

At that time, plaintiff was receiving workers' compensation benefits based upon a February 10, 1994, job-related injury. She was at BWC to file required monthly documentation related to her benefit claim. The procedure was handled by BWC employee Debbie Moore.

{¶3} According to plaintiff, Moore was in a less-than-cordial mood before plaintiff's turn at the counter. Plaintiff contends that Moore was yelling at a man and woman in front of her, that the man apologized for "upsetting" Moore, and that the woman with him left in tears. Plaintiff stated that when her turn came Moore at first ignored her, then swung around in her chair and belligerently demanded to know how she could help plaintiff.

{¶4} Plaintiff related that she had been through the procedure many times and was well-aware of the requirements. However, Moore would not cooperate with plaintiff's request for copies. Plaintiff then asked to speak to another employee who she knew was familiar with her claim. Moore attempted to call that individual but was unable to reach him. Moore again refused to make the requested copies, stating that she was not permitted to leave her work station. At this point, Moore's supervisor, Stephanie Mitchell, intervened and completed the procedure as plaintiff had requested.

Plaintiff then remarked that she would bring Mitchell a box of Christmas candy when she returned for her required December filing.

She also turned to Moore and told her that she would not be

bringing any candy for her. Immediately after that exchange, plaintiff left the BWC offices.

{¶5} Some time after plaintiff left the BWC, Debbie Moore reported to Stephanie Mitchell, stating that she had received a threatening phone call. In that call, the person stated: "I am going to kill you." Moore later received another call. This time, the person stated: "I am waiting." Moore reported that it was the same voice that she heard during the first call, and that she could positively identify it as belonging to plaintiff. In accordance with BWC policy, Mitchell reported the matter to her supervisor who instructed her to call the Ohio State Highway Patrol (OSHP). The call was made at approximately 4:45 p.m.

{¶6} The following day, Trooper James Ertel responded to the call and took statements from both Moore and Mitchell. He also contacted plaintiff and arranged to meet her at her residence. Plaintiff was instructed to write a statement for the trooper. Later that day, Trooper Ertel met with plaintiff and reviewed her statement. Trooper Ertel testified that plaintiff's statement was essentially the same as Moore's and Mitchell's except that plaintiff denied making any threatening phone calls. She also claimed she had not had access to a telephone during the time period when the calls were made. Nevertheless, Trooper Ertel determined that there was probable cause to issue a citation for aggravated menacing. He subsequently presented that charge to the

local prosecuting attorney. Plaintiff was never arrested on the charge, but was assigned a court date of November 30, 1998.

{¶7} Each of plaintiff's claims arise out of the November 12, 1998, incident. Defendant has denied liability.

I. MALICIOUS PROSECUTION

{¶8} The tort of malicious prosecution compensates a plaintiff for damages to dignity and reputation caused by a false accusation of a crime. *Trussell v. Gen. Motors Corp.* (1990), 53 Ohio St.3d 142. The elements of the tort are: 1) malice in instituting or continuing the prosecution; 2) lack of probable cause; and, 3) termination of the prosecution in favor of the accused. *Id.*

{¶9} "Malice," as that term is used in the context of malicious prosecution actions, refers to "an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice." *Criss v. Springfield Township* (1990), 56 Ohio St.3d 82. Although malice may be inferred from the absence of probable cause, probable cause may be present even though no crime has actually been committed. *McFinley v. Bethesda Oak Hosp.* (1992), 79 Ohio App.3d 613. Probable cause exists when the facts and circumstances are such that a reasonably cautious individual would be warranted in the belief that the accused is guilty of the offense charged. *Portis v. TransOhio Savings Bank* (1988), 46 Ohio App.3d 69. Probable cause should be measured in light of the

situation and the facts and circumstances that the complainant knew or reasonably should have known at the time the criminal complaint was filed. Id. There is no requirement that defendant have evidence that will ensure a conviction. *Epling v. Express Co.* (1977), 55 Ohio App.2d 59.

{¶10} In the present case, plaintiff has established the third element of this tort: the criminal proceedings were terminated in her favor. Specifically, the charge was dismissed with prejudice on July 26, 1999, after Debbie Mitchell, the chief prosecuting witness, failed to appear for numerous scheduled proceedings.

{¶11} Plaintiff contends that the BWC maliciously continued the prosecution against her because it knew that it could not produce Debbie Moore for trial. In fact, Moore was continuously absent from work beginning in January 1999. She was terminated for that reason in March 1999. Plaintiff contends that once the BWC knew that Moore could not be located, it should have attempted to end the criminal proceedings. Plaintiff further maintains that the BWC knew at the outset that Moore's allegations had no merit. For example, plaintiff maintains that important facts were kept from Trooper Ertel, such as information regarding a previous encounter between plaintiff and Moore, and the fact that Moore was counseled about that incident. She also maintains that the trooper was not advised that plaintiff had never previously caused any problems at the BWC and had been well-regarded for many years.

{¶12} Notwithstanding these arguments, the court finds that plaintiff has failed to prove her claim for malicious prosecution.

In the court's view, there is simply no evidence of malice in the instigation or continuance of the criminal case; there was also no lack of probable cause. More importantly, the BWC referred the entire matter to the OSHP in accordance with its established policy. The OSHP and the prosecuting attorney handled the case from that point on. Further, although Moore would have been the chief prosecuting witness, she did not personally file or sign the charges. Therefore, her conduct in the instigation or continuance of the charge is not at issue. Likewise, since the OSHP is not a party to this action, Trooper Ertel's conduct is not at issue. However, even if the court could fairly consider their actions, it would be unreasonable to find malice based upon Moore's one-time prior behavior toward plaintiff, her rude behavior on the date in question, and the fact that she was terminated from her employment at the BWC. There is absolutely no evidence to establish that Trooper Ertel acted maliciously. Further, even if the BWC had the authority to stop the criminal proceedings, the court can find no evidence to establish that there was any legitimate reason to do so. In light of the BWC's security concerns following a hostage-taking incident that had previously occurred in Columbus, Ohio, the action it took in immediately reporting the matter, and in allowing

justice to take its course, can be seen only as reasonable and prudent.

{¶13} Accordingly, plaintiff has failed to state a claim for malicious prosecution.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

{¶14} In order to state a cause of action for intentional infliction of emotional distress, plaintiff must show that: 1) defendant intended to cause emotional distress, or that defendant knew or should have known that its actions would result in serious emotional distress; 2) defendant's conduct was extreme and outrageous; 3) defendant's actions proximately caused plaintiff's psychic injury; and, 4) the mental anguish plaintiff suffered was serious. *Hanley v. Riverside Methodist Hosp.* (1991), 78 Ohio App.3d 73, citing *Pyle v. Pyle* (1983), 11 Ohio App.3d 31.

{¶15} In the present case, plaintiff contends that she was emotionally traumatized by the institution and continuation of the criminal charge against her. Her psychologist, Dr. James Downey, testified that although plaintiff was receiving workers' compensation benefits due to a physical and psychological injury, the filing of the criminal case caused a severe setback in her psychological condition. Plaintiff also maintains that BWC acted intentionally by allowing the charges to be filed without probable

cause and by allowing them to continue after Moore had been terminated.

{¶16} The court does not find these arguments to be meritorious. Having found that neither the BWC nor Trooper Ertel acted maliciously, and that probable cause did exist for the filing of the charges, the court must also conclude that the element of "intent" is lacking for the purpose of this claim. Further, there is simply no evidence of conduct toward plaintiff that could be considered "extreme and outrageous" as contemplated in the pertinent case law.

{¶17} "*** Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' *** The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, quoting 1 Restatement of the Law 2d, Torts (1965) 73, Section 46, Comment d.

{¶18} Accordingly, plaintiff has failed to prove her claim for intentional infliction of emotional distress.

III. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

{¶19} In *Heiner v. Moretuzzo* 73 Ohio St.3d 80, 87, 1995-Ohio-65, the Ohio Supreme Court stated "Ohio does not recognize a claim for negligent infliction of serious emotional distress where the distress is caused by the plaintiff's fear of a nonexistent physical peril." Plaintiff was never faced with physical peril. Therefore, plaintiff has also failed to establish this claim.

NEGLIGENT RETENTION AND SUPERVISION

{¶20} The factors needed to state a claim for negligent retention and supervision are: 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. *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724.

{¶21} This claim relates to the hiring and retention of Debbie Moore. She did not testify at the trial of this case. The court had no opportunity to assess her credibility or to hear her testimony regarding the November 12, 1998, incident or any other contact she may have had with plaintiff. Nevertheless, Moore's supervisor, Stephanie Mitchell, did testify regarding Moore's work performance. According to Mitchell, Moore was considered a very good employee and scored well on her performance evaluations. She stated that she had never received any negative reports about Moore

and that Moore worked well with other employees in the office. The reason for Moore's termination was absenteeism, which did not become a problem until after the incident with plaintiff. In contrast to this testimony, plaintiff offered her own statements regarding Moore's competency and asserted various arguments concerning the BWC's alleged knowledge of Moore's inferior performance and her potential to subject plaintiff to harm. Although the court agrees that Moore's conduct was rude and unprofessional, the preponderance of the evidence fails to establish that she was incompetent or that the BWC had actual or constructive knowledge of the alleged incompetence. In short, plaintiff failed to prove that the BWC breached any duty owed to plaintiff with regard to the hiring or retention of Moore.

{¶22} For these reasons, the court finds that plaintiffs have failed to prove any of their claims by a preponderance of the evidence. Judgment shall be rendered in favor of defendant.

RUSSELL LEACH
Judge

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Filed 5-9-2002
Jr. Vol. 704, Pg. 149
To S.C. reporter 6-26-2002