IN THE LICKING COUNTY COMMON PLEAS COURT

Connie J. Minkos,	:	
Plaintiff	:	
-vs-	:	Case No. 18 CV 994
Brian Mortellaro, et. al.,	:	Judge Branstool
Defendants.	:	

DECISION AND ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case is before the Court on Defendants' Motion for Summary Judgment. Plaintiff filed a Memorandum in Opposition, and Defendants filed a Reply in Support of its Motion. The matter has been fully briefed by the parties. For the reasons set forth below, the motion is granted.

I. Factual Background

Connie Minkos, the Plaintiff, worked at McDonalds for thirty-eight years. She climbed the ranks to Manager, and then again to Supervisor. At the beginning of 2018, she learned from the owner of Mortellaro McDonalds, Defendant Brian Mortellaro, that a restaurant she supervised would be inspected by corporate on February 8, 2018. For the next two months, Mrs. Minkos worked to ensure that the inspection would go smoothly.

On the day of the inspection, but before it began, Defendant Steve McElhatton, a Vice-President of the company, arrived at the restaurant to supervise the final preparations. Apparently unsatisfied with Mrs. Minkos's work, Mr. McElhatton quickly approached her and began to shout. A video recording shows Mr. McElhatton less than a foot away from Mrs. Minkos, shaking his fist near her face. An eyewitness averred that

she "thought he was going to hit her."[1] Mrs. Minkos attempted to retreat to a safer distance, but Mr. McElhatton grabbed both of her forearms and held her there. Mrs. Minkos told him not to touch her, and began to cry.[2]

After the incident, Mrs. Minkos filed a police report and approached Mr. Mortellaro, and alerted him about Mr. McElhatton's conduct. The next day, she spoke again to Mr. Mortellaro regarding the incident.[3] Although Mr. Mortellaro took steps to prevent further contact between Mrs. Minkos and Mr. McElhatton,[4] he declined to formally discipline Mr. McElhatton.

Mrs. Minkos filed this suit, alleging that Mr. McElhatton's actions constituted "harassment," either in tort or in violation of the harassment policy in the McDonald's Manager Handbook, as well as intentional infliction of emotional distress and negligent infliction of emotional distress. Mrs. Minkos named Mr. McElhatton personally as a Defendant, and sued Mr. Mortellaro and Mortellaro McDonalds through the theory of vicarious liability.

II. Analysis

A. Summary Judgment Standard

Under Civ. R. 56, the standard of review in evaluating a motion for summary judgment is clear. Summary judgment is proper only when all of the following are met: (1) there are no genuine issues of 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 viewing that evidence most

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[1] Plaintiff's Reply to Defendant's Motion for Summary Judgment, Exhibit 2.
[2] *Id.*
[3] *Id.* at p.3.
[4] Defendant's Motion for Summary Judgment, p.4.

strongly in favor of the party against whom the motion is made, that conclusion is adverse to that party. *Norris v. Standard Oil Co.*, 70 Ohio St.2d 1 (1982); *Harless v. Willis Day Warehousing*, 54 Ohio St.2d 64 (1978).

A party seeking summary judgment bears the initial burden of informing the Court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of issues of material fact on the essential elements of the non-moving party's claims. The moving party may not meet this burden simply by making conclusory assertions that the non-moving party has no evidence to prove its case. Instead, the moving party must point to specific evidence which affirmatively demonstrates that the opposition lacks evidence to support its claims.

Once the moving party satisfies its initial burden, the nonmoving 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." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, (1992).

A trial court should not enter summary judgment if it appears a material fact is genuinely disputed, or if it appears - after construing the allegations most favorable in favor of the non-moving party – reasonable minds could draw different conclusions from the undisputed facts.

B. <u>There Are No Genuine Issues of Material Fact</u>

Mrs. Minkos levels three claims against Defendants arising out of the incident on February 8, 2018. First, she alleges she suffered "harassment" and a "hostile work

environment." Second, she claims intentional infliction of severe emotional distress against Mr. McElhatton. Finally, she claims negligent infliction of emotional distress on the basis that Mr. Mortellaro negligently allowed her to suffer severe emotional distress at the hands of Mr. McElhatton. For the reasons listed below, none of Plaintiff's arguments survive summary judgment.

Harassment Claim

The first claim against Defendants has been generally labelled by both parties as "harassment." It is not entirely clear what Plaintiff means by using this term. In her complaint, Mrs. Minkos avers that Mr. McElhatton "subjected [her] to verbal abuse, assault and harassment," that Mr. Mortellaro "knowingly failed to protect or act on [her] allegations of abuse and harassment ... in direct violation of the Harassment policy," and that "[a]s a direct and proximate result of Defendant's [sic] intentional actions," she suffered damages.[5] In her reply to Mr. Mortellaro's motion for summary judgment, Mrs. Minkos clarifies that this is a "hostile work claim," and that "the acts complained of are of sufficient severity ... to constitute a hostile work environment."[6]

The problem is that to prove a hostile work environment, a plaintiff must prove discrimination based on plaintiff's membership in a protected class.[7] Mrs. Minkos has not identified any facts that indicate the events of February 8, 2018 and thereafter had anything to do with her membership in a protected class. In fact, nothing in the record indicates that she has ever even claimed that the harassment she suffered was based on her membership of a protected class.

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[5] Plaintiff's Complaint at ¶¶ 29–31.
[6] Plaintiff's Reply to Defendants' Motion for Summary Judgment, 6.
[7] Specifically, R.C. § 4112.02 prohibits employment discrimination against a person's "race, color, religion, sex, military status, national origin, disability, age, or ancestry."

Instead, Mrs. Minkos begins the support for her claim with a federal appeals case from the Second Circuit. *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62 (2d Cir. 2000). In *Whidbee*, two McDonalds employees in New York suffered harassment and abuse from a co-worker, and the Second Circuit agreed that the general manager's lack of response exposed the company to vicarious liability. But *Whidbee* involved race discrimination under 42 U.S.C. § 1981. *Id. Whidbee* does not support Plaintiff's assertion that a cause of action exists for "harassment" independent of any allegation of discrimination.

Indeed, every case cited by Mrs. Minkos to support her generalized "harassment" claim involves employment discrimination in some form or another. *See, e.g., Harris v. Forkift Sys.*, 510 U.S. 17 (1993) (sex discrimination), *Davis v. U.S. Postal Serv.*, 142 F.3d 1334 (10th Cir. 1998) (disability discrimination), *King v. Hillen*, 21 F.3d 1572 (Fed. Cir. 1994) (sex discrimination), *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985) (same), *Highlander v. K.F.C. National Management Co.*, 805 F.2d 804 (6th Cir. 1986) (same), *Delgado v. Lehman*, 665 F. Supp. 460 (E.D. Va. 1987) (same). Mrs. Minkos has not identified, and this Court cannot find, any authority, binding or otherwise, that supports a cause of action for harassing an employee absent discrimination.

To the contrary, Defendants point out that in the context of *Greeley* claims, courts have refused to recognize general "harassment" as a violation of public policy. *Strausbaugh v. Ohio DOT*, 150 Ohio App. 3d 438, 449–50 (10th Dist. 2002), *Bell v. Cuyahoga Community College*, 129 Ohio App. 3d 461, 465 (8th Dist. 1998). It is true that *Greeley* claims only arise in employment law after an adverse action against an employee, and that it has little to do with this case. But the refusal to acknowledge such

a claim supports the conclusion that there is no independent cause of action in tort for "harassment" in Ohio.

Finally, Mrs. Minkos included an employee handbook including a harassment policy for reasons she did not explain. Perhaps she means to say that Defendants breached their contract with her by failing to adhere to that harassment policy. Although Plaintiff has never stated that its harassment claim is a creature of contract, this Court rejects that argument too. An employee handbook can sometimes create a contract between the employee and her employer, either express or implied. *See, e.g.*, *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 104 (1985). But a handbook cannot be a contract when it expressly denies that it contains a contract. *Karnes v. Doctors Hospital*, 51 Ohio St. 3d 139, 141 (1990), *Sims v. Midvale*, 2012-Ohio-6081, ¶ 19. The handbook Mrs. Minkos alludes to in this case states "[t]his handbook is not a contract of employment."[8] Any possible argument that Mr. McElhatton's behavior breached a contract with Mrs. Minkos ends with that disclaimer. Therefore, there is nothing left to try on this claim, and Defendants are entitled to judgment as a matter of law.

Emotional Distress Claims

Mrs. Minkos's second cause of action alleges intentional infliction of emotional distress (IIED), and her third cause of action alleges negligent infliction of emotional distress (NIED). A claim for IIED has four elements: 1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; 2) that the actor's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency" and was such that it

[8] Plaintiff's Complaint, Exhibit 3.

can be considered as "utterly intolerable in a civilized community"; 3) that the actor's actions were the proximate cause of plaintiff's psychic injury; and 4) that the mental anguish suffered by plaintiff is serious and of a nature that "no reasonable man could be expected to endure it." *Ashcroft v. Mt. Sinai Medical Ctr.*, 68 Ohio App.3d 359, 366 (8th Dist.1990).

The facts in this case do not paint a pretty picture. Plaintiff's Exhibit 1 clearly shows Mr. McElhatton berating Mrs. Minkos. He stands over her, looming, his fist shaking inches from her. As she turns, attempting to create a safer distance from the man shouting in her face, he physically grabs her arms, forcing her to be still as he continues his tirade. Even absent corroborating witness testimony about how frightening the incident was, the footage itself tells a story. It's disturbing, it's frightening, and it's abusive.

But is it extreme and outrageous? Does Mr. McElhatton's conduct go beyond all possible bounds of decency? Is it utterly intolerable in a civilized community? The greater weight of the case law in Ohio says no. Consider the cases.

In *Mills v. Phoenix*, a manager at the defendant's packaging company along with two supervisors cornered the plaintiff employee in a room. 2014-Ohio-366 (5th Dist.). The manager screamed at the plaintiff, pointed a finger at his head, and "spit saliva in his face." *Id.* ¶ 4. The Fifth District held that, although inappropriate, the "evidence fail[ed] to demonstrate conduct that was so extreme and outrageous to go beyond all bounds of human decency." *Id.* ¶ 28. The facts of the case could not reach the high bar set by the "extreme and outrageous" element of an IIED claim.

Hull v. J.C. Penney Co. considered a similar factual structure. 2008-Ohio-1073 (5th Dist.). A manager at the defendant company disciplined a plaintiff employee for

leaving items behind a reception desk. *Id.* ¶ 9. The discipline on that occasion involved taking the items and handing them to the plaintiff one by one. *Id.* Once the plaintiff's hands were full, the manager forcibly stuck at least seven post-it notes on the plaintiff's clothes and skin in front of customers and employees alike. *Id.* Witnesses characterized the manager as "abrasive and/or abrupt." *Id.* ¶ 10. But again, the Fifth District concluded that the manager's conduct could not meet the demands of an IIED claim.

The Eighth District has also considered an employer discipline IIED case in *Jeurgens v. Strang, Klubnik & Assocs.*, 96 Ohio App. 3d 223 (8th Dist. 1994). The plaintiff employee in *Jeurgens* complained that the owners of the defendant company yelled at her on one occasion, and, on another, threw a notepad at her. *Id.* at 227–28. The court noted that although the owner's conduct was "less than desirable, ... it [did] not constitute evidence of outrageous conduct worthy of causing a legal infliction of emotional distress." *Id.* at 233. The bar was, once again, simply too high for the plaintiff to clear.

These cases stand closely together with the incident on February 8, 2018 in this case. All of them involve a supervisor berating an employee beyond the ordinary course of discipline in the workplace. All of them include some physical manifestation of the supervisor's anger at the employee. On the other hand, however, all of them stem from isolated incidents in the workplace.

That's where the trouble begins for Mrs. Minkos. No case in Ohio that this Court could find has sustained a plaintiff's IIED claim based on isolated instances of a supervisor disciplining a plaintiff employee. It is true that several cases have recognized a claim for IIED after a pattern of abuse in employment. *Hampel v. Food Ingredients Specialties*, 89 Ohio St. 3d 169 (2000), *Garrison v. Bobbitt*, 134 Ohio App. 3d 373 (2d

Dist. 1999). But Mrs. Minkos's claim differs from *Hampel* and *Garrison*. Although both cases involve abuse from a supervisor, the scope of the abuse sets the two apart. In *Hampel*, the plaintiff suffered constant, discriminatory harassment from his supervisor for a period of eight months, a far cry from the single incident at issue in this case. 89 Ohio St. 3d at 172–73. Similarly in *Garrison*, the plaintiff firefighter suffered underhanded abuse at the hands of his superiors for nearly a year. 134 Ohio App. 3d at 376–77, 380–81. But in this case, the entire claim revolves around Mr. McElhatton's conduct on a single occasion. That is simply not enough to rise to the level of extreme and outrageous. Because of this, even in the light most favorable to the Plaintiff, even in the face of Mr. McElhatton's reprehensible conduct, there is no genuine issue of material fact, and Defendants are entitled to judgment as a matter of law on Plaintiff's IIED claim.

Nor is there a genuine factual issue for NIED. For negligent infliction of emotional distress, "Ohio courts have limited recovery ... to such instances as where one was a bystander to an accident or was in fear of physical consequences to his own person." *High v. Howard*, 64 Ohio St. 3d 82, 85-86 (1992). *See also Gearing v. Nationwide Ins. Co.*, 76 Ohio St. 3d 34, 40 (1996), *Lawyers Cooperative Publishing Co. v. Muething*, 65 Ohio St.3d 273, 280 (1992). This fear must expose the plaintiff "to real or impending physical calamity." *Dobran v. Franciscan Med. Ctr.*, 102 Ohio St. 3d 54, ¶ 12 (2004).

Plaintiff's claim fails here because Ohio does not allow claims for NIED in employment law cases. The Fifth District dismissed an NIED claim in *Nichter v. Suarez Corp.* because "[i]n the employment context, Ohio does not recognize the tort." 1993 Ohio App. LEXIS 4195 at *9 (5th Dist.). This disposes of the NIED claim altogether.

In her complaint, Mrs. Minkos alleges that the NIED stems from "Mr. Mortellaro's failure to act and/or protect an employee from [Mr. McElhatton's extreme and outrageous conduct]."[9] Rather than a claim for NIED, Mrs. Minkos appears to argue that Mr. Mortellaro and his business are vicariously liable for Mr. McElhatton's IIED. But since there are no genuine issues of material fact regarding the IIED claim against Mr. McElhatton, her claim against Mr. Mortellaro fails as a matter of law too.

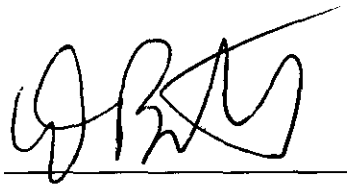
III. Conclusion

Plaintiff's nebulous claim of harassment fails to identify a cognizable cause of action. Mr. McElhatton's conduct was inappropriate, and his contact was unacceptable, but even in the light most favorable to Mrs. Minkos, it does not rise to the level of "extreme and outrageous." This also means that Mr. Mortellaro and Mortellaro McDonalds cannot be held vicariously liable for any emotional distress suffered, and this case simply falls nowhere near a valid NIED claim. Therefore, Defendants are entitled to relief as a matter of law, and summary judgment should be granted for the Defendants.

Accordingly, Defendants' Motion for Summary Judgment is granted and Plaintiff's claims are dismissed. Pursuant to R.C. 2505.02(B)(1), this is a final appealable order.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.

It is so ordered.



W. David Branstool, Judge

[9] Plaintiff's Complaint at ¶ 43.

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IN COMPLIANCE WITH CIVIL RULE 58, IT IS VERIFIED THAT COPIES HAVE BEEN SENT TO PARTIES AND/OR THEIR ATTORNEY OF RECORD IN A MANNER PRESCRIBED BY CIVIL RULE 5 (B) ON THIS 30 DAY OF Sept. 2019 D. Thomas