STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE MORRIS,

Plaintiff-Appellant,

v

SELECTCARE, INC., BRIAN CROSS and JOHN DILLAMAN,

Defendants-Appellees.

UNPUBLISHED
December 6, 1996

No. 183483
LC No. 93-466179

Before: Michael J. Kelly, P.J., and Hood and H.D. Soet,* JJ.

PER CURIAM.

Plaintiff appeals as of right the order of the trial court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) and dismissing her claims for race discrimination, retaliation, civil conspiracy, and intentional infliction of emotional distress. We affirm in part and reverse in part.

I

On appeal, plaintiff first contends that the trial court erred in granting defendants' motion for summary disposition as to her claim of race discrimination because she submitted evidence to establish a prima facie case of race discrimination and evidence to show that defendants' articulated reason for her disparate treatment was merely pretext for illegal race discrimination. We agree that the trial court erred in holding that plaintiff failed to establish a prima facie case of race discrimination. We reverse the grant of summary disposition as to count I (race discrimination) and remand for further proceedings consistent with this opinion. In its dismissal of Count I, the trial court opined that plaintiff hadn't established a prima facie case of intentional discrimination.

Reviewing the factual evidence supporting plaintiff's race discrimination claim and resolving the benefit of any reasonable doubt in her favor, we find that plaintiff succeeded in establishing a prima facie case of race discrimination. Plaintiff is black, and thus within a protected class of employees. *Sisson v*

* Circuit judge, sitting on the Court of Appeals by assignment.

Board of Regents of the University of Michigan, 174 Mich App 742, 747; 436 NW2d 747 (1989). Evidence showed that plaintiff's supervisors, defendants Brian Cross and John Dillaman, closely monitored her behavior and frequently faulted her for "visiting" with co-workers. Cross and Dillaman did not document the behavior of white employees with whom plaintiff socialized during work hours. Additionally, evidence showed that Cross and Dillaman required plaintiff to follow a different procedure than similarly situated employees were required to follow when she desired secretarial assistance. Because plaintiff submitted evidence to show that she was within a protected class of employees and that defendants treated her differently from her white co-workers for engaging in essentially the same behavior, we find that plaintiff succeeded in establishing a prima facie case of race discrimination.

While it is true that defendants explained why plaintiff was treated differently from other employees, including documented numerous instances of plaintiff's insubordination, unwillingness to cooperate, and failure to meet deadlines, the court did not assess the quality or quantity of evidence submitted by plaintiff that defendants asserted legitimate non-discriminatory reasons for its action, were perceptual. On remand the court must decide, viewing the evidence in a light most favorable to plaintiff, whether a jury question was raised as to whether race discrimination played a significant roll in the decision to discipline plaintiff and or in failure to promote or consider plaintiff for promotion. *Howard v Canteen Crop,* 192 Mich App 427, 432; ___ NW2d ___ (1992).

II

Next, plaintiff argues that the trial court erred in dismissing her claims for retaliation under the Elliott-Larsen Civil Rights Act and civil conspiracy. The Elliott-Larsen Civil Rights Act prohibits employers from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the act. MCL 37.2701; MSA 3.548(701); *McLemore v Detroit Receiving Hospital and University Medical Center*, 196 Mich App 391, 395-396; 493 NW2d 441 (1992). In order to establish a prima facie case of unlawful retaliation under the Act, a plaintiff must establish (1) that (s)he opposed violations of the Act or participated in activities protected by the act, and (2) that the opposition or participation was a significant factor in an adverse employment decision. *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1310 (1989). After the plaintiff establishes a prima facie case of retaliation, the employer is allowed the opportunity to set forth a legitimate, nondiscriminatory reason for the adverse employment decision. *Id.*

The evidence showed that plaintiff filed a complaint with the Michigan Department of Civil Rights (MDCR) on June 22, 1993, alleging that SelectCare discriminated against her on the basis of race and gender. On August 6, 1993, plaintiff received her yearly evaluation from Cross and Dillaman. The evaluation gave plaintiff an overall assessment rating of one, which meant "needs improvement." In connection with her unfavorable review, Cross and Dillaman placed plaintiff on a ninety-day probationary period during which she was required to meet the performance goals Cross and Dillaman set for her. Plaintiff's employment review provided for a reevaluation at the end of the probationary period and possible termination if her performance failed to improve. On August 19, 1993, before her probation ended, plaintiff walked off the job and never returned. Subsequently, Cross wrote that two

of his achievements in 1993 were successfully documenting plaintiff's misbehavior and finally causing her departure from SelectCare.

Reviewing the evidence and granting plaintiff the benefit of any reasonable doubt, we conclude that plaintiff failed to establish a prima facie case of retaliation. First, evidence established that plaintiff was evaluated in July of each year she was employed at SelectCare. Regardless of her civil rights complaint, plaintiff was due for an evaluation in July or August of 1993. Therefore, the timing of the poor evaluation is, contrary to plaintiff's position, of little significance. See *Booker*, *supra* at 1314.

Second, well before plaintiff filed her complaint, Dillaman and Cross began documenting instances of her misbehavior. Evidence also showed that plaintiff was reprimanded for her unacceptable behavior and insubordination. Hence, the evidence strongly suggests that plaintiff's poor evaluation was the culmination of an on going investigation for inadequate performance and not a retaliatory employment decision.

Third, it is not evident that plaintiff suffered an adverse employment decision. Although Cross and Dillaman evaluated plaintiff poorly and found overall that she needed improvement, they allowed her ninety days in which to better her performance. Plaintiff does not allege that she was terminated or demoted after she made her complaint. When this Court and others have addressed the issue of retaliation, layoffs, terminations and general workplace harassment have been considered adverse employment decisions. See *id.* at 1308; *McLemore*, *supra* at 398; *Kocenda v Detroit Edison*, 139 Mich App 721, 726; 363 NW2d 20 (1984). In light of these cases, we are not convinced that plaintiff's poor evaluation and probationary period can be considered adverse employment decisions, especially since defendants allowed plaintiff time to correct her shortcomings and only considered termination as a last resort.

Even if plaintiff established a prima facie case of retaliation under the Act, defendants succeeded in underscoring her poor performance, and not her civil rights complaint, as the reason that she was given a low performance appraisal and placed on probation. Reviewing the evidence, we conclude that plaintiff has not shown that this reason is merely pretext for defendants' retaliatory conduct. Although plaintiff contends that Cross' written comments indicate retaliatory intent, in fact they do not and plaintiff does not explain her conclusion why this is so. Cross' statements indicate neither racial animus, nor do they cast doubt on defendants' legitimate, nondiscriminatory explanation for her poor evaluation. Indeed, Cross' statements reaffirm that he considered plaintiff to have engaged in inappropriate behavior during his tenure as her supervisor. In light of the foregoing, the trial court was correct in dismissing plaintiff's retaliation claim pursuant to granting defendants' MCR 2.116(C)(10) motion for summary disposition.

Next, plaintiff argues that the trial court erred in dismissing her civil conspiracy claim. We disagree. MCL 37.2701(a); MSA 3.548(701)(a) provides, in pertinent part:

> Two or more persons shall not conspire to . . . [r]etaliate or discriminate against a person because the person has opposed a violation of [the Elliott-Larsen Civil Rights

> Act], or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under [the Elliott-Larsen Civil Rights Act.]

Plaintiff contends that Cross and Dillaman's joint completion of her 1993 performance evaluation indicates that they conspired to retaliate against her for filing a complaint with the MDCR. We have already determined that the evidence does not support plaintiff's contention that defendants retaliated against her for filing a complaint with the MDCR. It is settled that in a civil action for damages resulting from wrongful acts alleged to have been committed in the pursuance of a conspiracy, the "gist or gravamen of the action is not the conspiracy itself, but is the wrongful acts causing the damages." *Roche v Blair*, 305 Mich 608, 613-614; 9 NW2d 861 (1943); see also *Coronet Development Co v FSW, Inc*, 379 Mich 302, 308-309; 150 NW2d 809 (1967). Thus, the conspiracy standing alone, without the commission of acts causing damage, would not be actionable, since the cause of action does not arise from the conspiracy, but from the acts done. *Roche*, *supra* at 614; see also *Tucich v Dearborn Indoor Racquet Club*, 107 Mich App 398, 402-403; 309 NW2d 615 (1981) (civil conspiracy claim dismissed where plaintiff failed to show alleged conspirators caused civil wrong resulting in damages). In this case, the trial court was correct in dismissing plaintiff's conspiracy claim because she failed to show that she was subject to retaliatory conduct which resulted in damages.

III

Lastly, plaintiff advances that the trial court erred in dismissing her claim for intentional infliction of emotional distress because she submitted evidence to show that defendants' behavior was so extreme and outrageous as to permit recovery. The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Liability for intentional infliction of emotional distress is found only where the conduct complained of 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. *Id.* In reviewing such a claim, it is initially for the court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Id.*

Here, evidence showed that Cross and Dillaman closely monitored plaintiff's workplace activities. Additionally, plaintiff testified that Cross once told her that she should find a clerical position because she needed a brainless job. Plaintiff was also required to obtain permission to receive secretarial assistance with some of her work, while other employees apparently were not subject to this procedure.

Granting her the benefit of any reasonable doubt, we conclude that plaintiff did not meet the threshold showing that defendants' conduct was sufficiently egregious to support her claim for intentional infliction of emotional distress. This Court has stated that liability for intentional infliction of emotional distress does not "extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. It has been said that the case is generally one in which the recitation of facts to an average

member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Id.* Applying this standard, this Court upheld summary disposition where a plaintiff alleged that her supervisors constantly harassed her and intimidated her on the basis of her religion and gender, calling her a "Jewish-American princess" and asking her who she slept with to get her job. *Meeks v Michigan Bell Telephone Co*, 193 Mich App 340, 346; 483 NW2d 407 (1992).

Here, plaintiff alleged managerial conduct that does not rise to the level of misconduct engaged in by the defendants in *Meek*. In all, Cross and Dillaman's behavior seems appropriately viewed as a "petty oppression" for which this Court does not permit recovery. Moreover, there is simply no evidence that plaintiff was aware that Cross and Dillaman were closely watching her until after the commencement of litigation. Because no further factual development could render Cross and Dillaman's behavior sufficiently egregious as to be actionable in intentional tort, we affirm the trial court on this count as to its grant of summary disposition pursuant to MCR 2.116(C)(10).

Affirmed in part reversed in part and remanded for further proceedings as to count I of plaintiff's complaint consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ H. David Soet