set of facts complained of gives rise to a conventional tort action for which the legislature has clearly delineated a statute of limitations, the claim should usually be governed by that statute.” *Id.* (citations omitted). See also *Lusby v. Cincinnati Monthly Pub. Corp.* (C.A.6, June 6, 1990), 1990 WL 75242, *4 (“It would be unfair to permit [a] plaintiff to recover for the alleged [defamation] under the guise of an action for emotional distress when the Ohio General Assembly has specifically elected to limit the availability of such an action through a brief filing period.”). Here, it is undisputed that Tenney’s intentional infliction of emotional distress claim is based primarily upon an alleged sexual assault by O’Neil and physical assault by Lissi. Tenney’s parasitic intentional infliction of emotional distress claim should be subject to the one year statute of limitations for assault and battery.

C. **Lower Courts Have Consistently Applied the *Doe* Holding to Preclude an Extension of the Statute of Limitations for Assault and Battery Claims**

Since this Court’s 1994 *Doe* decision, lower courts have applied the one year statute of limitations for assault and battery to intentional infliction of emotional distress claims based on sexual assault. For example, the Fifth District Court of Appeals addressed a claim similar to Tenney’s and reached the opposite conclusion from the Eleventh District court below. See *Waters v. Allied Mach. & Eng. Corp.*, 5th Dist. Nos. 02AP040032, 02AP040034, 2003-Ohio-2293. In *Waters*, the plaintiff filed an action against her former employer and supervisor for sexual harassment, intentional infliction of emotional distress and wrongful discharge. *Id.* ¶1. On appeal, Bigler, the supervisor,

argued that Waters' claim was based upon an alleged sexual assault which took place over a year before she filed her complaint, and therefore should have been time-barred. *Id.* ¶¶61-63. Waters countered that her intentional infliction of emotional distress claim was premised on her claim of sexual harassment and hostile work environment, and thus subject to a six-year statute of limitations. *Id.*

Relying on *Doe*, the court held that Waters' intentional infliction of emotional distress claim was rooted in the alleged sexual assault because that was the only conduct in the record likely to cause her severe emotional distress. *Id.* Thus, the appellate court held that Waters' intentional infliction of emotional distress claim was, in essence, a battery claim subject to a one year statute of limitations. *Id.* See also, *Scott v. Borelli* (1995), 106 Ohio App.3d 449, 666 N.E.2d 322 (action premised upon acts of sexual abuse is subject to one-year statute of limitations for assault and battery, even if plaintiff pleads negligence and intentional infliction of emotional distress); *Primmer v. Vrable* (March 19, 1996), 10th Dist. No. 95APE07-936, 1996 WL 125552, *2 (plaintiff's claims based purely upon the sexual assault governed by the one-year statute of limitations pertaining to the assault and battery, even though plaintiff pled intentional infliction of emotional distress); *Vandiver v. Morgan Adhesive Co.* (1998), 126 Ohio App.3d 634, 639-640, 710 N.E.2d 1219, 1222-1223 (employee's claims for emotional distress, arising from allegations that he was sprayed with fire extinguisher at work and that two ice bombs were rolled into his restroom stall, were predominantly based upon claims of assault and battery, and thus claims were governed by statute of limitations applicable to claims for assault and battery); *Stafford v. Clever Investigations, Inc.*, 10th Dist. No. 06AP-1204, 2007-Ohio-5086, ¶11 (plaintiff's claim for intentional infliction of emotional

distress arose from an assault and battery, thus the one-year statute of limitations for assault and battery governed the claim). These cases demonstrate that it is the act of an intentional (as opposed to accidental) touching, not the batterer's state of mind during the touching, that determines the true nature of a claim for relief, and the corresponding statute of limitations.

D. The Doe Holding Has Been Applied to Preclude Plaintiffs from Pleading Other Causes of Actions as One for Intentional Infliction of Emotional Distress to Circumvent Shorter Statutes of Limitation

Lower courts have consistently relied upon *Doe* to pierce complaints for purposes of establishing the statute of limitations for intentional infliction of emotional distress actions based upon conduct that constitute torts other than assault and battery. In *Grover v. Bartsch* (2006), 170 Ohio App.3d 188, 191-192, 866 N.E.2d 547, 550, the Grovers' claims for infliction of emotional distress were based on the allegations that Bartsch, an author, had falsely accused General Grover of unprofessional conduct and of failing to properly perform his duties in a time of war. The Grovers asserted that Bartsch made these false accusations during a speech and in his book. *Id.* Although couched as a cause of action for infliction of emotional distress, the Grovers sought to recover for the injury caused by the alleged defamatory statements regarding General Grover's military service. *Id.* at 202, 886 N.E.2d at 558. Thus, the court held that the essential character of the claims for infliction of emotional distress was defamation, and those claims were subject to the one-year statute of limitations set forth in R.C. 2305.11(A). *Id.* See also *Breno v. City of Mentor*, 8th Dist. No. 81861, 2003-Ohio-4051, ¶13 (same); *Dawson v. Astrocosmos Metallurgical, Inc.*, 9th Dist. No. 02CA0025, 2002-Ohio-6998, ¶¶40-41 (true nature of plaintiff's claim for intentional infliction of emotional distress was based upon workers' compensation retaliation, thus the 180-day statute of limitations in R.C.

4123.90 applied); *Prysock v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 01AP-1131, 2002-Ohio-2811, ¶¶9-10 (plaintiff's claims for negligence and breach of contract were, in fact, medical malpractice claims subject to the statute of limitations set forth in R.C. 2305.11(B)).

E. Public Policy Favors Application of a One Year Statute of Limitations for Intentional Infliction of Emotional Distress Claims Based on a Battery

Adherence to the statute of limitations prescribed by the legislature is also sound public policy. “Statutes of limitation seek to prescribe a reasonable period of time in which an injured party may assert a claim, after which the statute forecloses the claim and provides repose for the potential defendant.” *Id.* at ¶11. While “affording plaintiffs what the legislature deems a reasonable time to present their claims,” statutes of limitations “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.” *United States v. Kubrick* (1979), 444 U.S. 111, 117, 100 S.Ct. 352, 357 (construing Federal Tort Claims Act). A plaintiff is required to exercise reasonable diligence in presenting a tort claim; statutes of limitations discourage the plaintiff from sleeping on his or her right to bring such a claim. *Id.* at 123, 100 S.Ct. at 360.

This Court has held that clever pleading should not be allowed to transform one claim into another type of claim so as to afford the plaintiff a longer statute of limitations. That would circumvent the purpose behind a statute of limitations. See *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 100, 524 N.E.2d 166, 168. The decision below would subvert the legislature's intent in enacting a one year statute of limitations for assault and

battery and allow litigations to seek recovery for such injuries by pleading intentional infliction of emotional distress.

IV. CONCLUSION

The General Assembly enacted the one-year statute of limitations for batteries to ensure that such claims were brought and adjudicated promptly. That intent, recognized and enforced by this Court for nearly fifteen years, would be thwarted if claimants could simply recast their claims as ones for emotional distress. Because the divided decision below would largely vitiate the statute for claims of assault, battery, libel and slander, it should be reversed, and the trial court's decision granting summary judgment should be affirmed.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this Merit Brief of Appellants General Electric Company and Joanne O'Neil was sent by ordinary U.S. mail to Thomas A. Sobecki, 520 Madison Avenue, Suite 811, Toledo, Ohio 43604, attorney for Appellee, this 10th day of January, 2008.



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IN THE SUPREME COURT OF OHIO

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: County Court of Appeals,
: Eleventh Appellate District

v.

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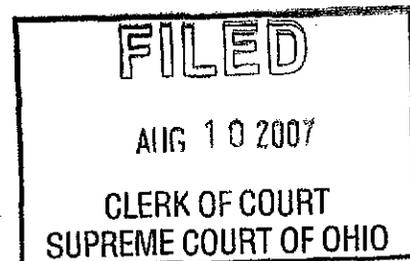
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Notice of Appeal of Appellants General Electric Co. and Joanne Deibold NKA O'Neil

Appellants General Electric Co. and Joanne O'Neil (formerly Joanne Deibold) give notice of appeal to the Supreme Court of Ohio from the judgment of the Trumbull County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals case No. 05-T~~X~~-119 on June 29, 2007.

This case is one of public or great general interest.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Gregory V. Mersol', written over a horizontal line.

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I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to Thomas A. Sobecki, 520 Madison Avenue, Suite 811, Toledo, Ohio 43604, attorney for appellee, this 10th day of August, 2007.



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STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

FILED
COURT OF APPEALS

JUN 29 2007

BARRY P. TENNEY,

Plaintiff-Appellant,

- vs -

GENERAL ELECTRIC COMPANY, et al.,

Defendants-Appellees.

TRUMBULL COUNTY, OH
JUDGMENT BY MARY ALLEN, CLERK

CASE NO. 2005-T-0119

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the trial court is affirmed in part, reversed in part. The matter is hereby remanded to the trial court for further proceedings consistent with the opinion.


JUDGE WILLIAM M. O'NEILL

COLLEEN MARY O'TOOLE, J., concurs,

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

JUN 29 2007

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

BARRY P. TENNEY,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2005-T-0119
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.

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 dignity¹³ *** 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

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 limitations³⁹ 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. GRENDALL, J., concurs in part, dissents in part, with Dissenting Opinion.

DIANE V. GRENDALL, 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 (["mere 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'Neils actions toward Tenney were intentional acts of offensive touching. Although she claimed she would give Tenney a "motherly hug," O'Neils 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'Neils conduct as a "full sexual encounter."

{¶88} Since O'Neils 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 [plaintiffs] 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 [plaintiffs] 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.

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

BARRY P. TENNEY,) CASE NO. 2000-CV-1792
)
 PLAINTIFF,) JUDGE JOHN M. STUARD
)
 VS.)
) JUDGMENT ENTRY
 GENERAL ELECTRIC CO. et al.,)
)
 DEFENDANTS,)

This matter is before this Court upon the Defendants, General Electric Company, Joanne O'Neil, Bill Calahan and Terry Larson's' Motions for Summary Judgment.

This case is on remand from the Eleventh District Court of Appeal. The only remaining issue left for this Court to address is Mr. Tenney's claim of intentional infliction of emotional distress.

Pursuant to Civ.R. 56(C), summary judgment is proper if:

"(1) No genuine issue as to any material fact remains 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 viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show

that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, (1996), 75 Ohio St.3d 447, 479.

To prevail on a claim for intentional infliction of emotional distress, Plaintiff must prove that (1) the Defendants intended to cause emotional distress, or knew or should have known that their actions would result in serious emotional distress; (2) Defendants' conduct was so extreme and outrageous that it went beyond all possible bounds of decency and could be considered to be completely intolerable in a civilized community; (3) Defendants' actions proximately caused psychic injury to Plaintiff; and (4) Plaintiff suffered serious mental anguish of a nature no reasonable person could be expected to endure. *McPherson v. Goodyear Tire & Rubber Co.*, 9th Dist.No.21499, 2003-Ohio-7190, at 33.

In the present action, the Court finds that the complaint and the evidence submitted in no way allege or support any extreme or outrageous

conduct on the part of the Defendants that recklessly caused Mr. Tenney to suffer emotional distress. Construing the evidence in the light most favorable to Mr. Tenney, the Court concludes that, while the Defendants actions were arguably outrageous, Mr. Tenney has failed to present any evidence of psychological injury or of mental anguish that was beyond endurance. Thus, there is no genuine issue of material fact as to Plaintiff's claim for intentional infliction of emotional distress, and summary judgment is appropriate on that claim.

Therefore, the Court finds the following as to:

1. Defendant Larson: Plaintiff's allegation that Defendant Larson ejected his partner from the plant and used profanity do no constitute the extreme and outrageous conduct required to survive a motion for summary judgment on a claim of intentional infliction of emotional distress. There are no genuine issues of material fact and Defendant Larson is entitled to judgment as a matter of law;

2. Defendant Callahan: Plaintiff's allegation that Defendant Callahan did not vigorously prosecute his grievances against other union members, was not extreme and outrageous as required to survive a motion for summary judgment on a claim of intentional infliction of emotional distress. There are no genuine issues of material fact and Defendant Callahan is entitled to judgment as a matter of law;

3. Defendant O'Neil: Plaintiff cites three incidents that he alleges occurred over the twenty-year period Defendant O'Neil was the nurse at the GE plant where Plaintiff worked. He alleges that Defendant O'Neil (1) told him that he was a homosexual because he was raped as a child and that he would not be gay if he had better parents. (2) O'Neil told her pregnant daughter to talk to the fetus so that it would not become a homosexual. (A grievance was filed against O'Neil regarding her comments. GE responded to the grievance finding that O'Neil did not violate company policy but encouraged Plaintiff to bring forth any future concerns.) (3) Plaintiff claims that Defendant O'Neil made a sexual advance toward him by hugging him closely and telling him she loved him. (4) Plaintiff claims that O'Neil told him that there were people in her church who were gay and made themselves straight, even though some "do backslide once in a while". All of these claims while perhaps insulting, do not rise to the level required when asserting a claim for intentional infliction of emotional distress. Plaintiff has not demonstrated that these incidents by Defendant O'Neil were extreme and outrageous as required to survive a motion for summary judgment on a claim of intentional infliction of emotional distress. There are no genuine issues of material fact and Defendant O'Neil is entitled to judgment as a matter of law; and

(4) Defendant GE claims the majority of the incidents and comments that Plaintiff relies on to support his claim are barred by the four year

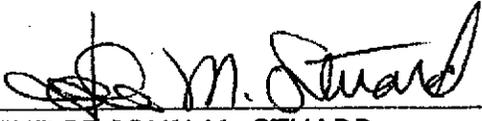
statute of limitation, were committed by hourly coworkers outside the course and scope of their employment, or are preempted by Section 301 of the Labor Management Relations Act or the Ohio Workers' Compensation Act. The remainder, which relate to comments, gestures, and graffiti referencing his sexuality do not rise to the requisite level of extreme and outrageous conduct. The Court agrees. Plaintiff once again has not proven to the Court that this Defendant's behavior or lack of it, was so outrageous as to cause him the depression and/or emotional distress he alleges. Plaintiff attaches an affidavit by a co-worker which backs up some of the allegations but still does not prove or rise to the standard of intentional infliction of emotional distress.

Reviewing the record in the light most favorable to the Plaintiff and applying the standard for intentional infliction of emotional distress, the Court concludes that the Defendants' conduct, while inappropriate, was not so outrageous and extreme to create a genuine issue of material fact for a jury. Accordingly, the Court finds and hereby grants all of the above mentioned Defendants Motions for Summary Judgment on the claim of intentional infliction of emotional distress. Plaintiff to bear the costs of this action.

This is a final appealable order with no just cause for delay.

IT IS SO ORDERED.

DATE 9/13/05



JUDGE JOHN M. STUARD

Cc: Thomas A. Sobecki
Gregory V. Mersol

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SEND
COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD
OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTH-
WITH BY ORDINARY MAIL.



JUDGE JOHN M. STUARD

WASHEQUETE ALLEN
CLERK OF COURTS
TRUMBULL COUNTY

2005 SEP 15 A 11: 52

TRUMBULL COUNTY
CLERK OF COURTS

STATE OF OHIO)
) SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

BARRY P. TENNEY,

Plaintiff-Appellant,

- vs -

GENERAL ELECTRIC COMPANY,
et al.,

Defendant-Appellee.

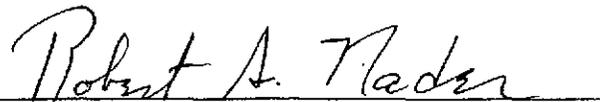
JUDGMENT ENTRY

CASE NO. 2001-T-0035

For the reasons stated in the opinion of this court, it is the judgment and order of this court, that the judgment of the Trumbull County Court of Common Pleas is reversed and the cause remanded for proceedings consistent with this opinion regarding appellant's claim of intentional infliction of emotional distress. The judgment of the trial court is hereby affirmed with regard to appellant's discrimination claim.

FILED
COURT OF APPEALS
JUN 17 2002

TRUMBULL COUNTY, OHIO
MARGARET R. O'BRIEN Clerk


JUDGE ROBERT A. NADER

DIANE V. GRENDALL, J., concurs,

JUDITH A. CHRISTLEY, P.J., dissents with a Dissenting Opinion.

FILED
COURT OF APPEALS
JUN 17 2002

TRUMBULL COUNTY, OHIO
MARGARET R. O'BRIEN, Clerk

COURT OF APPEALS

ELEVENTH DISTRICT

TRUMBULL COUNTY, OHIO

J U D G E S

BARRY P. TENNEY,

Plaintiff-Appellant,

HON. JUDITH A. CHRISTLEY, P.J.,
HON. ROBERT A. NADER, J.,
HON. DIANE V. GRENDALL, J.

- vs -

CASE NO. 2001-T-0035

GENERAL ELECTRIC COMPANY,
et al.,

OPINION

Defendants-Appellees.

CHARACTER OF PROCEEDINGS:

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

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

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Terry Larson and Bill Callahan)

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Warren, Ohio 44485

(Defendant)

ROBERT A. NADER, J.

{¶1} Appellant, Barry P. Tenney, appeals the judgment of the Trumbull County Court of Common Pleas dismissing his complaint against his employer, General Electric Company ("G.E."), and several of its employees, Joanne Deibold ("O'Neil"), Bill Callahan ("Callahan"), Lanette Harbin ("Harbin"), and Terry Larson ("Larson"), for failure to state a claim upon which relief could be granted pursuant to Civ.R. 12(B)(6).

{¶2} Appellant has been employed by G.E. since 1973. In his complaint, appellant alleges that in the four years preceding the lawsuit he was subjected to continuous harassment by his supervisors and co-workers, including unwelcome sexual remarks, because of his orientation. Specifically, appellant alleges: (1) O'Neil, the plant nurse, made repeated harassing and outrageous comments regarding appellant's parents and made unwelcome and inappropriate physical contact with him; (2) Callahan, a G.E. employee and also the union president, told appellant that he was a trouble maker, bad worker, and a liar; (3) Harbin, a G.E. employee, threatened to kill appellant; (4) Larson, a G.E. foreman, threatened appellant and became agitated when appellant's friend went to the plant regarding a personal matter; (5) unknown G.E. employees wrote crude and outrageous things about appellant on the bathroom walls and other areas of the facility, including falsely stating that he has AIDS; and, (6) instead of protecting appellant from this conduct, G.E. endorsed the conduct and participated in the alleged harassment. As a

result of these actions, appellant claims he suffers severe emotional distress and depression, which causes him to be unable to devote his full attention to his job.

{¶3} Based on the conduct described, supra, appellant alleges: in Count One, that O'Neil, Larson, Callahan and Harbin, interfered with his employment relationship; in Count Two, that appellees' conduct rose to the level of intentional infliction of emotional distress; and, in Count Three, that, in contravention of Ohio law, appellees discriminated against him on the basis of sexual orientation.

{¶4} All appellees¹ who had been served with the complaint filed motions to dismiss, pursuant to Civ.R. 12(B)(6), arguing that appellant failed to state a claim upon which relief could be granted. The trial court granted appellees' motions and dismissed the charges with prejudice. From this judgment, appellant appealed, raising the following assignments of error:

{¶5} "[1.] The trial court erred in finding that Count II of appellant's complaint – Intentional/Reckless Infliction of Emotional Distress – failed to state a claim for which relief can be granted.

{¶6} "[2.] The trial court erred in finding that Count III of appellant's complaint – discrimination/hostile work environment based on sexual orientation – failed to state a claim for which relief can be granted."

{¶7} In his first assignment of error, appellant argues that *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 2000-Ohio-128, and *Russ v. TRW, Inc.* (1991), 59 Ohio St.3d 42 support his claim of intentional infliction of emotional

¹ The record reveals that Lanette Harbin was not served with a complaint and no action on her behalf has been taken in this litigation. Additionally, due to appellant's error in the complaint, Joann O'Neil was incorrectly identified as Joanne Diebold.

distress. Appellees argue that appellant's reliance on *Hampel* and *Russ* is misplaced and that he failed to make sufficient allegations to overcome a motion to dismiss.

{¶8} When reviewing a trial court's grant of a Civ.R. 12(B)(6) motion to dismiss, an appellate court must independently review the complaint and determine whether the dismissal was appropriate. *McGlone v. Grimshaw*, (1993), 86 Ohio App. 3d 279, 285. Dismissal is only appropriate, under Civ.R. 12(B)(6), when it appears, from the complaint, that appellant can prove no set of facts to support his claim, entitling him to relief. *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144. A court must presume the truth of all factual allegations set forth in the complaint and must make all reasonable inferences in favor of the nonmoving party. *McGlone* at 285. "In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted [pursuant to Civ.R. 12(B)(6)], it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus.

{¶9} The Supreme Court has held that in order to prove intentional infliction of emotional distress, the plaintiff must show: "(1) that the defendant intended to cause the plaintiff serious 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." *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410, 1994-Ohio-389. Liability for intentional infliction of emotional distress "does not extend to mere insults, indignities, threats, annoyances, petty

oppressions, or other trivialities.” *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375.

{¶10} An examination of the complaint in this case reveals that appellant does allege that, for a period of four years, his co-workers and supervisors: subjected him to harassing and outrageous comments, threatened him, and libeled him by writing that he had AIDS. If these allegations can be substantiated, a claim for intentional infliction for emotional distress might be proved. Furthermore, appellant alleged that he suffered severe emotional distress and depression. We note that this case appears to be a close call; however, the case is before us on a motion to dismiss. Thus, we must presume the truth of all the factual allegations set forth in the complaint and make all reasonable inferences in favor of the nonmoving party.

{¶11} Since it does not appear beyond doubt that appellee can prove no set of facts which would entitle him to relief, the judgment of the Trumbull County Court of Common Pleas must be reversed and the cause remanded for proceedings consistent with this Opinion. Thus, appellant’s first assignment of error has merit.

{¶12} We note that *Hampel* and *Russ* are distinguishable from the instant case because neither case presented the issue of whether a dismissal was appropriate; both cases had gone to trial.

{¶13} In appellant’s second assignment of error, he urges this court to find that discrimination based on sexual orientation is actionable under R.C. 4112.02(A). While appellant acknowledges that no Ohio court has allowed such a claim, he cites to the concurring opinion in *Retterer v. Whirlpool Corp.*, 89 Ohio St.3d 1215, 2000-

Ohio-129, as support for his argument. In *Retterer*, the court dismissed the case as having been improvidently allowed; however, in a concurring opinion, Justice Pfeiffer noted that the case “might have presented us the opportunity to consider whether discrimination based upon sexual orientation is also actionable under R.C. 4112.02(A)” and that “it is only a matter of time before the question *** is properly before [the] court.” *Retterer*, at 1216 (Pfeiffer, J., concurring).

{¶14} Appellees argue that sexual orientation is not protected by Ohio’s civil rights statute, R.C. 4112, the Ohio Supreme Court has not yet been presented with this issue, and no Ohio court has recognized a claim for discrimination based on sexual orientation.

{¶15} R.C. 4112.02(A), provides that is an unlawful discriminatory practice:

{¶16} “For any employer, because of the *race, color, religion, sex, national origin, handicap, 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.” (Emphasis added.)

{¶17} Sexual orientation is noticeably not included in the list of prohibitions enumerated in R.C. 4112.02(A). Further, a review of the case law reveals that, although same-sex sexual harassment may be actionable under R.C. 4112.02(A), the statute’s prohibitions have not been extended to sexual orientation. *Cooke v. SGS Tool Company* (Apr. 26, 2000), 9th Dist. Np. 19675, 2000 Ohio App. LEXIS 1784,

at * 7-8; See also, *Tarver v. Calex Corp.* (1998), 125 Ohio App.3d 468, 476-77; *Greenwood v. Taft, Stettinius & Hollister* (1995), 105 Ohio App.3d 295. We decline to interpret R.C. 4112.02 to prohibit discrimination based on sexual orientation.

{¶18} We conclude that the protections of R.C. 4112.02(A) do not extend to discrimination based on sexual orientation. Because appellant's discrimination claim was solely based on sexual orientation, the trial court properly dismissed his claim. Appellant's second assignment of error lacks merit.

{¶19} Based on the foregoing, the judgment of the Trumbull County Court of Common Pleas is reversed and the cause remanded for proceedings consistent with this Opinion regarding appellant's claim of intentional infliction of emotional distress. The judgment of the trial court is hereby affirmed with regard to appellant's discrimination claim.

DIANE V. GRENDELL, J., concurs,

JUDITH A. CHRISTLEY, P.J., dissents with a Dissenting Opinion,

JUDITH A. CHRISTLEY, P.J., dissenting,

{¶20} Although I concur with the judgment and the opinion of the majority with respect to appellant's first assignment of error, I respectfully dissent as to its disposition of his second assigned error for the following reasons.

{¶21} In rejecting appellant's second assignment of error, the majority holds that the protections of R.C. 4112.02(A) currently do not extend to discrimination based on sexual orientation. This statement is only partially correct.

{¶22} Generally speaking, under R.C. 4112.02(A), there are two types of actionable sexual harassment: "(1) 'quid pro quo' harassment, *i.e.*, harassment that is directly linked to the grant or denial of a tangible economic benefit, or (2) '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." (Emphasis sic.) *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, paragraph one of the syllabus, 2000-Ohio-128. With respect to hostile-environment sexual harassment, the Supreme Court has held that "R.C. 4112.02(A) protects men as well as woman from all forms of sex discrimination in the workplace, *including discrimination consisting of same-sex sexual harassment.*" (Emphasis added.) *Hampel* at paragraph three of the syllabus. To establish a claim of hostile-environment sexual harassment, a plaintiff must show the following:

{¶23} "(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." *Id.* at 176-177.

{¶24} Furthermore, although sex “is the sine qua non for any sexual harassment case[.]” the offending “conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.” (Emphasis sic.) *Id.* at 178, quoting *Oncala v. Sundowner Offshore Serv., Inc.* (1998), 523 U.S. 75, 80. In other words, “actions that are simply abusive, with no sexual element, can support a claim for sexual harassment if they are directed at an employee because of his or her sex.” *Hampel* at 178. Accordingly, a person’s sexual orientation is actually immaterial when claiming hostile-environment sexual harassment.

{¶25} A review of appellant’s complaint clearly shows that he asserted a cause of action based on hostile-environment sexual harassment. Specifically, appellant alleged that he was subject to continuous harassment because of his sexual orientation, and that the conduct was so severe or pervasive that it affected the “terms, conditions, or privileges of [his] employment ***.”

{¶26} Accepting the allegations in appellant’s complaint as true, I firmly believe that the trial court erred in granting appellees’ motion to dismiss. Whether or not the protections of R.C. 4112.02(A) currently extend to discrimination based on sexual orientation in areas other than hostile-environment sexual harassment claims is immaterial to this case because the Supreme Court in *Hampel* clearly stated that a person could pursue a claim under R.C. 4112.02(A) for hostile-environment sexual harassment, including cases involving same-sex sexual harassment.

{¶27} For these reasons, I respectfully dissent.

§ 2305.111

Statutes & Session Law

TITLE [23] XXIII COURTS -- COMMON PLEAS

CHAPTER 2305: JURISDICTION; LIMITATION OF ACTIONS

2305.111 Assault or battery actions - childhood sexual abuse.

2305.111 Assault or battery actions - childhood sexual abuse.

(A) As used in this section:

(1) "Childhood sexual abuse" means any conduct that constitutes any of the violations identified in division (A)(1) (a) or (b) of this section and would constitute a criminal offense under the specified section or division of the Revised Code, if the victim of the violation is at the time of the violation a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age. The court need not find that any person has been convicted of or pleaded guilty to the offense under the specified section or division of the Revised Code in order for the conduct that is the violation constituting the offense to be childhood sexual abuse for purposes of this division. This division applies to any of the following violations committed in the following specified circumstances:

(a) A violation of section 2907.02 or of division (A)(1), (5), (6), (7), (8), (9), (10), (11), or (12) of section 2907.03 of the Revised Code;

(b) A violation of section 2907.05 or 2907.06 of the Revised Code if, at the time of the violation, any of the following apply:

(i) The actor is the victim's natural parent, adoptive parent, or stepparent or the guardian, custodian, or person in loco parentis of the victim.

(ii) The victim is in custody of law or a patient in a hospital or other institution, and the actor has supervisory or disciplinary authority over the victim.

(iii) The actor is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code, the victim is enrolled in or attends that school, and the actor is not enrolled in and does not attend that school.

(iv) The actor is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the victim is enrolled in or attends that institution.

(v) The actor is the victim's athletic or other type of coach, is the victim's instructor, is the leader of a scouting troop of which the victim is a member, or is a person with temporary or occasional disciplinary control over the victim.

(vi) The actor is a mental health professional, the victim is a mental health client or patient of the actor, and the actor induces the victim to submit by falsely representing to the victim that the sexual contact involved in the violation is necessary for mental health treatment purposes.

(vii) The victim is confined in a detention facility, and the actor is an employee of that detention facility.

(viii) The actor is a cleric, and the victim is a member of, or attends, the church or congregation served by the cleric.

(2) "Cleric" has the same meaning as in section 2317.02 of the Revised Code.

(3) "Mental health client or patient" has the same meaning as in section 2305.51 of the Revised Code.

(4) "Mental health professional" has the same meaning as in section 2305.115 of the Revised Code.

(5) "Sexual contact" has the same meaning as in section 2907.01 of the Revised Code.

(6) "Victim" means, except as provided in division (B) of this section, a victim of childhood sexual abuse.

(B) Except as provided in section 2305.115 of the Revised Code and subject to division (C) of this section, an action for assault or battery shall be brought within one year after the cause of the action accrues. For purposes of this section, a cause of action for assault or battery accrues upon the later of the following:

(1) The date on which the alleged assault or battery occurred;

(2) If the plaintiff did not know the identity of the person who allegedly committed the assault or battery on the date on which it allegedly occurred, the earlier of the following dates:

(a) The date on which the plaintiff learns the identity of that person;

(b) The date on which, by the exercise of reasonable diligence, the plaintiff should have learned the identity of that person.

(C) An action for assault or battery brought by a victim of childhood sexual abuse based on childhood sexual abuse, or an action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, shall be brought within twelve years after the cause of action accrues. For purposes of this section, a cause of action for assault or battery based on childhood sexual abuse, or a cause of action for a claim resulting from childhood sexual abuse, accrues upon the date on which the victim reaches the age of majority. If the defendant in an action brought by a victim of childhood sexual abuse asserting a claim resulting from childhood sexual abuse that occurs on or after the effective date of this act has fraudulently concealed from the plaintiff facts that form the basis of the claim, the running of the limitations period with regard to that claim is tolled until the time when the plaintiff discovers or in the exercise of due diligence should have discovered those facts.

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2305.09 Four years - certain torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

- (A) For trespassing upon real property;
- (B) For the recovery of personal property, or for taking or detaining it;
- (C) For relief on the ground of fraud;
- (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code;
- (E) For relief on the grounds of a physical or regulatory taking of real property.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

Effective Date: 03-02-2004

§ 2305.11

Statutes & Session Law

TITLE [23] XXIII COURTS – COMMON PLEAS

CHAPTER 2305: JURISDICTION; LIMITATION OF ACTIONS

2305.11 Time limitations for bringing certain actions.

2305.11 Time limitations for bringing certain actions.

(A) An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture shall be commenced within one year after the cause of action accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued.

(B) A civil action for unlawful abortion pursuant to section 2919.12 of the Revised Code, a civil action authorized by division (H) of section 2317.56 of the Revised Code, a civil action pursuant to division (B)(1) or (2) of section 2307.51 of the Revised Code for performing a dilation and extraction procedure or attempting to perform a dilation and extraction procedure in violation of section 2919.15 of the Revised Code, and a civil action pursuant to division (B)(1) or (2) of section 2307.52 of the Revised Code for terminating or attempting to terminate a human pregnancy after viability in violation of division (A) or (B) of section 2919.17 of the Revised Code shall be commenced within one year after the performance or inducement of the abortion, within one year after the attempt to perform or induce the abortion in violation of division (A) or (B) of section 2919.17 of the Revised Code, within one year after the performance of the dilation and extraction procedure, or, in the case of a civil action pursuant to division (B)(2) of section 2307.51 of the Revised Code, within one year after the attempt to perform the dilation and extraction procedure.

(C) As used in this section, "medical claim," "dental claim," "optometric claim," and "chiropractic claim" have the same meanings as in section 2305.113 of the Revised Code.

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§ 4123.90

Statutes & Session Law

TITLE [41] XLI LABOR AND INDUSTRY

CHAPTER 4123: WORKERS' COMPENSATION

4123.90 Discrimination against alien dependents unlawful.

4123.90 Discrimination against alien dependents unlawful.

The bureau of workers' compensation, industrial commission, or any other body constituted by the statutes of this state, or any court of this state, in awarding compensation to the dependents of employees, or others killed in Ohio, shall not make any discrimination against the widows, children, or other dependents who reside in a foreign country. The bureau, commission, or any other board or court, in determining the amount of compensation to be paid to the dependents of killed employees, shall pay to the alien dependents residing in foreign countries the same benefits as to those dependents residing in this state.

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer. Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted shall be limited to reinstatement with back pay, if the action is based upon discharge, or an award for wages lost if based upon demotion, reassignment, or punitive action taken, offset by earnings subsequent to discharge, demotion, reassignment, or punitive action taken, and payments received pursuant to section 4123.56 and Chapter 4141. of the Revised Code plus reasonable attorney fees. The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken.

Effective Date: 11-03-1989

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