

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

WARREN EASTERLING	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23980
v.	:	T.C. NO. 09CV8649
AMERISTATE BANCORP, INC., et al.	:	(Civil appeal from Common Pleas Court)
Defendant-Appellee	:	

**OPINION**

Rendered on the 16<sup>th</sup> day of July, 2010.

WARREN EASTERLING, 71 Arlington Avenue, Dayton, Ohio 45417  
Plaintiff-Appellant

GREGORY J. DEMOS, Atty. Reg. No. 0062819, 12 W. South Street, Lebanon, Ohio 45036  
Attorney for Defendant-Appellee

FROELICH, J.

{¶ 1} Warren L. Easterling appeals from a judgment of the Montgomery County Court of Common Pleas, which overruled his motion for summary judgment on his claim for harassment and granted the motion of Defendants Ameristate Bancorp., Inc., Ameristate Mortgage, and Ameristate Bankcorp’s Vice President, Daniel G. Dorko, to dismiss and for summary judgment. For the following reasons,

the trial court's judgment will be affirmed.

I

{¶ 2} According to Easterling's Complaint, Easterling was hired by Ameristate<sup>1</sup> as a mortgage loan officer in October 2005. Beginning in December 2008, two checks that Ameristate issued as payment for commissions that Easterling had earned were returned for insufficient funds. Within thirty days, Ameristate "made good on" these two checks.

{¶ 3} On March 13, 2009, Ameristate issued a "draw" check for \$850, which was also returned due to insufficient funds. This draw check was replaced with another check (check number 4723) on March 25, 2009. Easterling attempted to cash this check at Ameristate's bank on two occasions, but was informed there were insufficient funds. On April 3, 2009, Ameristate replaced check number 4723 with cash. On April 14, 2009, Easterling was paid \$122.17 by check number 4677 to satisfy the balance of payroll due on March 13, 2009.

{¶ 4} In March or April 2009, Easterling requested proof that payroll taxes were being withheld and proof of total payroll due to him. Ameristate "fabricated" a check stub to imply that Easterling had been paid in full and on time.

{¶ 5} On May 13, 2009, Ameristate refused to pay for commissions on a loan closing that had taken place on May 8, 2009. Easterling sued for payment of those commissions in the Miamisburg Municipal Court; that action was dismissed for want of prosecution.

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<sup>1</sup> The parties do not distinguish between Ameristate Bancorp and Ameristate Mortgage. We refer to them collectively as "Ameristate."

{¶ 6} On October 23, 2009, Easterling, pro se, filed a Complaint against Defendants. He claimed that their actions constituted harassment, and he sought compensatory damages of \$50,000 and punitive damages of \$125,000. Easterling attached copies of the payroll checks, deposit slips, the check stub, and the municipal court dismissal entry to his Complaint.

{¶ 7} On February 3, 2010, Easterling moved for summary judgment on his claim for harassment. In his memorandum, Easterling repeated the allegations in his Complaint and clarified that Dorko had paid him on April 3, 2009, with cash from his (Dorko's) wallet. Easterling also elaborated on his claim that his employer refused to pay him commissions for the May 8, 2009, closing. He stated that the client, Tanya Jackson, was referred to him by Realtor Donna Deaton, but that Dorko instructed the title agent at closing to deny him a signed executed settlement statement. Easterling further asserted:

{¶ 8} "Daniel Dorko and Ameristate Bancorp. Inc. has purposefully bounced paychecks which created constant undue financial hardship and mental anguish which affected my confidence and comfort level within their employ. It is tough to be productive and confident when an employee cannot be certain his payroll check will clear. I had no other income to rely upon to exist and provide myself food, shelter and water. This harassment began after Mr. Dorko became aware of my not having any other reliable income."

{¶ 9} Easterling attached numerous exhibits to his summary judgment motion, including copies of the exhibits that were attached to his Complaint, several e-mails indicating his involvement in the Jackson closing, and a printout from the

Montgomery County website showing the real estate sale to Jackson.

{¶ 10} Defendants opposed Easterling's motion, noting that Easterling had not supported his motion with evidence as required by Civ.R. 56(C) and arguing that Easterling was not entitled to judgment on his claim of harassment. Daniel Dorko provided an affidavit, which stated, in its entirety:

{¶ 11} "1. I am the Vice President of Ameristate Bancorp, Inc., and as such, personally know Plaintiff in the within cause and have personal knowledge of the allegations contained in Plaintiff's Complaint;

{¶ 12} "2. In 2008, 2009, and through the current date, Ameristate has suffered significant financial hardship, due to the economic conditions and, in particular, the economic conditions of the housing market;

{¶ 13} "3. As a result, and in conjunction with the new bank policy, deposited checks could be held for up to ten (10) business days depending on account balances. This unfortunately resulted in certain checks being rejected for insufficient funds to Plaintiff and at least four (4) other employees of Ameristate[;]

{¶ 14} "4. As acknowledged in Plaintiff's Complaint, all monies owing to Plaintiff as a result of said checks were paid in full. Furthermore, Ameristate paid any fees associated with said checks;

{¶ 15} "5. With respect to the Jackson closing on May 8, 2009, Plaintiff had voluntarily left the employ of Ameristate on April 27, 2009. After doing so, Plaintiff illegally and in violation of client confidentiality used client's personal and private information in an attempt to get a loan authorized on client's behalf through a different lender. As a result of Plaintiff's conduct, he was prohibited from

participating in said closing;

{¶ 16} “6. I, nor anyone affiliated with Ameristate, ever intentionally or purposely provided Plaintiff with compensation checks, knowing they would not be honored;

{¶ 17} “7. I, nor any other person affiliated with Ameristate, ever harassed Plaintiff.”

{¶ 18} On the same date that Defendants opposed Easterling’s motion for summary judgment, they filed a motion to dismiss Easterling’s Complaint, pursuant to Civ.R. 12(B)(6), and for summary judgment, relying upon Dorko’s affidavit.

{¶ 19} Easterling responded to Defendants’ motion, arguing that Defendants had admitted to issuing checks with insufficient funds and denying him payment for the Jackson closing. Easterling submitted his own affidavit, which stated:

{¶ 20} “1. I, Warren Easterling, witnessed Daniel G. Dorko, Vice President of Ameristate Bancorp, writing all of the checks presented in evidence. The cash evidence[d] by the cash deposit slips was given to me by Mr. Dorko from his personal wallet.

{¶ 21} “2. Mr. Dorko or Ameristate never represented the bad checks as a mistake by verbally apologizing or issuing a memo making me aware of company hardships and asking for understanding.

{¶ 22} “3. Mr. Dorko, during the time period of this harassment, was instrumental in insuring some of my other deals would not close and caus[ing] some of client[s] to cease contact with me and making me uncomfortable in his office.

{¶ 23} “4. The evidence in this case is so clear because the defendant was cocky in its believing they could do anything they wanted and would never face any court of law.

{¶ 24} “5. The effect of the defendants['] actions consist of, but are not limited to:

{¶ 25} “• Public embarrassment when the checks bounced and my personal bills became unpaid.

{¶ 26} “• Loss of reputation with my clientèle and the public at large when all of these issues became public[.]

{¶ 27} “• Mental anguish due to the stress created by Mr. Dorko’s behavior and the financial hardship created by his actions such as my home mortgage being in arrears and subsequently placed in foreclosure, had to give up my car insurance, life insurance, health club membership. In the summer of 2009, I felt like a 17 year old because I had no money of my own and was forced to stay at home with no social interaction of any kind.

{¶ 28} “• I was forced to seek other employment.

{¶ 29} “• I had no other means of income; Mr. Dorko was fully aware of this fact.

{¶ 30} “• I believe the defendant intended to destroy my life.

{¶ 31} “6. As a 12 year veteran of the mortgage industry and a 4 year veteran of real estate sales, I assure the court of 100% accuracy of the closing statements and check issued by the title agencies involved. The title agencies, as independent 3<sup>rd</sup> parties to the transactions, are responsible to insure all funds in a

transaction a[re] properly dispersed and the signatures on the closing statement are an affirmation to the fact that the figures represented are relative to the transaction which actually occurred. Hence, the deals did close, the defendant was paid and the defendant was subsequently negligent in handling its finances and adhering to the 50% commission split as agreed to with plaintiff on scheduled pay dates.

{¶ 32} “[7]. This case is a claim of which the requested relief can be granted and the requested damages of \$175,000 will attempt to make me whole.”

{¶ 33} On March 15, 2010, the trial court overruled Easterling’s motion for summary judgment. The court indicated that it could not consider the documents attached to Easterling’s motion, because they were not incorporated by affidavit. The trial court further stated that, even if the court were to consider Easterling’s evidence, Dorko’s affidavit created genuine issues of material fact. “Still further, Plaintiff has failed to set forth any authority or law upon which he predicates his claim, and in support of his suggestion that he is entitled to judgment as a matter of law.” The court thus concluded that, construing the evidence in the light most favorable to Defendants, Easterling failed to demonstrate an absence of genuine issues of material fact and that he was entitled to judgment as a matter of law.

{¶ 34} On April 5, 2010, the trial court granted Defendants’ motion to dismiss and for summary judgment. The court reasoned, in part:

{¶ 35} “Plaintiff’s Complaint concedes that Defendants made good on any overdraft checks issued to Plaintiff. Plaintiff’s Complaint also alleges in conclusory terms that he was harassed, without any explanation of the nature of the harassment. Therefore, Plaintiff’s Complaint fails to state any cognizable claim of

harassment or damage from overdraft checks issued by Defendant.

{¶ 36} “The Court further finds that Defendants are entitled to summary judgment with respect to Plaintiff’s claim regarding the May 8, 2009 closing. The record before the Court demonstrates that there is no genuine issue of material fact regarding Plaintiff’s claim and that Defendants are entitled to judgment on said claim as a matter of law.”

{¶ 37} Easterling appeals from the denial of his motion for summary judgment and the granting of Defendants’ motion to dismiss and for summary judgment. In his Statement of the Assignment of Errors, Easterling lists various Rules of Civil Procedure and Rules of Evidence and indicates that those Rules (or, more likely, violations of those Rules) are reflected on certain pages. This Statement of Assignment of Errors does not comply with App.R. 16(A)(3). Nevertheless, we construe Easterling’s assigned errors to be that the trial court erred in denying his motion for summary judgment and in granting Defendants’ motion to dismiss and for summary judgment. We will address the trial court’s rulings in a manner that facilitates our analysis.

## II

{¶ 38} We begin with Easterling’s challenge to the trial court’s dismissal of his harassment claim against Defendants, pursuant to Civ.R. 12(B)(6).

{¶ 39} “A motion to dismiss a complaint for failure to state a claim upon which relief can be granted, pursuant to Civ.R.12(B)(6), tests the sufficiency of a complaint. In order to prevail, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. *O’Brien v. University*

*Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753 at syllabus. The court must construe the complaint in the light most favorable to the plaintiff, presume all of the factual allegations in the complaint as true, and make all reasonable inferences in favor of the plaintiff. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.” *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, ¶16.

{¶ 40} Under Civ.R. 10(C), the documents attached to Easterling’s Complaint were part of Easterling’s Complaint and could be considered by the trial court in ruling on Defendants’ motion to dismiss. However, the trial court was not permitted to consider Dorko’s or Easterling’s affidavits or any additional evidence in considering Defendants’ motion to dismiss.

{¶ 41} In granting Defendants’ motion to dismiss Easterling’s harassment claim based on Defendants’ having paid Easterling with checks that were returned for insufficient funds, the trial court concluded that Easterling failed to state a cognizable claim for harassment or to allege damages as a result of Defendants’ alleged conduct. We agree with the trial court’s conclusions.

{¶ 42} In his Complaint, Easterling alleged that Defendants wrote two checks – check numbers 4667 and 4719 – that were returned for insufficient funds. Easterling further alleged, however, that after these checks were returned, “Defendant made good on these checks.” Easterling further alleged that Defendants issued a draw check that was returned due to insufficient funds; however, he again stated that he was subsequently paid by cash and check number 4677 for the amount due to him. Easterling did not allege in his Complaint

that he had suffered any damages as a result of Defendants' alleged conduct.

{¶ 43} Moreover, Easterling did not adequately allege the legal basis for his claim of harassment. Although having pay checks repeatedly returned for insufficient funds is undoubtedly distressing and may result in embarrassment, it does not necessarily support a cause of action for harassment. For harassment to be actionable, "the workplace must be permeated with 'discriminatory intimidation, ridicule, or insult' sufficiently severe or pervasive to alter the conditions of the employment." *Hawkins v. Anheuser-Busch, Inc.* (C.A.6, 2008), 517 F.3d 321, 333 (discussing sexual harassment), citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-67, 106 S.Ct. 2399, 91 L.Ed.2d 49.

{¶ 44} Fortunately or unfortunately, not all upsetting or even mean-spirited conduct in the workplace is actionable. See *Harris v. Forklift Sys., Inc.* (1993), 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (stating that conduct is not actionable if it is "merely offensive"). Ohio recognizes employment-at-will and, "unless otherwise agreed, either party to an oral employment-at-will employment agreement may terminate the employment relationship for any reason which is not contrary to law." *Mers v. Dispatch Printing, Co.* (1985), 19 Ohio St.3d 100, syllabus. There is no exception for malicious conduct or actions taken by an employer in bad faith. *Id.* at 105.

{¶ 45} Rather, to be actionable, the harassing conduct against an at-will employee must be contrary to law. For example, Ohio and federal law prohibit employment discrimination on the basis of an individual's race, color, religion, sex, national origin, disability, or age. See 42 U.S.C. 2000e et seq. ("Title VII of the

Civil Rights Act of 1964”); 29 U.S.C. 621 et seq. (“Age Discrimination in Employment Act”); 42 U.S.C. 12101 et seq. (“Americans with Disabilities Act”); R.C. Chapter 4112. Ohio further recognizes a claim for wrongful termination in violation of public policy. *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228; *Collins v. Rizkana* (1995), 73 Ohio St.3d 65. In the absence of an employee’s membership in a protected class, participation in a protected activity, or a clear public policy that prohibits the employer’s conduct, an employee cannot maintain a claim for harassment merely because his employment has become unpleasant or undesirable.

{¶ 46} In this case, Easterling failed to identify the basis for his employer’s alleged harassing conduct or, as the trial court put it, the “nature” of the harassment. Although Easterling describes Ameristate’s conduct as harassing, he did not allege in his Complaint that this conduct was the result of his membership in a particular protected class, was in response to any protected activity, or was a violation of a particular recognized public policy. Accordingly, Easterling failed to state a cognizable claim for harassment, and the trial court did not err in dismissing his complaint under Civ.R. 12(B)(6).

{¶ 47} Easterling states in his appellate brief that passing bad checks is contrary to R.C. 2913.11 and R.C. 2307.61. R.C. 2913.11 is a criminal statute that states: “No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored or knowing that a person has ordered or will order stop payment on the check or other negotiable instrument.” R.C. 2307.61 details the damages that a

victim of theft may receive in a civil action against any person who willfully damages the owner's property or who commits a theft offense. Easterling has not alleged, however, that Defendants' conduct constituted theft or that he was bringing a civil action against them for theft damages; even if he had so alleged, this does not constitute "harassment."

### III

{¶ 48} Easterling also claims that the trial court erred in denying his motion for summary judgment and in granting Defendants' motion for summary judgment.

{¶ 49} Summary judgment is governed by Civ.R. 56. Under that Rule, summary judgment should be granted only if no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 50} Upon a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue of material fact exists for trial. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Once the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the party's pleadings. *Id.*; Civ.R. 56(E). Rather, the burden then shifts to the non-moving party to respond, with affidavits or as otherwise permitted by Civ.R. 56, setting forth specific facts which show that there is a genuine issue of material fact for trial. *Id.* Throughout, the evidence must be construed in favor of the non-moving party. *Id.* An appellate court reviews summary judgments de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. In other

words, we review such judgments independently and without deference to the trial court's determinations. *Id.*

{¶ 51} Beginning with Easterling's motion for summary judgment, Easterling argues, in essence, that the trial court erred in failing to consider his documentary evidence and in concluding that his evidence did not demonstrate harassment as a matter of law.

{¶ 52} In deciding a motion for summary judgment, the trial court may only consider evidence submitted by the parties in accordance with Civ.R. 56, which states, in part:

{¶ 53} "(C) \*\*\* Summary judgment shall be rendered forthwith if *the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any*, timely filed in the action, 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. *No evidence or stipulation may be considered except as stated in this rule. \*\*\**"

{¶ 54} "(E) \*\*\* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the

party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." (Emphasis added.)

{¶ 55} Easterling asserts that the trial court denied his motion for summary judgment without considering his documentary evidence. The trial court expressly stated, however, that even considering all of Easterling's documentary evidence, Easterling was not entitled to summary judgment on his harassment claim. Easterling's documentary evidence supported his allegations that Defendants provided certain checks and an earnings statement to Easterling and that Easterling was involved in the Jackson loan. Defendants admitted in their Answer that check numbers 4667 and 4719 were returned for insufficient funds, that the draw check was replaced by check number 4723, and that they issued check number 4677 for the balance of pay owed to Easterling.

{¶ 56} Although Defendants acknowledged in their Answer and in Dorko's affidavit that certain checks were returned for insufficient funds, Easterling acknowledged in his Complaint that the Defendants "made good on" the first two checks that were returned, and Easterling was also paid in full for the draw check that was returned for insufficient funds. Consistent with these admissions, Dorko stated in his affidavit that "all monies owing to Plaintiff as a result of said checks were paid in full" and that Ameristate "paid any fees associated with said checks." In addition, Dorko denied that anyone at Ameristate harassed Easterling or purposefully wrote checks knowing that they would be returned due to insufficient

funds. Dorko explained in his affidavit that certain checks were returned for insufficient funds due to the economic downturn in the housing market and new banking policies, and that no one at Ameristate had harassed Easterling or purposely provided Easterling with compensation checks, knowing the checks would not be honored.

{¶ 57} Construing Defendants' evidence in the light most favorable to them, as we are required to do when reviewing Easterling's motion for summary judgment, Defendants' evidence (i.e., Dorko's affidavit) demonstrated that genuine issues of material fact existed as to whether their conduct constituted unlawful harassment and, further, that Easterling was not entitled to judgment as a matter of law. The trial court did not err in denying Easterling's motion for summary judgment.

{¶ 58} Turning to Defendants' motion for summary judgment, the trial court granted summary judgment only as to Easterling's claim that Ameristate failed to pay him for the Jackson closing on May 8, 2009. With respect to this claim, Dorko provided an affidavit stating that Easterling had voluntarily left his employment with Ameristate on April 27, 2009. Dorko indicated that, "[a]fter doing so, Plaintiff illegally and in violation of client confidentiality used client's personal and private information in an attempt to get a loan authorized on client's behalf through a different lender. As a result of Plaintiff's conduct, he was prohibited from participating in said closing."

{¶ 59} Because Defendants supported their summary judgment motion with an affidavit, Easterling could not rely on the allegations in his Complaint, and he

was required to demonstrate with “evidentiary materials” that a genuine issue of material fact existed on his claim. Civ.R. 56(E). Although Easterling submitted an affidavit along with his memorandum opposing Defendants’ motion, Easterling did not address the May 8, 2009, closing in his affidavit, and he did not dispute Dorko’s sworn statement that Easterling was denied commissions for that closing because he no longer worked for Ameristate and had improperly tried to use confidential client information. Consequently, even construing Easterling’s evidence in the light most favorable to him, as we must when reviewing Defendants’ motion for summary judgment, Easterling failed to create a genuine issue of material fact as to whether he was entitled to those commissions. Because Dorko’s unrefuted affidavit demonstrated that Easterling was not entitled to commissions for the May 8, 2009, closing, the trial court did not err in granting summary judgment to Defendants on that claim.

{¶ 60} We note that Easterling states in his appellate brief that he is entitled to relief from the trial court’s order under Civ.R. 60(B). This issue was not raised in the trial court, and we cannot consider it in this appeal.

#### IV

{¶ 61} Having overruled Easterling’s assignments of error, the trial court’s judgment will be affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Warren Easterling

Gregory J. Demos  
Hon. Mary Katherine Huffman