

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JANE DOE/ CARY ZIMMERMAN et al.,)
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 Plaintiffs)
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 v.)
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 WESTERN RESERVE CO., LLC, et al.)
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 Defendants)
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)

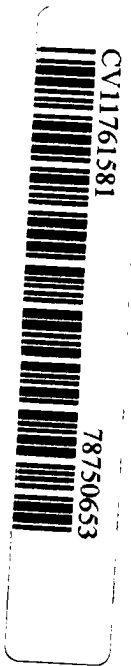
CASE NOS. 11-CV-761581
12- CV- 768278

JUDGE PAMELA A. BARKER

**OPINION AND JOURNAL ENTRY ON
MOTIONS FOR SUMMARY JUDGMENT
OF PLAINTIFFS AND DEFENDANTS**

This matter is before the Court on the Defendants' Motion For Summary Judgment, filed on 6/29/12, and opposed by Plaintiffs on 8/17/12. Additionally, the Plaintiffs collectively filed a Motion for Partial Summary Judgment on 7/5/12, which was opposed by Defendants on 8/30/12. Both sides filed reply briefs as well.

For factual background, this matter includes two consolidated cases involving two families of Plaintiffs who lived on the Defendants' premises at Carriage Hill Apartments in Chagrin Falls, Ohio. Plaintiff Jessica Barczyk was an employee who lived with fellow employee (and fiancée) Damon Harvey. The couple also lived with their minor son John Doe. The other household consisted of Plaintiffs David Zimmerman (an employee), his wife Cary Zimmerman, who are the parents of Jacob Zimmerman (also an employee) and their daughter Trina Zimmerman. After Defendants claim they received a tip about drug use on premises, they asked the employees Barczyk, Harvey and both Zimmermans to submit to a random drug test. Barczyk and Jacob Zimmerman complied and passed the tests. The other Plaintiffs refused and were terminated. Even though they passed the tests, due to their residential arrangements, Plaintiffs Doe and Jacob Zimmerman were terminated as well. Since the on-site apartment was part of the Plaintiffs' compensation and a requirement for their employment, they were all evicted in light of the terminations. Plaintiffs collectively then brought the following actions with claims regarding their termination, the scope of the drug test, a public policy violation, an emotional distress claim, unpaid wages claims, invasion of privacy, intentional misrepresentation, and



wrongful eviction. Plaintiffs John Doe, Cary Zimmerman and Trina Zimmerman join in this case as to the wrongful eviction claims.

Civ. R. 56(C) provides in relevant part as follows:

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. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that: *** (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***.'" *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific facts showing that there is a genuine issue

for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

“Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials which directly negate its opponent’s claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge ‘that there is an absence of evidence to support the nonmoving party’s case.’ *Id.* at 325. See, also, *Hodgkinson v. Dunlop Tire & Rubber Corp.* (1987), 38 Ohio App.3d 101, 526 N.E.2d 89.” *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73. Given the above standard, the Court will analyze these claims by assessing Defendants’ Motion first.

A. DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

1) DEFENDANTS HAD THE RIGHT TO TERMINATE THE PLAINTIFFS FOR ANY OR NO REASON AS THEY WERE EMPLOYEES AT-WILL, EXCEPT A GENUINE ISSUE OF FACT EXISTS AS TO JESSICA BARCZYK AND JACOB ZIMMERMAN.

Defendants first argue that, under Ohio law and absent any agreement to contrary, an employment relationship is regarded as “at-will” and subject to termination at any time by the employer. (*Defendants’ Motion for Summary Judgment*, p.6, ¶12). This classification is not at issue for purpose of the pending Motions as Plaintiff’s acknowledge their status as “at-will” employees (*Plaintiffs’ Brief Opposing Summary Judgment*, p.5, ¶12).

Defendants argue that the termination of the Plaintiffs’ was supported by the fact that as “at-will” employees they may be terminated for 1) any and no reason at all; 2) for possession

or use of illegal drugs or narcotics; 3) and for refusal to take a drug test (*Defendants' Motion for Summary Judgment*, p.6-12).

Specifically, in the handbook Defendants supply to employees, it reads: " Any employee who reports for work or who is at work is subject to chemical screening and/or blood/alcohol testing to determine the presence of unauthorized drugs or alcohol in the body." (*Defendants' Motion for Summary Judgment*, p.9, ¶12).

Defendants liken the facts at hand to those in the case *SETA v. Reading Rock, Inc* (1995), 100 Ohio App.3d 731, where the plaintiff was terminated for a positive drug test. In *Reading Rock*, the court specifically held that: "the drug policy was simply an elaboration and the implementation of Reading's employee handbook, which expressly lists the use of illegal drugs as a cause for dismissal without prior warning." *Id.* at 738.

Importantly, the court went on to state, "the existence of Reading's policy in and of itself does not alter the employment at-will relationship... both employer and employee retain the right to terminate the employment for any or no reason." *Id.*

Defendants point out that, as in *Reading Rock*, the Plaintiffs in this case signed applications that specifically stated that the relationship may be terminated at any time, for any reason at all, as an at-will employment relationship and that as employees they are subject to mandatory drug testing. Given the at-will employee status of each of the Plaintiffs and given the fact that they were subject to random drug screening, the Defendants' Motion for Summary Judgment as to the termination of the Plaintiffs Damon Harvey and David Zimmerman, who refused to take the test and admitted to various drug related activities in their depositions, is **GRANTED**. See *Deposition of David Zimmerman* (admitting drug use), pp. 19-20; See *Deposition*

of Cary Zimmerman (David Zimmerman's wife as to her husband's drug use), p.16. See *Deposition of Damon Harvey* (advising he had a criminal drug case while employed by Defendants and did not notify Defendants), p. 18 and (admitting using drugs on Defendants' premises at work) pp. 24-25.

As to the remaining Plaintiffs, Jessica Barczyk and Jacob Zimmerman, who claim that they submitted to the drug tests based upon Lisa Jackson's representation or assurance that if they took and passed the tests they would be able to maintain their employment, genuine issues of material fact exist precluding summary judgment in favor of Defendants on their claims.

First, there is a genuine issue of material fact for a jury as to Jessica Barczyk and Jacob Zimmerman's public policy claims. The Court in *Painter v. Graley*, 70 Ohio St. 3d 377, 384 (Footnote 8), defined the elements for a violation of public policy as follows:

1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element);
2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element);
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element),
4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

As such, a genuine issue of material fact exists as to these elements as to these two employees who complied with the drug test and who additionally did not pose the same danger as the other terminated employees. Essentially, these employees were terminated in large part due to their relationships to the other non-compliant Plaintiffs. Additionally, Plaintiffs Jessica Barczyk and Jacob Zimmerman can also proceed on their claims for Intentional Misrepresentation, as a material issue of fact exists as to what Defendants' representative Lisa

Jackson related to these two employees who took and subsequently passed the drug test. Plaintiffs contend they would not have subjected themselves to the drug test if they knew they would be terminated as a matter of course since their housemates and fellow employees refused their own tests. As such, genuine issues of material fact for the jury exist as to these termination claims regarding Plaintiffs Jessica , Jessica Barczyk and Jacob Zimmerman only. Defendants' Motion for Summary Judgment on those issues as to these specific Plaintiffs is DENIED.

2) MANDATORY DRUG TESTING DOES NOT CONSTITUTE AN INVASION OF PRIVACY, BUT THE SCOPE OF THE TESTING IN THIS CASE PRESENTS A GENUINE ISSUE OF MATERIAL FACT FOR THE JURY TO CONSIDER AS TO PLAINTIFFS JESSICA BARCZYK AND JACOB ZIMMERMAN ONLY

To establish a claim for invasion of privacy, one of the following must be proven: 1) "the unwarranted appropriation or exploitation of one's personality"; 2) "the publicizing of one's private affairs with which the public has no legitimate concern"; or 3) "the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities". *Seta v. Reading Rock*, 100 Ohio App. 3d at 739.

In *Reading Rock* the court concluded that mandatory drug testing in general "did not constitute an invasion of privacy". *Id.* (See Also *Groves v. Goodyear Tire & Rubber Co.* (1991), 70 Ohio App.3d 656, holding that drug testing by employers did not constitute an actionable invasion of an employee's right to privacy).

While testing in general has been found to be acceptable by courts in Ohio, Plaintiffs Jessica Barczyk and Jacob Zimmerman are alleging that the drug tests they were subjected to were so invasive, that this particular form of testing used by the Defendants rose to the level of violating

their privacy. Given the affidavits of these Plaintiffs (*Jessica Barczyk Affidavit* ¶ 4.6; and *Jacob Zimmerman Affidavit* ¶4), a genuine issue of fact exists as to this claim for Plaintiffs Jessica Barczyk and Jacob Zimmerman. Accordingly Defendant's Motion for Summary Judgment is **DENIED** on this issue as to these specific Plaintiffs.

3) GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WAGE/OVERTIME CLAIMS FOR PLAINTIFFS JESSICA BARCZYK, JACOB ZIMMERMAN, DAVID ZIMMERMAN AND DAMON HARVEY

In their complaints, Plaintiffs Jessica Barczyk, Jacob Zimmerman, David Zimmerman, and Damon Harvey are making individual and varying claims for unpaid overtime wages or minimum wage claims. In their Motion for Summary Judgment, Defendants contend that the Plaintiffs do not offer any hard data or details as to their overtime pay and roughly guessed at any figures owed to them (*Jessica Barczyk Deposition*, p. 24-25; *David Zimmerman Deposition*, p. 34-35; *Damon Harvey Deposition*, p. 92-93; *Jacob Zimmerman Deposition*, p. 13). To further establish these claims and to support their case on their own Motion for Summary Judgment, these Plaintiffs provided affidavits indicating averages and estimates for the amounts that they are claiming in their Motion for Partial Summary Judgment. Defendants argue in their own Motion that: 1) the affidavits contradict the deposition testimony; and 2) the affidavits constitute the first mention in sworn testimony of any specifics associated with Plaintiffs' claims. (*Defendants' Motion for Summary Judgment*, p.6, ¶11). The Court finds that these arguments are without merit.

Relying upon excerpts from the Plaintiffs' depositions, the Defendants point out that at their depositions, all the Plaintiffs testified that they did not have specifics numbers of wages owed in front of them and that the best they can offer at the time of the depositions were

general estimates. The subsequent filing of affidavits by these Plaintiffs does not contradict the information provided at depositions since at their depositions each one testified that he or she was not prepared or able to recall "hard numbers". Any slight inconsistencies in the deposition testimony, the generalizations and numbers provided later in affidavits and the credibility of these affidavits can be attacked by Defendants at trial through cross-examination.

Accordingly, Summary Judgment for Plaintiffs wage claims are **DENIED** as genuine issues of material facts exist for the jury.

4) PLAINTIFF JESSICA BARCZYK PRESENTS NO EVIDENCE TO SUPPORT HER CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In their Motion for Summary Judgment, Defendants argue that Plaintiff Jessica Barczyk's claim of intentional infliction of emotion distress must be dismissed, as she has failed to support this claim with any evidence. (*Defendants' Motion for Summary Judgment*, p.21, Section E).

The Eighth District Court of Appeals summarized the required elements to establish a case of intentional infliction of emotional distress in the case *Hines v. Center for Human Services*, 1988 Ohio App. LEXIS 2540:

In *Pyle v. Pyle* (1983), 11 Ohio App. 31, 34, this court set forth the requisite elements to establish a prima facie case of intentional infliction of serious emotional distress:

1. The actor either intended to cause emotional distress or should have known that actions taken would result in serious emotional distress to the plaintiff.
2. The actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and can be considered as utterly intolerable in a civilized community.

3. The actor's actions were the proximate cause of plaintiff's psychic injury; and

4. The mental anguish suffered by the plaintiff is serious and of a nature that no reasonable man could be expected to endure it.

Hines, at *9.

Defendants' argument centers on the fact that Plaintiff Jessica Barczyk does not offer any expert testimony or any medical records and fails to meet the required elements to support her claim. Importantly, by her own admission, she did not receive medical treatment or counseling of any kind in response to this alleged incident. (*Jessica Barczyk's Deposition*, p. 86).

In arguing for summary judgment on this claim, Defendants properly rely on the Eighth District's holding in *Lombardo v. Mahoney*, 2009 Ohio 5826, at *14:

Summary judgment [on an intentional infliction of emotional distress claim] is appropriate when the plaintiff presents no testimony from experts or third parties as to the emotional distress suffered and where the plaintiff does not seek medical or psychological treatment for the alleged injuries." *Id.* at P58 (footnote omitted). See, also, *Farmer v. Rolls-Royce Energy Sys., Inc.*, Muskingum App. No. 06CA8, 2006 Ohio 4050.

Plaintiff Jessica Barczyk fails to rebut or mention this argument in the Plaintiffs combined Brief in Opposition. As such, the Court **GRANTS** Defendants' Motion for Summary Judgment with respect to Plaintiff Jessica Barczyk's intentional infliction of emotional distress claim.

5) PLAINTIFFS' WRONGFUL EVICTION CLAIM IS WITHOUT MERIT AS APARTMENT WAS A CONDITION OF EMPLOYMENT

In their complaints, Plaintiffs argue that as tenants they should have been afforded proper notice and were wrongfully evicted in violation of Ohio's Landlord-Tenant Law (Ohio Revised Code Section 5321.01, *et. Seq.* As Defendants note in their Motion for Summary Judgment, in the case at hand, the parties do not have a rental agreement, but rather were to maintain residence on site as a term of their employment and as a part of their compensation (*See Lisa Jackson's Affidavit*, ¶121-23). Defendants correctly argue that Plaintiffs were aware from the beginning of their employment that their residency on site was contingent on their maintained employment. As "at-will" employees, being terminated for refusals to submit to drug testing, no eviction process was necessary as with termination of employment came termination of compensation, specifically the apartments on Defendants' premise. In response to the Defendants' Motion for Summary Judgment on this claim, the Plaintiffs rehash their argument from their own Motion for Partial Summary Judgment and indicate that the employment agreement between parties qualified as an oral "rental agreement" for purpose of the Ohio landlord tenant law and as such, immediate eviction without notice was improper and actionable. (*Plaintiffs' Brief in Opposition*, p. 12; *Plaintiffs' Motion for Partial Summary Judgment*, p. 12-13). Plaintiffs fail to cite to any case law to support this conclusion and the Defendants arguments to the contrary are well-taken. Further, the wrongful termination causes of action of Plaintiffs Jessica Barczyk and Jacob Zimmerman would include their respective losses of residences as part of their damages associated therewith. As such, Defendants' Motion for Summary Judgment on the Wrongful Eviction causes of actions of all Plaintiffs is **GRANTED**.

B. PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT

1. UNPAID WAGE CLAIMS

Plaintiffs' Motion for Partial Summary Judgment focuses only on two areas. The first is the unpaid wage claims which consist Plaintiff Jessica Barczyk's minimum wage argument and unpaid overtime claims by Plaintiffs Damon Harvey, David and Jacob Zimmerman. The Court has already assessed this argument as to Defendants' Summary Judgment Motion above and found that genuine issues of fact exist and as such Plaintiffs' Motion for Summary Judgment on this claim is **DENIED**.

2. WRONGFUL EVICTION IN VIOLATION OF OHIO LANDLORD TENANT LAW

Plaintiffs also claim that they are entitled to Summary Judgment on their Wrongful Eviction causes of action. However, the Court has already considered and granted defendants' Motion for Summary Judgment on this cause of action and accordingly and for the reasons already stated, Plaintiffs' Partial Motion for Summary Judgment on this cause of action is **DENIED**.

Accordingly, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT is **GRANTED IN PART** and **DENIED IN PART**.


Finally, PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT is **DENIED**.



Judge Pamela A. Barker

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