STATE OF MICHIGAN

COURT OF APPEALS

SHELLY BREITHAUPT,

Plaintiff-Appellant,

v

NORTHERN MICHIGAN HOSPITALS, INC., BURNS CLINIC MEDICAL CENTER, P.C., DEE BETTS, DIANA STEWART, DAVE THOMAS and LEE BRITTON,

Defendants-Appellees.

UNPUBLISHED
September 3, 1996

No. 182041
LC No. 93-2359-NO

Before: Doctoroff, C.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals the circuit court order granting defendants summary disposition in this action for sexual discrimination and harassment, retaliation, intentional infliction of emotional distress and tortious interference with contract. Plaintiff alleges that, during the course of her employment with defendant Burns Clinic Medical Center, Inc., she was exposed to a general atmosphere of vulgar and sexually oriented conversation and conduct by her female supervisor and coworkers, and that she found this atmosphere offensive. We affirm.

On appeal, plaintiff contends that the trial court erred in granting summary disposition as to each of her claims. We do not agree. The trial court did not err in granting defendants' motion for summary disposition of plaintiff's sexual harassment claim. The Elliott-Larsen Civil Rights Act of 1977, MCL 37.2101 et seq; MSA 3.548(101) et seq, provides a cause of action for "discrimination because of…sex". "Discrimination because of sex" includes:

> sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
>
> such conduct or communication has the purpose or effect of substantially interfering with an individual's employment…or creating an intimidating, hostile, or offensive employment…environment. [MCL 37.2103(h)(iii); MSA 3.548(103)(h)(iii).]

In order to show that she was subjected to harassment on the basis of sex, a plaintiff must show that "but for the fact of her sex, she would not have been the object of harassment." *Radtke v Everett*, 442 Mich 368, 383; 501 NW2d 155 (1993), quoting *Henson v Dundee*, 682 F2d 897, 904(CA 11, 1982). The harassment must be "gender-based." *Barbour v DSS*, 198 Mich App 183, 186; 497 NW2d 216 (1993). Where the alleged harassment is "gender neutral", or equally offensive to both men and women, it is not actionable. *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 341; 497 NW2d 585 (1993).

Other states have directly considered the question whether a plaintiff has an action for sexual harassment when the alleged harassment is conducted by people of plaintiff's own gender. We are aware of decisions by the second district of the California Court of Appeals, in which particularly egregious conduct between members of the same gender was found actionable under California law. See *Matthews v Superior Court*, 40 Cal Rptr 2d 350 (1995); *Mogilefsky v Superior Court*, 26 Cal Rptr 2d 116 (1993).

However, we find more persuasive the federal district court decision in *Goluszek v Smith*, 697 F Supp 1452 (ND Ill 1988). Although not bound by the decisions, Michigan courts look to federal decisions on Title VII in interpreting Michigan's statute. *Radke, supra* at 381-382. In *Goluszek*, the male plaintiff's male coworkers openly speculated about his sex life, made explicit suggestions concerning sexual activity, accused him of being gay or bisexual, and poked him in the buttocks with a stick. The court in *Goluszek* discussed the intent behind the Title VII of the United States Civil Rights Act:

> Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable. The "sexual harassment" that is actionable under Title VII "is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person." Actionable sexual-harassment fosters a sense of degradation in the victim by attacking their sexuality. In effect, the offender is saying by words or actions that the victim is inferior because of the victim's sex. [*Goluszek*, supra at 1456, citations omitted.]

The *Goluszek* court concluded that, while "Goluszek may have been harassed 'because' he is a male…that harassment was not of a kind which created an anti-male environment in the workplace." Id.

In this case, as in *Goluszek*, the alleged harassment was by members of plaintiff's own gender. A male employee in another department also commented on the "trashy mouth" of plaintiff's supervisor. Although the alleged behavior was exceedingly crude, it was no more so than the behavior in *Goluszek*. Too, the alleged behavior in this case was equally offensive to both men and women and did not create an anti-female atmosphere. We are not persuaded that plaintiff stated a complaint upon which relief can be granted or that she demonstrated a genuine issue of material fact in this case. The allegations are not sufficient to create a prima facie case that the harassment in this case was "because of" plaintiff's sex.

The trial court did not err in dismissing plaintiff's claim for retaliation. Plaintiff never made a charge, filed a complaint, testified, assisted or participated in an investigation, proceeding or hearing under the act, until after she left her employment. *McLemore v Detroit Rec Hosp*, 196 Mich App 391, 395-396; 493 NW2d 441 (1992). Plaintiff did, however, express concern about the vulgar work environment when she complained to her supervisors. *Id* at 396. Nonetheless, we agree with the trial court that the fact that plaintiff's coworkers complained about the smell of her perfume, snubbed her, referred to her as a "bitch" and a "narc", and gave her dirty looks was not sufficient to create a cause of action for retaliation. Nor was the evidence here sufficient to justify the conclusion that plaintiff's supervisors intentionally allowed plaintiff's coworkers to make her working conditions so unpleasant that a reasonable person would feel compelled to resign. *Mourad v Automobile Club Ins Ass'n*, 186 Mich App 715, 721; 465 NW2d 395 (1991).

Plaintiff also challenges the trial court's grant of summary disposition as to plaintiff's claim of intentional infliction of emotional distress. Liability for the intentional infliction of emotional distress is found only where the conduct complained of is:

> 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. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. [*Doe v Mills*, 212 Mich App 73, 91;536 NW2d 824 (1995).]

The trial court did not err in granting defendants motion for summary disposition on this claim.

Finally, the trial court properly granted summary disposition on plaintiff's claim of tortious interference with a contractual relationship. For a plaintiff to have such a claim, the interferer "must intentionally do an act that is per se wrongful or do a lawful act with malice and that is unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Feaheny v Caldwell*, 175 Mich App 291, 303; 437 NW2d 358 (1989). When the defendant is an agent or officer of a party to the contract, the plaintiff has the additional burden of showing that the interferer was acting outside the scope of their authority when they interfered. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 657; 513 NW2d 441 (1994). The plaintiff has this additional burden because a corporate officer is liable for tortious interference only if they acted for their own benefit and with no benefit to the corporation. *Stack v Marcum*, 147 Mich App 756, 759-760; 382 NW2d 743 (1985). The plaintiff must provide specific proof of affirmative acts that the defendant has taken to interfere. *Coleman-Nichols*, supra at 657.

In this case, plaintiff has not alleged any affirmative act which interfered with her contractual relationship. Plaintiff merely alleges that, in the eleven days between the sexual harassment seminar and plaintiff's resignation, defendants acquiesced in the vulgar and offensive environment and took insufficient action to curb her coworkers' anger over plaintiff's

complaints. Further, we agree with the trial court that plaintiff's claim, that defendants' gain was that plaintiff "wouldn't be there to complain" about their parties and sexual jokes anymore, did not constitute sufficient personal benefit to support plaintiff's action.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Roman S. Gribbs