

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Erin Osborne

Court of Appeals No. L-12-1331

Appellant

Trial Court No. CI0201101945

v.

Brian Douglas, et al.

DECISION AND JUDGMENT

Appellee

Decided: November 15, 2013

* * * * *

Mark A. Davis, for appellant.

Margaret Mattimoe Sturgeon, Philip B. Phillips and Jennifer L.
Neumann, for appellee Johnson Controls, Inc.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, in which the trial court granted a motion for summary judgment filed by appellee, Johnson Controls, Incorporated (“JCI”), denied a motion for summary judgment filed by appellant, Erin Osborne, and dismissed sexual harassment claims against JCI. Appellant

also appeals from a judgment in which the trial court found that Brian Douglas, appellant's former supervisor, is not liable in damages for intentional infliction of emotional distress. For the reasons that follow, we affirm the judgments of the trial court.

{¶ 2} At all times relevant to this appeal, JCI operated a factory in Northwood, Ohio, that manufactured components used in various models of automobiles. Appellant began working at JCI in June 2003, in the instrument manufacturing division, after which she was transferred to the seat manufacturing division, where her team supervisor was Brian Douglas. In 2008, appellant was laid off for part of July and August. After returning to work, appellant was placed on short-term disability due to the birth of a child, from September 9, 2008, until May 14, 2009. Appellant experienced one more two-week layoff from June 1, 2009, until June 15, 2009. On August 10, 2009, JCI suspended appellant pending an investigation of charges that she falsified time sheets for herself and a co-worker, Lindsay Schuler. On the day she was suspended, appellant met briefly with her union representative, Tiffany DeMoss. During that meeting, appellant told DeMoss that Douglas sexually harassed her while she was working on the production line, and that he sent her inappropriate text messages. Appellant also told DeMoss that she believed Douglas "set her up" by telling her to incorrectly fill out the time sheets for herself and Schuler. DeMoss suggested that appellant report the sexual harassment charges to JCI.

{¶ 3} An investigation of the charges against appellant was conducted by JCI's human resources manager, Mary "Yvonne" Hambright and, on August 30, 2009, JCI

terminated appellant's employment. Appellant did not report sexual harassment by Douglas, as suggested by DeMoss. The union filed a grievance as to the level of discipline given to appellant, which was denied.

{¶ 4} In 2010, Elizabeth Gorajewski, a temporary JCI employee, reported that she was sexually harassed by Douglas. As a result of Gorajewski's report, Douglas was suspended and ultimately fired. Appellant's mother, Andrea Napier, who was employed by JCI at that time, met with DeMoss and plant manager Brenda Leggett, to remind them that Erin had reported similar allegations against Douglas over a year earlier. DeMoss and Leggett met with appellant on October 18, 2010. At that time, appellant renewed her allegations against Douglas; however, JCI took no action as a result of appellant's accusations.

{¶ 5} On February 24, 2011, appellant filed a complaint against JCI and Douglas, in which she alleged that Douglas made verbal statements and engaged in behavior that amounted to sexual harassment while appellant was assigned to make Jeep Wrangler seats under Douglas' supervision. The complaint set forth claims of sexual harassment, intentional infliction of emotional distress, and wrongful and/or retaliatory discharge against Douglas. The complaint also contained allegations that JCI, Douglas' employer, is liable for wrongful and/or retaliatory discharge, breach of contract, and negligent supervision. In addition to ordinary damages, attorney fees, costs, and pre- and post-judgment interest, the complaint sought punitive damages from both Douglas and JCI. On March 31, 2011, JCI filed a motion to remove the case to federal court, on grounds

that appellant's breach of contract claim was preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. 185(A). On April 3, 2011, appellant dismissed her breach of contract claim. Thereafter, the parties stipulated to the remand of the case back to the Lucas County Court of Common Pleas. The trial court reactivated the case on September 23, 2011.

{¶ 6} On November 29, 2011, appellant filed a motion to consolidate this case with the sexual harassment case brought by Gorajewski (case No. CI0201105486). On December 19, 2011, appellant filed a motion for default judgment against Douglas on grounds that he had not filed a timely response to the complaint. On December 22, 2011, the motion to consolidate was denied. On January 12, 2012, after holding a hearing, the trial court entered a default judgment against Douglas.

{¶ 7} On April 30, 2012, appellant filed a motion for summary judgment, in which she argued that all of the allegations in the complaint should be taken as true, and JCI should be held strictly liable under the doctrine of respondeat superior, because she obtained a default judgment against Douglas. In support, appellant relied on portions of both deposition testimony and affidavits given by JCI employees Jesse Molina, Aaron Schultz, and the deposition testimony of Mary "Yvonne" Hambright, DeMoss, Marjorie Cramer, Sarah Douglas, and Vincent Waldron, in addition to her own deposition testimony.

{¶ 8} In an affidavit dated December 10, 2010, Aaron Schultz stated that he "personally observed Brian Douglas show a pattern of behavior toward attractive women

at the plant.” Schultz further stated that, if a woman Douglas approached did not respond positively to his advances, Douglas would “publically humiliate” her and “make her job more difficult.” Schultz also stated that “girls would complain to human resources or the plant manager and management would sweep it under the road [sic] to protect their golden boy.”

{¶ 9} In a deposition taken on March 27, 2012, Schultz testified that, as union steward, he never filed a grievance against Douglas on appellant’s behalf. Schultz testified that he observed Douglas switching appellant from “online” worker to “relief person,” even though she did not have enough seniority to qualify for that position. He also stated that Douglas called both male and female employees “fat,” and he never saw Douglas grope appellant. Schultz stated that he saw sexually suggestive text messages sent by Douglas to Schultz’s ex-girlfriend, Brandi Minish, however, Minish never actually complained about Douglas’ behavior. Schultz did not remember any specific allegations of sexual misconduct by Douglas against Minish, and he qualified the statements made in his affidavit regarding Douglas’ behavior by saying that he had no personal knowledge of Douglas’ treatment of other women at JCI, and he did not know of any employees whose work allegedly was made more difficult by Douglas.

{¶ 10} On cross-examination, Schultz testified that JCI is “lenient” regarding dating between its supervisors and employees, and the company provides “sexual harassment training” every year. Schultz stated that JCI’s sexual harassment policy was supposed to be “zero tolerance.” As to JCI’s attendance policy, Schulz testified that each

employee has “bank time” to be used when they are tardy, and he was not aware that anyone was accused of filling out a time card for another worker. He also stated that he did not notice “big changes” in appellant due to Douglas’ behavior.

{¶ 11} On January 7, 2011, Waldron executed a sworn affidavit in which he stated that he “personally observed Brian Douglas make rude comments to Erin Osborne.” Specifically, Waldron stated that Douglas would ask appellant about her tattoos, and would ask her to “go out” with him. Waldron stated that, in his opinion, Douglas made appellant’s life “harder” after she refused his advances.

{¶ 12} Waldron also recalled that, on one occasion, Douglas was suspended for sending out a sexually suggestive “email” addressed to JCI employee Sarah Frost, which accidentally was sent to many JCI employees, including Waldron

{¶ 13} In his deposition testimony, taken on March 27, 2012, Waldron said that he did not actually see Douglas tell appellant to fill out her time card incorrectly. Waldron testified that he heard Douglas say that he wanted to have sex with appellant and that “he wanted to put her up on his face and ride her around,” however, he thought it was a joke, and he never complained to human resources about Douglas’ statements. Waldron stated that, on one occasion, Douglas set him up by telling him not to steam the seats during the manufacturing process, and then complained that Waldron did his job incorrectly, but he did not file a grievance. He also said that Douglas was “constantly” messing with “people,” not just women. He was not aware if anyone else complained to Leggett about

Douglas. Waldron testified that he had no firsthand knowledge that Douglas set appellant up to be fired beyond what appellant told him.

{¶ 14} On cross-examination, Waldron testified that JCI workers could be terminated for excessive tardiness. He stated that appellant said she was fired because of “paperwork.” Waldron said that he could not remember hearing Douglas make sexual comments, and that JCI has a “no tolerance” policy about asking co-workers out. Waldron said that Douglas was careful not to make sexual comments in his presence because he can “lip-read.”

{¶ 15} In an affidavit sworn on December 15, 2010, Jesse Molina stated that he personally observed Brian Douglas “cussing and calling people names.” Molina also stated that Douglas would pretend to be a Marine drill sergeant and yell “Let’s go ladies!” Molina said he complained about Douglas to management, but no action was taken. He then called the hotline and an investigation was done, but no harassment was found.

{¶ 16} On March 27, 2012, Molina testified in a deposition that he never met with appellant to discuss the lawsuit, and he never saw Douglas harass appellant. He had, however, heard Douglas engage in “name calling” of a non-sexual nature with women on the line. Molina said that Douglas’ behavior was “unprofessional” and that he “cursed,” even to male employees. Molina testified that he called the hotline to report Douglas, but was told that he was not harassed. When questioned regarding his earlier affidavit, Molina stated that he had no specific examples of Douglas’ actions being ignored by

management. However, Molina stated that he personally heard Douglas calling Arnulfo Gomez a “rat boy,” and Molina a “Lady.” On cross-examination, Molina testified that he was suspended for not properly making seats as a result of Douglas’ actions.

{¶ 17} Hambright testified that she began working at JCI’s Northwood facility on March 28, 2008, as the human resources manager. Hambright stated that appellant’s falsification of time records was brought to her attention by Peggy Cramer, who audited those records. She said that a time sheet must be filled out to explain why an employee does not punch in using the time clock. In appellant’s case, there were no punches on two separate days, and the door swipe badge and surveillance cameras showed appellant entering the building, so Hambright asked Douglas for “absent request notification sheets” for those days. Appellant’s time sheets were signed by appellant, Linda Duggan and Douglas, and dated August 10, 2009. Hambright stated that each employee is allowed 64 hours of time for absences or tardies per year, to be allocated in quarterly increments of 16 hours each. She said that appellant was three minutes late on August 3, and .25 hours late on August 10, and that appellant said Douglas told her how to fill out the notification sheets.

{¶ 18} Hambright testified that it was appellant’s falsification of the notification sheets, and not just her tardiness, that resulted in her termination. Hambright further testified that Douglas denied telling appellant how to fill out the forms, but he admitted to watching her fill them out before he signed the forms and turned them in. Hambright stated that she did not receive appellant’s version of the story until after she was

suspended, and that: “What I went on for her discharge was the fact that she was late and that was through the camera system” along with the falsification of the paperwork. “She could have used her bank [time].”

{¶ 19} Hambright said that any complaints against Douglas are kept in a file separate from his personnel file, and that JCI also maintained a file on appellant and Elizabeth Gorajewski. She also stated that the company hotline is used to report incidents of name-calling, such as the time Douglas called a co-worker “rat boy.” She denied knowledge of the “email” incident involving Sarah Frost, and said “[t]here’s no other sexual harassment claims on file for Brian Douglas other than Erin Osborne and Elizabeth Gorajewski’s.”

{¶ 20} As to JCI’s sexual harassment policy, Hambright testified that sexual harassment is defined as comments, propositions and sexual comments, as well as touching, brushing against employees, and making promises of preferential treatment. Hambright also testified that appellant filed a grievance challenging the finding that she falsified time records, and asking that her termination be reduced to a suspension; however, the grievance was denied on August 21, 2009. Hambright stated that it is undisputed that Douglas told appellant to fill out the notification forms; however, there is disagreement between appellant and Douglas as to whether he told her how to fill out the forms.

{¶ 21} DeMoss testified that she was a materials handler at JCI, and that she was also appellant’s union representative. DeMoss stated that she has worked under Douglas

and described him as “an ass” who was arrogant, loud and talked down to other people. DeMoss said that Douglas “liked to do things his own way,” and that she never witnessed Douglas sexually harassing appellant. DeMoss testified that appellant first told her that Douglas “sexually harassed her and that she had text messages that he had sent her” after appellant was terminated. DeMoss stated that she encouraged appellant to tell Hambright and even gave her the company’s 800 number. DeMoss further stated that, the day she was suspended, appellant accused Douglas of “setting her up” and said that he “told her to fill them out and that she had filled them out before.” She stated that Douglas told workers to use machines in an unsafe manner, and that he put “numbers” ahead of safety. DeMoss also said that she did not know why appellant did not trust management. She stated that appellant’s claim was reported to Hambright and Leggett on October 18, 2010, right after Elizabeth Gorajewski complained about Douglas. DeMoss stated that she never filed a grievance against Douglas, and that she normally would meet with him instead and then give the complaint to her chairman, Wayne Truitt. She stated that Douglas was terminated in 2010 and that, in 2013, a lot of workers were laid off when JCI went through bankruptcy.

{¶ 22} DeMoss testified that Mike Martinez, who dated Frost, reported unsafe working conditions. She also stated that she “never witnessed Brian do anything that was degrading to women at work personally.” DeMoss said that Douglas “wanted things done faster,” and described him as “rude to everyone equally.” Finally, DeMoss stated that appellant told her Douglas instructed her as to how to fill out the time sheets.

{¶ 23} Cramer testified in her deposition that she worked in JCI's human resources department from July 31, 2006, until March 1, 2012, and that Hambright was one of her supervisors. Cramer stated that appellant was fired for falsifying documents for herself and another employee, and that the investigation was triggered because both forms, one for appellant and one for a male employee, were done in the same handwriting. Specifically, she stated:

[The] supervisor has nothing to do with the forms – what I detected with the forms being the identical sigs [sic], I would not go back to the supervisor. That is a whole different issue. I'm looking at it as two forms, identical signatures, identical handwriting for a male and a female, put together, turned in together; so when this comes up that raises a red flag.

{¶ 24} Cramer further stated that a supervisor has no control as to how the time form is completed, and that Douglas' signature merely confirms that appellant and Schuler were working that day. It does not prove that Douglas saw who filled out the form.

{¶ 25} Cramer agreed with Hambright that each worker has "bank time" to be used if they are tardy and, if the bank time is exhausted, the employee can be dismissed. However, she stated that appellant had "plenty" of bank time in August 2009. As to sexual harassment, Cramer stated that it is determined from the victim's point of view, and that her job as investigator is to collect written statements, not to interview or

interpret the evidence. After the investigation is completed, it goes to the regional human resources office, which may initiate another audit.

{¶ 26} Cramer stated that she was not aware of Douglas' past relationship with Leggett, and she was not aware of any prior false statements made by Douglas, nor was she aware of the email concerning Frost, and she was not involved in the decision to fire Douglas. Cramer further stated that JCI does not have a policy against one employee dating another employee. Cramer testified that the conveyor system on the production line, which Douglas supervised, rotates workers every hour to "balance out" the harder and easier jobs, and to prevent injuries due to the performance of repetitive tasks. She also said that Douglas, as supervisor, was responsible for everything that happened on the floor in the seat production area, and that there was only one plant manager on duty at any given time, supervising 200 hourly employees.

{¶ 27} Sarah Frost testified that she and Brian Douglas both worked for JCI, and they were married for a time. Sarah also testified that she never saw the sexually suggestive message sent by Douglas, which she characterized as a "text," not an "email," because she was working in a different area of the plant at the time, and she forgave him for sending it. Sarah said that Douglas was suspended for two weeks for sending the message, and that the company was "not happy with him." Sarah stated that Douglas is a "flirt" but not in a sexual way, and that he only made sexual comments to her outside of work. She denied knowing about any messages sent by Douglas to other female

employees, and stated that she did not know anything about Douglas' actions after their divorce.

{¶ 28} Sarah confirmed that Douglas told her he had a “one-time” sexual relationship with plant manager Leggett when the two worked together in Oklahoma. Sarah said that she did not divorce Douglas because he was cheating, and she was not aware of any sexual harassment claims against him. Sarah testified that she was bullied and treated unfairly at JCI, but was not sexually harassed. She stated that her boss, Sasha VonSacken, filed a complaint against her in 2011, and that she was briefly suspended for running “out of parts.” She also stated that JCI provides sexual harassment training once each year in order to advise employees as to what constitutes harassment and how to report it.

{¶ 29} Appellant testified in her deposition that, at all times relevant to this lawsuit, she was, and is, married to Desmond Cartlidge, with whom she has three children. Appellant said she filed a sexual harassment suit with the Ohio Civil Rights Commission after she was fired from JCI. Although she was eventually able to obtain other employment, her hourly wage is now \$11.75 per week plus benefits, whereas her last hourly wage at JCI was \$19.47. After reviewing a copy of her time record at JCI, appellant testified that she was laid off by JCI for one month in the summer of 2008, was on short-term disability due to the birth of a child from September 9, 2008 until May 14, 2009, and was laid off for two weeks in June 2009. Appellant said that the last official

date she worked was August 10, 2009, but she was “walked out” before that sometime in July.

{¶ 30} Appellant stated that she filled out an “absenteeism request notification form” and put an “X” next to “on-time” on August 3, 2009. She stated that she swiped her access card to enter the building at 6:03 a.m. for her 6:00 a.m. shift. She further stated that “I submitted this form because Brian Douglas told me what to fill out and that’s exactly what I did.” Appellant acknowledged that filling out a false form violated company policy. However, she claimed that Douglas “printed me one [sic] off and I asked him where to mark it and he said mark it right here, I’ll take care of it” without asking whether she was late. Appellant stated that she did not know she was late on that day until she “got walked out for it.” Appellant also stated that, although she had filled out late forms in the past, the form was recently changed and she did not know how to fill it out without Douglas’ assistance, and she trusted Douglas, as her supervisor, to know whether she was late at the time. She testified that, on August 7, 2009, she filled out another form and placed an “X” next to “on time.” She stated that Douglas asked her to fill out the forms on both occasions without telling her that she was late for work. As for Schuler’s form, appellant stated that Douglas told her to “do it that way” and that she was just following his orders.

{¶ 31} Appellant testified that DeMoss told her she was suspended pending an investigation of the time sheets, and that she was ultimately terminated. She then asked DeMoss about her accusations against Douglas, which were initially raised after her

suspension, and DeMoss told her that Leggett and Hambright were “not going to play tit for tat with [her] and that was the bottom line.” She then filed a grievance requesting her termination be reduced to a suspension; however, she did not directly challenge the fact that she was disciplined for falsifying time records. Also, her grievance did not include a sexual harassment charge against Douglas.

{¶ 32} Appellant said that she received sexual harassment training from JCI, in the form of a slide presentation and a written agreement, which she signed. She also said the JCI has a zero-tolerance policy regarding sexual harassment. She acknowledged receiving a copy of the policy and the union’s collective bargaining agreement with JCI, which included a prohibition on sexual harassment, which she signed without ever reading the whole thing. Appellant said that she did not find out that she could call human resources to report sexual harassment “until really, really late,” and she did not remember who told her she could call.

{¶ 33} Appellant stated that the allegation in her complaint saying that Douglas sexually harassed her before the spring of 2009 was not accurate, and that no one other than Douglas sexually harassed her. She also stated that she never saw Douglas outside of work. However, at work, “[h]e would always say sexual things to me, telling me I had a nice ass, asking me to come over knowing that I was married * * * that he wanted to have sex with me * * * [and ask me for pictures, for naked pictures, and he would call me and ask me if I was alone.” Appellant also said that she “may have” given Douglas her cell phone number so she could be called into work early and that, the week she was

fired, Douglas said that “he wanted to lift my leg up over my head and f*** me from behind.” Although appellant could not recall specifically when other comments were made, she recounted incidents when Douglas teased her about having an affair with a male friend who was a co-worker, grabbed her from behind “a number of times,” and continually texted her and asked for sex.

{¶ 34} As to the witnesses who testified, appellant could not say exactly what Waldron and Molina heard; however, Schultz knew about the sexual remarks. She testified Douglas asked if she wanted pictures of his “package,” frequently called her to ask if she and her husband were still together, and offered to give her easier jobs if she would have sex with him. In contrast, there were “five or six times” when she “brushed him off,” and Douglas placed her on the “hardest station” all day long, lifting 50 pound seats instead of the lighter 20 pound seats. She said that Douglas “told me if I went along with what he said I wouldn’t have to work hard that day.” However, appellant said that Douglas did not give her harder jobs every time she refused his advances.

{¶ 35} Appellant said that, although she was constantly harassed, and her days were made harder, her hours and her pay were never affected, and she was given pay raises based on the length of her employment. She also said that Douglas never threatened to physically harm her. She admitted not complaining about Douglas to management until September 2010, more than a year after her termination, and stated that she told DeMoss about the “leg lifting” comment after she was suspended. Also, appellant said that, while she was walking to her suspension meeting, she told DeMoss

that Douglas “set her up” because she would not have sex with him. In response, DeMoss told her to tell human resources. Later, after telling appellant that JCI would not play “tit for tat,” DeMoss called appellant to say that she was fired. Appellant testified that she found out about Gorajewski’s sexual harassment claim from her mother, who still works for JCI and that she met with Leggett and Hambright on October 18, 2010. Appellant said that she never saw the message appellant reportedly attempted to send to Frost.

{¶ 36} Appellant stated that, in spite of Douglas’ harassment, she was still able to do her job. Appellant said she believes she was terminated for following Douglas’ orders. She denied seeing the time clock photos that showed she was late to work. She said that Douglas did not retaliate against her in any way other than setting her up to be fired and, although she cannot prove it, she believes she was fired in order to “save Brian’s butt.”

{¶ 37} Appellant stated that Douglas’ conduct made her “nervous about supervisors” at a subsequent job. She was not sure if she has had a panic or anxiety attack that is related to Douglas’ actions since November 2010. She claimed to have migraines caused by Douglas, but could not remember when the headaches started. She stated that the harassment by Douglas began between the time she gave birth to her second and third child. Appellant also stated that she reported panic attacks, anxiety and chest pains, hair loss and psoriasis to various doctors; however, she did not present any evidence to support her medical claims, and she did not answer when asked to list any

emotional or psychological damages she suffered due to the allegations made in her complaint.

{¶ 38} JCI filed a motion for summary judgment on May 3, 2012, in which the company argued that appellant's sexual harassment claims should fail as a matter of law because the record does not contain admissible evidence to: (1) establish a prima facie case of either quid pro quo sexual harassment or a hostile workplace environment, or (2) show that appellant was subjected to a tangible employment action. JCI further asserts that evidence was presented to show that it exercised reasonable care to prevent sexual harassment at the Northwood plant and, in any event, appellant "unreasonably failed to utilize the measures provided." JCI further argued that appellant's claim for retaliation must fail because she did not establish a causal connection between her termination and her allegations of sexual harassment, and her claim for intentional infliction of emotional distress fails as a matter of law because she did not sufficiently demonstrate severe emotional distress resulting from JCI's actions or inaction. Finally, JCI argued that appellant's claims for negligent supervision, retention and hiring fail as a matter of law because the company could not reasonably anticipate Douglas' actions, and appellant is not entitled to punitive damages because she "cannot identify any negligence on the part of JCI." In addition to relying on the deposition testimony of Hambright, appellant, Cramer, and DeMoss, as set forth above, JCI attached to its memorandum copies of its "No Harassment Policy," and the judgment entry in which appellant withdrew her breach of contract claim against JCI.

{¶ 39} On May 10, 2012, appellant filed a memorandum in opposition to JCI's summary judgment motion, in which she essentially argued that the record contains sufficient evidence to show that she was sexually harassed by Douglas, that her refusals of Douglas' advances resulted in retaliatory action, and that JCI was or should have been aware that Douglas was harassing appellant and others in the workplace, but did nothing about it. Appellant also filed a cross-motion for summary judgment. JCI filed a reply brief on May 17, 2012, in which it stated that, in opposing JCI's summary judgment motion, appellant "grossly mischaracterizes sworn testimony, including her own, makes numerous factual allegations without any citation to the record and relies heavily on inadmissible hearsay" in an attempt to mislead the trial court as to the legal merits of her claims against her former employer.

{¶ 40} On September 10, 2012, the trial court issued a judgment entry in which it found that appellant did not present sufficient admissible evidence to support her sexual harassment claims either on the basis of quid pro quo or hostile workplace environment. The trial court also found that JCI exercised reasonable care to prevent sexual harassment in the workplace, and that appellant failed to take advantage of the measures set up by JCI to address any sexual harassment that may have occurred. In addition, the trial court found that appellant presented no admissible evidence, other than her own testimony, to show that she suffered physical and/or emotional consequences as a result of the alleged sexual harassment to support her claim of intentional infliction of emotional distress on the part of JCI. Finally, the trial court found that appellant failed to present any evidence

to demonstrate a causal connection between the alleged harassment by Douglas and JCI's decision to terminate her employment. Accordingly, the trial court granted JCI's motion for summary judgment and denied appellant's motion for summary judgment.

{¶ 41} On October 1, 2012, the trial court conducted a hearing on the remaining issue of the assessment of damages against Douglas pursuant to default judgment issued against him on January 12, 2012. Testimony at the hearing was presented by Phillip Blossom, Michael Magura, Ph.D., and appellant.

{¶ 42} Blossom, a private investigator, testified that he tried unsuccessfully to serve Douglas with notice of the damages hearing. Magura, an economist, testified that, as a result of JCI terminating appellant's employment, she suffered \$337,000 in lost wages. Appellant testified at the hearing that, as a result of "almost daily" sexual harassment by Douglas, she suffered anxiety and panic attacks, for which she was prescribed medication. Appellant also testified that she suffered depression, which affected her at work and at home. Appellant stated that she will probably have to take medication "for life" for her panic attacks.

{¶ 43} On October 22, 2012, the trial court issued a judgment entry in which it stated, after considering the record and the testimony presented at the damages hearing that, even taking the allegations against Douglas in the complaint as true, appellant did not allege "a cause of action against Douglas individually" under R.C. 4112.02. Specifically, the trial court found that R.C. 4112.02 "is set up to encourage proactive prevention on the part of employers and to punish *them* for allowing such behavior to

occur.” (Emphasis in original.) Accordingly, appellant’s first claim is for vicarious liability against JCI, and not for direct action against Douglas. Similarly, the trial court found that no evidence was presented to show that JCI’s decision to terminate her was a pretext, or that Douglas “set her up” to be fired in retaliation for her sexual harassment claim. The trial court further found that appellant’s claims for “negligent hiring, retention, and supervision” are directed at JCI, and do not state actionable claims against Douglas.

{¶ 44} As for appellant’s claim for intentional infliction of emotional distress, the trial court found that appellant’s complaint does successfully state a claim for which Douglas may be held individually liable. However, the evidence presented at the damages hearing did not establish that appellant’s alleged injuries were severe and disabling enough to warrant an award of damages. Specifically, the trial court found that appellant did not present a “guarantee of genuineness” that her injuries are “serious enough to be rendered compensable.” In support of its finding, the trial court stated that such a “guarantee of genuineness” is best demonstrated by expert medical testimony or, at least, some evidence beyond appellant’s own testimony that supports her claim of severe emotional distress as a result of Douglas’ alleged conduct.

{¶ 45} Based on its findings, the trial court concluded that appellant “failed to establish that she suffered compensable serious emotional distress attributable to [her] claim of intentional infliction of emotional distress. Therefore, the court can not [sic] award [her] damages.” Appellant filed a timely notice of appeal on November 19, 2012.

{¶ 46} On appeal, appellant sets forth ten assignments of error:

Assignment of Error No. 1

The trial court erred when it failed to grant summary judgment to appellant.

Assignment of Error No. 2

The trial court erred by granting a blanket objection of inadmissibility to appellee.

Assignment of Error No. 3

The trial court erred in granting summary judgment upon the quid pro quo claim.

A. Quid Pro Quo offering incentives does not require a tangible detriment.

B. Appellant established a tangible detriment by undesirable reassignment or undesirable work assignment.

C. Appellant establishes Douglas' orchestration of her termination as a tangible employment action.

Assignment of Error No. 4

The trial court erred in granting summary judgment upon the hostile work environment claim.

Assignment of Error No. 5

The trial court erred in dismissing appellant's intentional infliction of emotional distress claim.

Assignment of Error No. 6

The trial court erred in granting summary judgment upon appellant's negligent supervision and negligent retention claims.

Assignment of Error No. 7

The trial court erred in granting summary judgment upon disputed facts.

Assignment of Error No. 8

The trial court erred by denying damages against Douglas in default.

Assignment of Error No. 9

The trial court erred in failing to find respondeat superior liability upon Douglas' default, or at least in not limiting the analysis to agency.

Assignment of Error No. 10

The trial court erred in failing to consolidate the cases.

{¶ 47} We will first address appellant's assignments of error that involve preliminary and evidentiary issues, followed by a determination as to appellant's first, third, fourth, fifth and sixth assignments of error, in which she argues that the trial court erred by granting summary judgment to JCI and dismissing her complaint on that basis.

Improper “Blanket Objection” to Admissibility of Evidence

{¶ 48} In her second assignment of error, appellant asserts that the trial court erred by granting JCI’s “blanket objection” as to the admissibility of evidence she presented in support of her summary judgment motion. In support, appellant argues that JCI did not specifically object to each item of evidence that was offered by appellant and, as a result, she was “deprived of an opportunity to respond.” Appellant further argues that the trial court improperly engaged in “guessing” as to what evidence JCI sought to exclude. We disagree, for the following reasons.

{¶ 49} Civ.R.56(C), which governs the submission of evidence in support of summary judgment, confines the trial court’s consideration to “the pleadings, depositions, answers to interrogatories, written admission, affidavits, transcripts of evidence, and written stipulations of fact * * *.” “Furthermore, when ruling on a summary judgment motion, a court may consider only evidence that would be admissible at trial.” *Wesley v. Walraven*, 4th Dist. Washington No. 12CA18, 2013-Ohio-473, ¶ 21, citing *Pennisten v. Noel*, 4th Dist. Pike No. 01CA669, 2002 WL 254021 (Feb. 8, 2002). Finally, the issue of whether or not the trial court erred by excluding evidence is moot in this case, since our review on summary judgment is de novo. *Alexander v. Motorist Mut. Ins. Co.*, 1st Dist. Hamilton No. C-110836, 2012-Ohio-3911, ¶ 17, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶ 50} On consideration, we find that evidence presented in support of each of appellant’s assignments of error will be considered by this court at the appropriate time in

deciding this appeal. Further, because our review of the trial court's decision is de novo, we are not bound by the trial court's decision to include or exclude any particular piece of evidence. Accordingly, the claim raised in appellant's second assignment of error is not well-taken.

Dismissal of Intentional Infliction of Emotional Distress Claim

{¶ 51} In her fifth assignment of error, appellant asserts that the trial court erred when it found that appellant did not establish her claim for severe emotional distress. In support, appellant argues that the burden to establish her claim is preponderance of the evidence, and that a jury should be allowed to decide "whether Douglas acted outrageously and whether [appellant] suffered sufficient emotional distress."

{¶ 52} In order to establish a claim for intentional infliction of emotional distress a plaintiff must show that:

(1) the defendant either intended to cause emotional distress, or knew or should have known that its actions would result in serious emotional distress; (2) defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency, and would be considered utterly intolerable in a civilized community; (3) defendant's actions proximately caused injury to plaintiff; and (4) the mental anguish plaintiff suffered is serious and of such a nature that no reasonable person could be expected to endure.

Jackson v. Saturn of Chapel Hill, Inc., 5th Dist. Stark No. 2005 CA 00067, 2005-Ohio-5302, ¶ 23, citing *Ashcroft v. Mt. Sinai Med. Ctr.*, 68 Ohio App.3d 359, 588 N.E.2d 280 (8th Dist.1990).

{¶ 53} The Ohio Supreme Court has held that “severe emotional distress” includes “traumatically induced neurosis, psychosis, chronic depression, or phobia.” *Finley v. First Realty Property Mgt., Ltd.*, 195 Ohio App.3d 366, 2009-Ohio-6797, 924 N.E.2d 378 (9th Dist.). In order to establish such a claim, the plaintiff’s injury must “be of such magnitude that ‘a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.’” *Jones v. White*, 9th Dist. No. 18109, 1997 WL 669737 (Oct. 15, 1997), quoting *Carney v. Knollwood Cemetery Assn.*, 33 Ohio App.3d 31, 40, 514 N.E.2d 430 (8th Dist.1986). Generally, Ohio courts do not require a plaintiff to submit expert medical testimony to establish serious emotional distress; however, he/she must present some evidence in addition to his/her “own testimony to establish severe emotional distress.” *Buckman-Peirson v. Brannon*, 159 Ohio App.3d 12, 2004-Ohio-6074, 822 N.E.2d 830, ¶ 47.

{¶ 54} In this case, only appellant and her economic expert testified at the damages hearing. As set forth above, appellant testified as to the nature of Douglas’ behavior, including sexual innuendo, asking her out, and making lewd comments to her while she was working. Appellant stated that, as a result of Douglas’ behavior, she experienced depression and “anxiety attacks” for which she obtained medication and that she experienced some hair loss. She stated that Douglas sexually harassed for “about 2

years.” However, no testimony was presented by appellant’s doctors or any other person who could corroborate her claims of serious emotional distress.

{¶ 55} This court has reviewed the entire record in this case, including appellant’s deposition testimony and the testimony she gave at the damages hearing. Upon consideration thereof, we find that appellant has not presented any evidence, other than her own testimony, to establish that she experienced severe emotional distress as a result of Douglas’ behavior, or that she was unable to cope adequately with the mental distress she claims was engendered by the circumstances of the case. Accordingly, the trial court did not err when it found that, although the complaint properly alleged a claim for intentional infliction of emotional distress against Douglas, appellant failed to meet her burden to present evidence establishing the severity of her injury. Appellant’s fifth assignment of error is not well-taken.

Consideration of “Disputed Testimony”

{¶ 56} In her seventh assignment of error, appellant asserts that the trial court erred by granting summary judgment to JCI based on “disputed facts.” In support, appellant appears to argue that the trial court should not have given any weight to the deposition testimony of Molina, Waldron and Schultz because it contradicted statements they made in affidavits that supported appellant’s complaint. Therefore, summary judgment is not proper and the case should have been submitted to a jury. We disagree.

{¶ 57} The Supreme Court of Ohio has held that, in cases where the deposition testimony of a non-party witness is inconsistent with prior statements made in that

witness's affidavit, such contradiction does not, without explanation, create a genuine issue of material fact that will defeat an opposing party's motion for summary judgment. *Pettiford v. Aggarwal*, 126 Ohio St.3d 413, 2010-Ohio-3237, 934 N.E.2d 913, ¶ 38. The rationale for this conclusion is that, if a witness "is permitted to defeat summary judgment at the eleventh hour by changing his or her opinions without a sufficient explanation, summary judgment will be rendered meaningless." *Id.* at ¶ 34.

{¶ 58} As set forth above, Molina and Schultz stated in their affidavits that they generally knew Douglas to be offensive and abrasive toward JCI employees, both male and female. Waldron stated in his affidavit that he heard Douglas ask appellant out, and make comments to her with sexual overtones; however, he did not say that appellant told him she was upset by these comments, which he believed at the time to be "a joke." In their depositions, none of the men stated that they actually saw Douglas touch appellant in a sexual manner, or directly heard him make any of the comments that appellant relies on to support her claim, and none of them ever filed a sexual harassment complaint against Douglas.

{¶ 59} In this case appellant, the non-moving party, is attempting to defeat summary judgment in favor of JCI by claiming that three of her own witnesses gave deposition testimony that was inconsistent with affidavits that were submitted in support of her complaint. However, upon examination of those statements, we agree with the trial court that the deposition testimony of Molina, Schultz and Waldron, while not entirely supportive of the conclusion appellant advances in her complaint, is not so

inconsistent with the statements made in their affidavits as to create an issue of fact that can only be resolved by a jury. Accordingly, on consideration, we find that the trial court did not err by basing its decision on the evidence that was presented in the record, which included both the affidavits and the deposition testimony of Molina, Schultz and Waldron. Appellant's seventh assignment of error is not well-taken.

Failure to Order Douglas to Pay Damages

{¶ 60} In her eighth assignment of error, appellant asserts that the trial court erred by not ordering Douglas to pay damages for intentional infliction of emotional distress. In support, appellant first argues that Douglas must be held individually liable for damages due to his "discriminatory behavior" because she obtained a default judgment, and the testimony presented by appellant and her economic expert at the damages hearing was undisputed. Appellant further argues that the trial court erroneously held that her claim against Douglas is limited to her claim of intentional infliction of emotional distress because "[p]aragraphs [sic] 14 of the complaint alleges an action against the Defendants (plural) for sexual harassment. Paragraph 15 of the Complaint makes a specific claim against Douglas and then subsequently against Johnson Controls through respondent [sic] superior."

{¶ 61} As to whether appellant is automatically entitled to damages from Douglas because she obtained a default judgment, the Supreme Court of Ohio has held that, where claims are brought against both an employer and an employee, and a default judgment is obtained against the employee, the employer must be allowed to contradict evidence

admitted at the default hearing in subsequent summary judgment proceedings. *Archacki v. [Greater Cleveland] Regional Transit Auth.*, 8 Ohio St.3d 13, 14, 455 N.E.2d 1285 (1983), quoting *Archacki v. Regional Transit Auth.*, 8th Dist. Cuyahoga No. 43681, 1982 WL 2526 (Nov. 10 1982), paragraph two of the syllabus. Appellant’s first argument is not well-taken.

{¶ 62} As to the remaining argument articulated in this assignment of error, the relevant question is not what claims the complaint states against the defendants together, but what causes of action can be brought against each separate defendant. Contrary to appellant’s assertion, paragraph 15 of the complaint does not even mention the tort of intentional infliction of emotional distress. It does, however, raise claims of “hostile workplace” and “quid pro quo sexual harassment” against Douglas, as well as “pretextual termination,” and liability “through respondent [sic] superior, apparent and actual agency, negligent supervision, and or negligent retention.”

{¶ 63} R.C. 4112.02 states, in pertinent part, that:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, 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.

{¶ 64} The statute further defines an “employer” as “any person acting directly or indirectly in the interest of an employer.”

{¶ 65} In *Genaro v. Central Transp., Inc.*, 84 Ohio St.3d 293, 703 N.E.2d 782 (1999), the Ohio Supreme Court held that, “[f]or purposes of R.C. Chapter 4112, a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112.” *Id.* at syllabus. In this case, the trial court found that appellant’s claims for retaliatory discharge, negligent hiring, retention, and supervision “do not state claims against Douglas” because they were based on the actions of her employer, JCI. However, it is undisputed that Douglas was appellant’s supervisor during the relevant times of her employment at JCI. Accordingly, the trial court erred by finding that appellant’s claims pursuant to R.C. Chapter 4112 could not be brought against Douglas individually.

However, as stated above, appellant failed to establish that her terms, conditions and/or privileges of employment were affected by Douglas’ behavior. Accordingly, the trial court did not err by not ordering Douglas to pay damages for those claims, and appellant’s eighth assignment of error is not well-taken.

Failure to Find Respondeat Superior Liability

{¶ 66} In her ninth assignment of error, appellant asserts that the trial court erred by not finding that JCI was liable for Douglas’ acts pursuant to the doctrine of respondeat superior. In support, appellant argues that the default judgment against Douglas makes

JCI automatically liable in damages, so long as Douglas' prohibited acts were committed while he was working as an agent of JCI.

{¶ 67} On consideration of our determination as to appellant's eighth assignment or error, we find that Douglas' default does not automatically create liability on the part of JCI through the doctrine of respondeat superior. Appellant's ninth assignment of error is not well-taken.

Failure to Consolidate with Case No. CI0201105486

{¶ 68} In her tenth assignment of error, appellant asserts that the trial court erred by failing to consolidate her case against JCI with the lawsuit filed by Elizabeth Gorajewski, case No. CI0201105486. In support, appellant argues that both cases involve the same defendant, at least several of the same witnesses, and similar claims of sexual harassment. We disagree, for the following reasons.

{¶ 69} The trial court's consolidation of cases is governed by Civ.R. 42(A) which states, in relevant part, that:

(1) *Generally.* When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

{¶ 70} The decision to consolidate pending cases is within the sound discretion of the trial court, and will not be disturbed on appeal absent a finding of abuse of that discretion. *Perry v. Perry Local School Dist.*, 11th Dist. Lake No. 99-L-174, 2000 WL 816248 (June 23, 2000). An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983). In addition, the Ohio Supreme Court has held that “the management of cases lies within the discretion of the court, and not with the parties so long as the rights of the parties are adequately protected.” *Dir. of Highways v. Kleines*, 38 Ohio St.2d 317, 320, 313 N.E.2d 370 (1974).

{¶ 71} Although appellant argues that consolidation of her case with case No. CI0201105486 would save judicial resources, she utterly fails to explain how the trial court’s decision not to consolidate the two cases impaired her own ability to litigate her claims. Without such a showing, we cannot say that the trial court’s decision was arbitrary, unreasonable, or unconscionable. Appellant’s tenth assignment of error is not well-taken.

Summary Judgment

{¶ 72} We note at the outset that an appellate court reviews a trial court’s granting of summary judgment de novo, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 73} Initially, the party seeking summary judgment bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The motion may be filed "with or without supporting affidavits[.]" Civ.R. 56(A). Thereafter, the burden shifts to the non-moving party to show why summary judgment is inappropriate. Civ.R. 56(E). "If the non-movant fails to respond, or fails to support its response with evidence of the kind required by Civ.R. 56(C), the court may enter summary judgment in favor of the moving party." *Snyder v. Ford Motor Co.*, 3d Dist. Allen No. 1-05-41, 2005-Ohio-6415, ¶ 11; Civ.R. 56(E). A fact is "material" if it is "one that would affect the outcome of the suit under the applicable substantive law." *Stachura v. Toledo*, 177 Ohio App.3d 481, 895 N.E.2d 202, 2008-Ohio-3581, ¶ 23 (6th Dist.), quoting *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist.1999).

{¶ 74} In her first assignment of error, appellant asserts that the trial court erred by not granting her cross-motion for summary judgment. In support, appellant argues that, because a default judgment was obtained against Douglas, all of the facts alleged in her

complaint, and supported by deposition testimony given by appellant and other witnesses, should be taken as true.

{¶ 75} For the reasons stated in our determination of appellant’s ninth assignment of error, we find that appellant is not entitled to summary judgment solely because a default judgment was obtained against Douglas. Accordingly, her first assignment of error is not well-taken.

{¶ 76} In her third assignment of error, appellant asserts that the trial court erred by not finding that appellant presented sufficient admissible evidence to raise an issue of fact as to *quid pro quo* sexual harassment. In support, appellant argues that “uncontroverted testimony established that Brian Douglas offered employment incentives for sexual acts,” and that Douglas “set her up” to be fired when she refused to submit to his advances.

R.C. 4112.02(A) prohibits an employer from engaging in sexual discrimination against an employee. Case law interpreting and applying Title VII of the Civil Rights Act of 1964, Section 701 *et seq.*, as amended, 42 U.S.C.A. [Section] 2000e *et seq.* (“Title VII”) is generally applicable to cases involving R.C. Chapter 4112. *Genaro v. Cent. Transp., Inc.*, 84 Ohio St.3d 293, 703 N.E.2d 782 (1999). Sexual harassment that constitutes discrimination on the basis of sex and violates Title VII is generally categorized as either a *quid pro quo* claim or a hostile work environment claim. The terms “*quid pro quo*” and “hostile work environment” serve to

distinguish roughly between cases in which threats are carried out (*quid pro quo*) and cases in which threats are not carried out or are absent altogether (hostile work environment). *Burlington Ind., Inc. v. Ellerth* (1998), 524 U.S. 742, 751-755, 118 S.Ct. 2257, 2264-2265, 141 L.Ed.2d 633, * * *. *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 722-723, 729 N.E.2d 813 (10th Dist.1999).

{¶ 77} Generally, a claim involves quid pro quo harassment if “the sexual advances are directly linked to the grant or denial of a tangible economic benefit.” *West v. Curtis*, 7th Dist. Belmont No. 08 BE 28, 2009-Ohio-3050, ¶ 41. In this case, appellant claims that she was forced to work “hard jobs,” which she defines as having to lift 50 pound seats instead of 20 pound seats, five or six times over a two-year period. It is undisputed that, during that same period, appellant took several months off work to give birth to a child, and she also had two short-term layoffs. In addition, testimony was presented by Schultz that appellant was allowed to substitute for other workers on occasion during that same time period, even though she did not have the seniority to be considered for that position. Finally, testimony was presented that appellant’s work hours were not cut during the relevant time period, and she received scheduled pay increases based on the time she worked for JCI.

{¶ 78} As to whether appellant’s termination constitutes a tangible economic detriment, it is undisputed that the time sheets filled out by appellant for herself and Schuler stated that she was on time for work on two separate days, when surveillance

cameras showed that she was late. On one occasion, appellant used her ID card to enter the building after her scheduled shift had begun, and then did not use that same card to punch in at the time clock. Later, when she was told to fill out a time sheet for that day, appellant stated that she was on time for work. In addition, although appellant claims that Douglas “approved” her statements on the time sheets by signing them, Hambright testified that a supervisor’s signature on the sheets was merely evidence that the sheets were filled out and turned in, and were not a certification by the supervisor that the information on those sheets was accurate.

{¶ 79} On consideration of the foregoing, even if appellant’s allegations as to Douglas’ behavior are taken as true, we find that the record does not contain evidence to demonstrate that she suffered a tangible economic benefit or detriment when she was asked to perform different duties on several occasions. Finally, this court recently held that “temporal proximity does not support a claim of retaliation absent other compelling evidence.” *Whitaker v. FirstEnergy Nuclear Operating Co.*, 6th Dist. Ottawa No. OT-12-021, 2013-Ohio-3856, ¶ 34, quoting *Coch v. Gem Indus.*, 6th Dist. Lucas No. L-04-1347, 2005-Ohio-3045, ¶ 40, citing *Boggs v. The Scotts Co.*, 10th Dist. Franklin No. 04AP-425, 2005-Ohio-1264, ¶ 26.

{¶ 80} In this case, in spite of appellant’s allegation that she was fired because Douglas “set her up” in retaliation for not succumbing to his advances, there is no evidence that JCI was made aware of Douglas’ behavior, nor is there evidence that appellant was terminated for any reason other than her admitted decision to state that she

was on time for work on two separate occasions when she was actually late.

Accordingly, we find that the trial court did not err when it found that the record contained insufficient evidence to support appellant's claim of quid pro quo harassment. Appellant's third assignment of error is not well-taken.

{¶ 81} In her fourth assignment of error, appellant asserts that the trial court erred by finding that appellant did not present evidence to establish a claim of hostile work environment. In support, appellant argues that it is undisputed that Douglas was her supervisor and that she demonstrated the existence of a tangible employment detriment due to the actions of Douglas. Therefore, appellant reasons that, pursuant to *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 729 N.E.2d 813 (10th Dist.1999), JCI may not defend itself from vicarious liability by asserting that it had a sexual harassment policy.

{¶ 82} In order to establish a claim of hostile work environment, the plaintiff/employee must show:

(1) that the harassment was unwelcome; (2) that the harassment was based on sex; (3) that the harassing conduct was sufficiently severe or pervasive to affect the "terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment," and (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

Silvey v. Washington Sq. Chiropractic Clinic, 11th Dist. Geauga No. 2011-G-3047, 2012-Ohio-6214, ¶ 26, quoting *Hampel v. Food Ingredient Spec.*, 89 Ohio St.3d 169, 176-177, 729 N.E.2d 726 (2000).

{¶ 83} As to the employer's potential liability for sexual harassment, Ohio courts have held that:

[W]hen harassment by a supervisor with authority over the employee culminates in a tangible employment action against the plaintiff, the employer is subject to vicarious liability and the analysis ends. * * * Where no tangible employment action was taken, but a hostile work environment was created, the employer may avail itself of an affirmative defense to liability. To successfully raise this affirmative defense, an employer must establish two elements by a preponderance of the evidence: first, that the employer exercised reasonable care to prevent and correct properly any sexually harassing behavior, and second, that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Peterson at 723.

{¶ 84} As set forth in our determination of appellant's third assignment of error, the record does not demonstrate that appellant suffered a tangible employment detriment. Accordingly, JCI is entitled to assert the existence of a sexual harassment policy as an affirmative defense.

{¶ 85} As set forth above, JCI did have a written sexual harassment policy that was presented to employees. Appellant stated that she received a copy of the written policy, which she acknowledged with her signature. However, she stated that she was not aware of all of the provisions of the policy because she did not read it. In addition, testimony was presented to show that JCI established a hotline specifically for the purpose of reporting all types of harassment. Appellant testified in her deposition that, for whatever reason, she did not call the hotline to report Douglas' behavior.

{¶ 86} In addition to appellant's testimony, Sarah Frost testified that she knew about the sexually explicit message that Douglas intended for her but mistakenly sent to all employees, however, she never actually read the message, and it did not bother her. None of the male employees who testified actually saw the message, and none of them filed a complaint about its contents.

{¶ 87} DeMoss and appellant both testified that the first time appellant told DeMoss, her union representative, that she was sexually harassed by Douglas was after she was suspended and an investigation was begun into the falsification of her time sheets. Finally, appellant did not formally complain to management that she was harassed by Douglas until one year after her employment was terminated, and she became aware that Gorajewski had reported being sexually harassed, resulting in Douglas' termination by JCI.

{¶ 88} We agree with the trial court that much of the evidence presented by appellant was inadmissible hearsay, since it was based on statements made by co-workers

who did not actually hear Douglas make sexually explicit comments to appellant. We further agree with the trial court that, even after construing all the evidence in appellant's favor, including her allegation that Douglas' actions created a hostile workplace environment, that the plaintiff has been unable to establish that Douglas' conduct directly or indirectly affected the terms or conditions of her employment. Appellant's fourth assignment of error is not well-taken.

{¶ 89} In her sixth assignment of error, appellant asserts that the trial court erred by finding that there was not enough admissible evidence in the record to demonstrate that JCI had "actual or constructive knowledge" that Douglas sexually harassed appellant, and dismissing her claims for its negligent hiring, supervision and retention of Douglas on that basis. In support, appellant argues that the record contains testimony to establish her allegation that JCI must have been aware of Douglas' "propensity" to sexually harass women, including appellant. Appellant further argues that JCI was aware that Douglas "falsified documents, flaunted company policy, and engaged in other shenanigans." Accordingly, appellant concludes that "it is entirely foreseeable that Douglas might harass women who work under him, including [appellant], and [JCI] breached a duty to supervise/retain him."

{¶ 90} In order to successfully establish a claim for negligent retention and supervision, a plaintiff must show:

- (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's actual or constructive knowledge of such

incompetence, (4) the employer's act or omission causing plaintiff's injuries, and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Id.* at 729.

{¶ 91} It is undisputed that appellant was in an employment relationship with Douglas. With respect to the second element, it has been held that incompetence can relate not only or exclusively to an employee's lack of ability to perform the tasks that his or her job involves, but also "to behavior while on the job inapposite to the tasks that a job involves and which materially inhibits other employees from performing their assigned tasks. Sexual harassing behavior is within that definition." *Payton v. Receivables Outsourcing, Inc.*, 163 Ohio App.3d 722, 840 N.E.2d 326, 2005-Ohio-4978, ¶ 42 (8th Dist.), quoting *Harmon v. GZK, Inc.*, 2d Dist. Montgomery No. 18672, 2002 WL 191598 (Feb. 8, 2002). The plaintiff must also establish that the employer, this case JCI, had actual or constructive knowledge of such incompetence; more specifically, knowledge of the behavior that the plaintiff alleges.

{¶ 92} While the plaintiff in this case has taken numerous depositions and submitted affidavits, she has presented no admissible evidence on this point as required by Civ.R. 56. It is undisputed that appellant did not make any report of Douglas' behavior until one year after she was terminated from her employment for falsifying her time sheets. It is further undisputed that while employed by JCI, appellant never called the employer's anonymous hotline to report any of Douglas' offending behavior, and that she reported this behavior a year after she learned of Gorajewski's complaint. Once

Douglas' behavior was reported by Gorajewski, JCI took swift action by firing Douglas. Prior to this, JCI had no knowledge of any of Douglas' misconduct as alleged by appellant. Appellant's failure to complain until a year after termination unreasonably deprived JCI of the ability to take appropriate corrective action for her sake and the sake of the company's other employees. *See Deters v. Rock-Tenn Co., Inc.*, 6th Cir. No. 06-4356, 2007 WL 2404515 (Aug. 22, 2007).

{¶ 93} On consideration of the foregoing, we find that appellant has failed to establish that JCI knew or should have known that Douglas was sexually harassing appellant, or that such failure was the cause of any alleged injuries suffered by appellant. Accordingly, appellant's claim of negligent hiring, supervision and retention fails as a matter of law, and her sixth assignment of error is not well-taken.

{¶ 94} On consideration whereof, this court finds further that there remains no other genuine issue of material fact and, after construing all the evidence most strongly in favor of appellant, JCI is entitled to summary judgment as a matter of law. The judgments of the Lucas County Court of Common Pleas are affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgments affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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