

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,

Appellee.

Court of Appeals
Case No. 2005-T-0119

MERIT BRIEF OF APPELLEE BARRY P. TENNEY

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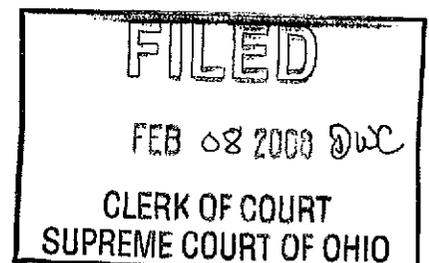


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STATEMENT OF FACTS

Appellee Barry Tenney ("Tenney") has been employed by appellant General Electric Company ("General Electric") at its Niles Mahoning Glass facility in Niles, Ohio, since March 6, 1973. (S-2 ---- Complaint, paragraph 1; 2nd Supp.- 1-7 ---- Amended Answer, paragraph 1).

In 1996, Tenney was doing reinspection with two other employees, at which time he was struck twice by falling glass, the second time seriously cutting his penis which has caused him pain in his groin area ever since. The two employees simply stood there laughing at Tenney. When he asked one of the employees why she did it, she responded that if and when she decided that she wanted to cut off his penis, she wouldn't use a piece of glass, but would use a knife. Tenney reported the incident to the General Electric management. So far as Tenney is aware, no discipline was taken against either employee. Tenney testified that the attack terrorized and humiliated him so that he is afraid to work at the plant. (S-14-20 ---- Tenney Dep. 74-77, 91-93; 2nd Supp. - 17-19 ---- Tenney Dep. 78-80; A-9-10 ---- Court of Appeals Decision 5-6).

In 1996, when an emergency occurred at Tenney's home, his partner, Larry, came to the plant seeking Tenney. Someone pointed Tenney out to Larry. When Larry walked by Mr. Larson, a foreman for General Electric, Larson told Larry that he had to leave. After Larry walked away, Larson started calling Tenney who had been walking with Larry, a motherfucker, sonofabitch, and other improper words. Larson told Tenney that he better never see Larry again in the plant, or Tenney would be sorry. Tenney reported this to Doug Lowery, a supervisor in the front office. Tenney pointed out to Mr. Lowery that other employees regularly were visited by friends and family, and yet they were not treated the same way he (Tenney) was treated. Lowery stated that Larson should not have treated Tenney that way, and that he was going to talk to him. A few minutes later

Tenney observed Larson walking toward the front office, and a little bit after that, he heard loud laughing, looked over, and saw Larson and Lowery running in and out of a small men's bathroom nearby. There were the only ones around that area. Tenney was working only a few feet away. About half an hour later another employee came up to Tenney and told him that there was something in the small bathroom that he should know about and that Larson or his friend had written something really horrible about Tenney. So Tenney went in to look at the writing, and saw something like "come 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" or something like that. (2nd Supp. 20-25, 45, 50-52 ---- Tenney Dep. 81-86, 187, 316-318; A-10 ---- Court of Appeals Decision 6).

In 1996 or 1997, two employees were making pig noises and feigning gay sex in an explicit fashion, while laughing and looking at Tenney. This was done in the presence of John Ealy, a supervisor and in Tenney's chain-of-command, who did nothing to stop it but instead watched and laughed. (2nd Supp. 42-44, 50 ---- Tenney Dep. 126-128, 316; 2nd Supp. 53-54 ---- Ealy Dep. 6-7). Mr. Ealy holds the senior management position of production leader and manager of shop operations for General Electric. (2nd Supp. 53-54 ---- Ealy Dep. 6-7). 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. This happened in 1998 and/or 1999. (2nd Supp. 55-59 ---- Robbins Dep. 6-10; A-11 ---- Court of Appeals Decision 7).

On or about 1999, Tenney lost his safety glasses, and was directed to see appellee Joanne O'Neil ("O'Neil"),¹ who is the General Electric nurse, for a replacement. He did so, and at that time

¹ O'Neil's former name was Deibold.

O'Neil told him that her son and daughter were going to have a baby, and that she had told her son and daughter to talk to the fetus and tell the fetus that he/she (the fetus) should want the opposite sex as a partner, not the same sex. (2nd Supp. 8-9 ---- Tenney Dep. 31-32). O'Neil explained to Tenney, "That's because I don't want the child to come out to be like – a homosexual like you, Barry." (2nd Supp. 9 ---- Tenney Dep. 32). O'Neil went on and said to Tenney that the only way a man could become a homosexual is if he was raped as a child. She further stated that it was his parents' fault, that if his parents would have been better parents and raised him better, that he would not have been raped as a child and become a homosexual. (2nd Supp. 9 ---- Tenney Dep. 32; A-11 ---- Court of Appeals Decision 7).

Tenney was in the union. He contacted his union so that a grievance could be filed concerning this incident. Tenney discussed the grievance and what happened between him and O'Neil with the union president, Bill Callahan. Also present during this discussion was Bill Mullins. Mr. Mullins held a position with General Electric in personnel management, which was part of human resources. Mr. Mullins was the General Electric representative responsible for processing grievances and handling claims of harassment on behalf of the company. (2nd Supp. 9-12 ---- Tenney Dep. 32-35).

Tenney also reported the incident involving O'Neil to Waymer Martin, General Electric's front office person. Mr. Martin's job involved being a coordinator, telling the employees where they were going to be for fill-ins and related matters. After crying for a period of time, Tenney told Ms. Martin that due to what O'Neil did to him, he wanted to kill himself. Tenney was not able to work the rest of the shift and had to go home early. He took sick leave the rest of the day and the next day. (2nd Supp. 46 ---- Tenney Dep. 188).

Tenney had to see O'Neil at times in her capacity as the company nurse. She would many times say things like, "Oh Barry, you shouldn't stay with Larry because he abuses you," or "we got men in my church that used to be gay but now they're straight and they're married. You would make a good husband." (2nd Supp. 38 ---- Tenney Dep. 104).

Tenney told Mr. Mullins that he never felt safe going to O'Neil for any type of care, and that he had high blood pressure and would get chest pains. Mr. Mullins promised Tenney that O'Neil would not hurt him. In fact, O'Neil hurt Tenney tremendously in an emotional way, and Mr. Mullins' empty promise only added to the pain. According to Tenney, he felt like he had been sexually abused. (2nd Supp. 38-39 ---- Tenney Dep. 104-105; A-11 ---- Court of Appeals Decision 7).

On August 6, 1999, Tenney was having bad chest pains at work. He thought he was having a heart attack, so he went to the nurse's station and told O'Neil that he was having chest pains. (S-21-22 ---- Tenney Dep. 97-98). O'Neil told Tenney that she was sorry if she had hurt him in the past. When Tenney tried to leave the nurse's station, O'Neil stood in front of the doorway, blocking it so that Tenney could not get out, and told him that since his mother and father were dead, she would be his mother. She stated that she wanted to give him a motherly hug. Tenney wanted to push her out of the way, but didn't know what to do, so he decided to just be polite and allow her to give him a motherly hug. She then rubbed her hands up and down his tailbone, touching his tailbone, back up and down his back. She then put her lips on his neck, to his ear. (2nd Supp. 31-34 ---- Tenney Dep. 97-100). Tenney kept saying "I got to go. I got to go. I got to get back on my job." (S-24 ---- Tenney Dep. 101). O'Neil refused to let go of him. Tenney tried to back away, and O'Neil almost fell over because she wouldn't let go. She was pressing up into him and her breasts

were going into him. Tenney felt like throwing up. O'Neil put her lips up to Tenney's ear and told him that God had sent her to him. Tenney continued in his attempt to get out of the embrace without causing O'Neil to fall on the floor, but she was still coming on to him and running her hands up and down his back. She finally let go of him. (S-24-25 ---- Tenney Dep. 101-102; A-11-12 ---- Court of Appeals Decision 7-8). Tenney became physically ill as a result of this incident. He could feel every little crease on her body. This incident occurred just months after the incident with O'Neil when Tenney had lost his safety glasses and Tenney had been promised by Mr. Mullins that O'Neil would never hurt him again. (2nd Supp. 37 ---- Tenney Dep. 103). The Court of Appeals discussed the aftermath:

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.

(A-12 ---- Court of Appeals Decision 8).

From time to time, graffiti directed against Tenney on the basis of his homosexuality would appear on one of the company rest room walls, such as "Adam and Eve, not Adam and Steve." Tenney's name appeared directly in the graffiti sometimes, such as "Adam and Eve, not Adam and Steve and Barry" and "Barry, fag queen, drag queen." Tenney reported the graffiti to several people, including senior manager John Ealy. (2nd Supp. 13-16, 40, 41 ---- Tenney Dep. 66-69, 109, 112; 2nd Supp. 60 ---- Robbins Dep. 11). Some of the graffiti was painted over by General Electric, but some was not for a period of time, and in fact was there for three months or longer. (2nd Supp. 13-16, 39-

40 ---- Tenney Dep. 66-69, 108-109; 2nd Supp. 60---- Robbins Dep. 11). Mr. Robbins, a long-time hourly employee of General Electric, testified that in the men's restroom, on both sides of the plant, there had been derogatory graffiti about homosexuals for 28 years, up to the last six or seven years prior to his deposition in September 2004. Management people used the restroom with the graffiti, including Mr. Larson and Mr. Ealy. (2nd Supp. 59-63 ---- Robbins Dep. 10-14). The graffiti was on the partitions between the urinals, "pretty much all over." (2nd Supp. 64 ---- Robbins Dep. 19). According to Mr. Robbins, the graffiti would remain anywhere from a month to six or eight months at a time. (2nd Supp. 62-63, 65 ---- Robbins Dep. 13-14, 22; A-10 ---- Court of Appeals Decision 6). Even after the graffiti was painted over it could still be seen and it still caused Tenney considerable emotional pain. (2nd Supp. 47-48 ---- Tenney Dep. 190-191).

And every time I still use that bathroom, I still see it written on the wall, even though it's painted over. And all these places that people have written things about me, I know what's under those things. Every time I use that bathroom when I go in that plant, there's many times I break down and cry. I have to run and hide so nobody can see the tears on my face, or the times I wanted to kill myself and commit suicide, and now I'm going for therapy.

(2nd Supp. 25-26 ---- Tenney Dep. 86-87). Tenney has tried to slit his wrists a couple of times due to the harassment at work and the only thing that stopped him is that he did not want to leave his partner, because his partner is unable to care for himself. Tenney switched from a night job to a day job in the plant, as he did not feel safe in the plant at night. (2nd Supp. 27-28 ---- Tenney Dep. 88-89). Tenney admitted during this deposition that it is difficult for him to do his job because he gets depressed at work due to the harassment. (2nd Supp. 29-30 ---- Tenney Dep. 90-91). Sometimes he has to leave work early and use sick leave time due to the harassment. (2nd Supp. 47-49 ---- Tenney Dep. 190-192).

Another employee, Elizabeth Miller, testified by affidavit that on or about March 1999, while getting supplies from the men's restroom, she observed graffiti such as "Barry is a faggot," "Barry sucks dick," and other similar graffiti. When she returned to the same bathroom in August or September 1999, the graffiti was still on the walls. (2nd Supp. 66-67 ---- Affidavit of Elizabeth Miller, attached to Tenney's opposition to General Electric's motion for summary judgment).

Tenney filed his lawsuit in the Trumbull County Common Pleas Court on September 29, 2000. The Complaint contained three counts, they being interference with employment relationship, intentional infliction of emotional distress, and discrimination based on sexual orientation. (S-1-6 ---- Complaint). General Electric, O'Neil, Larson, and another defendant at the time, Bill Callahan, filed motions to dismiss under Rule 12(B)(6) of the Ohio Rules of Civil Procedure, claiming that the Complaint failed to state claims for which relief can be granted. Tenney did not contest the motions as to the interference with employment relationship claim. Tenney opposed the motions as to the other two claims. The motions were granted and the Complaint was dismissed. Tenney timely appealed. The Court of Appeals, in its Opinion filed June 17, 2002, reversed the judgment of the Common Pleas Court as to the intentional infliction of emotional distress claim and remanded it for further proceedings. The Court of Appeals affirmed, by a 2-1 decision, with regard to the discrimination claim. (A-39-47).² Upon remand, after a period of discovery, General Electric, O'Neil, Larson and Callahan filed motions for summary judgment. Tenney did not contest Callahan's motion. Tenney opposed the summary judgment motion filed by General Electric, O'Neil and Larson. The motion was granted and the case was again dismissed, on September 15, 2005. (A-

² Upon remand, Tenney filed a motion for default judgment against defendant Harbin, because she never filed an Answer. The motion was granted.

32-37). Tenney timely appealed. The Court of Appeals reversed, by a 2-1 decision, as to General Electric and O'Neil. It affirmed the trial court's granted of summary judgment as to Larson. The Court of Appeals decision was filed on June 29, 2007. (A-5-31). General Electric and O'Neil then timely appealed to this Court, asserting three proposed propositions of law. On November 21, 2007, this Court granted jurisdiction to hear only their third proposed proposition of law.

ARGUMENT

Appellants' 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.

Tenney answers appellants' contentions by first pointing out that General Electric and O'Neil never raised this issue in the Court of Appeals. A review of their briefs in the Court of Appeals verifies that the issue was never raised. The Court of Appeals addressed the issue on the mistaken belief that the trial court used it as a basis for granting summary judgment in favor of General Electric and O'Neil. In fact, the trial court never relied upon the battery/intentional infliction of emotional distress distinction as a basis for its decision. It appears that it was the dissenting opinion in the Court of Appeals that raised the issue and caused the majority to respond. Also noteworthy is the fact that General Electric and O'Neil never raised the issue in their motions for summary judgement at the trial court level. It would be entirely appropriate for the Supreme Court to deny the appeal on this basis alone. *See generally State of Ohio v. Childs* (1968), 14 Ohio St.2d 56 (it is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court).

Tenney next answers appellants' contentions by citing to *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 532, the same case relied upon by appellants. The Court in *Doe* stated that in determining which statute of limitations applies, "it is necessary to determine the true nature or subject matter of the acts giving rise to the complaint." 68 Ohio St.3d at 536. The *Doe* Court then quoted with approval the following from *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183: "[I]n determining which limitation period will apply, courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial."

In *Doe*, the Court concluded that all the claims were premised upon alleged sexual abuse. 68 Ohio St.3d at 536. All of the allegations of sexual abuse involved physical contact. This is not the situation in Tenney's case. Tenney's case involves many incidents, as outlined in the Statement Of Facts section of this brief. Most of the incidents do not involve physical contact at all. They all involved intentional acts and therefore Tenney rightfully claims they come under the tort of intentional infliction of emotional distress. One must look at the total picture and not focus exclusively on one single happening. General Electric and O'Neil are totally wrong when they state in their merit brief, at page 9, that "[i]t 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." Appellants point to nothing in the record to support this statement and it is simply not true.

General Electric and O'Neil also rely on *Manin v. Diloreti* (1994), 94 Ohio App.3d 777, in support of their position. However, *Manin* involved a violent criminal act of being struck on the head with a blunt object while at the same time being beaten with fists. *Doe* also involved exclusively criminal conduct.

Tenney's case involves employee harassment, much of it nonphysical harassment. The Court of Appeals stressed this fact in its decision.

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.

(A-16) (emphasis added). This point was also made clear by the court in *Vandiver v. Morgan Adhesive Co.* (1998), 126 Ohio App.3d 634, a case cited by General Electric and O'Neil:

Vandiver cites several employee harassment cases in which plaintiffs were allowed to maintain actions for both intentional infliction of emotional distress and assault and battery. He argues that these cases support his theory that in situations involving workplace harassment, one cause of action does not necessarily preclude the other. We find those cases factually distinguishable, however. In each of the cases Vandiver cites, the facts make clear that the victims were subjected not only to offensive physical contact, but also to significant, nonphysical harassment that could, by itself, potentially have been considered outrageous.

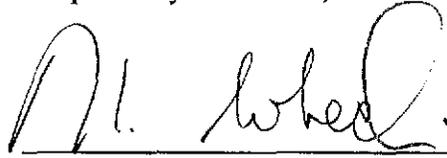
126 Ohio App.3d at 638-639. In support of this statement, the *Vandiver* court then cited several cases involving employee harassment of both physical and nonphysical conduct where a claim for intentional infliction of emotional distress was allowed covering all the conduct. These cases include the following: *Kerans v. Porter Paint Co.* (1991), 61 Ohio St.3d 486 (store manager touched plaintiff-employee's breasts without her consent, put his hand up her dress against her will, forced her to touch his genitalia, exposed himself to her, appeared naked before her, and requested that she watch him masturbate); *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131 (plaintiffs-employees subjected to pattern of sexual abuse that included both oral statements and other, nonspecified conduct that could be subject to criminal prosecution for sexual imposition); *Crihfield v. Monsanto Co.* (S.D. Ohio 1994), 844 F. Supp. 371 (plaintiff's co-worker engaged in

pattern of behavior against her which included exposing his genitals, unconsented sexual fondling, requests for sexual favors, and display of sexually explicit photographs). *See also Hidey v. Ohio State Hwy. Patrol* (1996), 116 Ohio App.3d 744 (complaint alleging that a state highway patrol trooper, during a traffic stop, pulled the passenger's pants away from the front of her body and then pulled her pants and underwear away from the back of her body, shining a flashlight in the exposed body areas, and also ordered her to show him her left breast, was actionable under the four-year statute of limitations for invasion of privacy and not under the one year statute of limitations for assault and battery).

CONCLUSION

This case involves a pattern of behavior consisting of a number of different incidents involving both physical and nonphysical conduct which the Court of Appeals, under the guidance of this Court's decisions in several cases including *Doe v. First United Methodist Church*, held was sufficient to overcome summary judgment as to the tort of intentional infliction of emotional distress. The appellants General Electric and O'Neil, for the first time, are asserting that at least some of the conduct is not actionable because it constitutes assault and battery and thus comes under a one year statute of limitations. Appellants take an overly narrow view of the case, ignoring much of the evidence in the record. Tenney is not trying to circumvent the statute of limitations in place. This is an intentional infliction of emotional distress case and therefore the four-year statute of limitations as set out in the law applies. The Court of Appeals decision below should be affirmed.

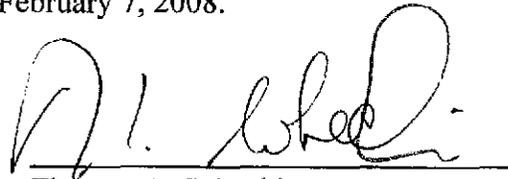
Respectfully submitted,



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Certificate of Service

I certify that a copy of this Merit Brief Of Appellee was sent by ordinary U.S. mail to counsel of record for appellants, Gregory v. Mersol, Baker & Hostetler LLP, 3200 National City Center, 1900 East Ninth Street, Cleveland, Ohio 44114-3485, on February 7, 2008.



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