

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TAMARA J. PECK,

Plaintiff- Appellant/Cross- Appellee,

v

COUNTY OF EATON, EATON COUNTY  
SHERIFF'S DEPARTMENT, EATON COUNTY  
SHERIFF, EATON COUNTY UNDER SHERIFF,  
EATON COUNTY CHIEF DEPUTY and EATON  
COUNTY CAPTAIN,

Defendants- Appellees/Cross- Appellants.

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UNPUBLISHED

June 27, 1997

No. 189492

Eaton Circuit Court

LC No. 94-000213-NZ

Before: Saad, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). We affirm.

Plaintiff began working for defendants as a corrections clerk in 1989, under the supervision of jail administrator, Captain Dye. In November 1991, she began a romantic relationship with Officer Michael Baird. Around this time, Captain Dye noticed that plaintiff was making and receiving a large number of personal telephone calls while she at work and he also saw plaintiff kissing Baird while Baird was on duty. Dye gave both plaintiff and Baird a direct order to cease all personal relations with each other while they were on duty. Suspecting that plaintiff was disobeying Dye's order, defendants generated a telephone log for all calls made from plaintiff's telephone. It showed repeated calls to Baird's home. On June 2, 1992, Dye wrote up plaintiff for "failure to obey a direct order." On June 27, 1992, defendants transferred plaintiff to the position of records clerk, pursuant to the rules of the Sheriff's Department, which permit transfers "as the Sheriff may deem necessary in the best interest of the Department." Plaintiff resigned without notice on September 21, 1994.

Plaintiff sued, alleging sexual harassment, sex discrimination, invasion of privacy and defamation. The trial court granted summary disposition for defendants pursuant to MCR 2.116(C)(10), concluding that plaintiff failed to show a genuine issue of fact as to (1) whether she was treated differently than

similarly situated males; and (2) whether plaintiff had a reasonable

expectation of privacy in the workplace; and pursuant to MCR 2.116(C)(7), on the grounds (1) that plaintiff's sexual harassment claim was barred by the statute of limitations; and (2) that plaintiff's tort claims were barred by governmental immunity.

## I

Plaintiff first argues that the trial court erred in granting summary disposition on her sexual harassment claim. Although she cites law on both causes of action, plaintiff fails to properly distinguish between an action for sex *discrimination* and an action for sexual *harassment*. Sexual harassment is only actionable for conduct that is sexual in nature and does not include harassment based on gender. See *Koester v City of Novi*, 213 Mich App 653, 669-670; 540 NW2d 765 (1995) (comments involving pregnancy, career choice, and child rearing are not actionable sexual harassment).

The statute of limitations on a sexual harassment claim is three years. *Slayton v Michigan Host, Inc*, 144 Mich App 535, 553; 376 NW2d 664 (1985). The only allegations of harassment of a sexual nature ever alleged by plaintiff were those made in her complaint. (She alleged that a former sheriff's department employee, told her "[y]ou smell good enough to eat," and "[y]ou look good enough to eat," although she acknowledged that these comments stopped by May, 1990.) Plaintiff did not file her complaint until March 1, 1994. Thus, the trial court properly granted summary disposition on plaintiff's sexual harassment claim because it was barred by the statute of limitations.<sup>1</sup>

## II

Plaintiff next argues that the trial court erred in granting summary disposition on her sexual discrimination claim. She maintains that she was treated differently than a similarly situated male because defendant monitored, disciplined and transferred *her* for not keeping her relationship with Baird "off" the job, while doing nothing to *Baird*. "In order to establish a prima facie case of discrimination under a theory of disparate treatment, it must be shown that a plaintiff was . . . treated differently from members of a different class for the same or similar conduct." *Merillat v Michigan State University*, 207 Mich App 240, 247; 523 NW2d 802 (1994). Here, the only person plaintiff compares herself to is Baird. However, defendants' evidence showed that: (1) although defendants did monitor plaintiff's telephone calls, and did transfer her for violating Dye's order, there was no position to which Baird could have been transferred at the time of plaintiff's transfer because of Baird's status as a corrections officer, and (2) Baird's telephone use could not have been monitored because Baird did not have one telephone assigned to him for his use. Plaintiff did not refute this evidence and thus failed to create an issue regarding the reasons for defendants' actions.

## III

Next, plaintiff argues that the trial court erred in finding that her tort claims of invasion of privacy and defamation were barred by governmental immunity. Plaintiff argues that by searching her desk, defendants intentionally accomplished what they could not accomplish legally and that, under *Smith v Dep't of Public Health*, 428 Mich 540, 611; 410 NW2d 749 (1978), "the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a

governmental function” *id.*, that could give rise to immunity. Plaintiff concedes that the Sheriff’s Department rules state that employees do not acquire a propriety right to lockers or storage areas and that these areas are subject to periodic administrative inspection. However, under normal circumstances, such inspections are to be conducted in the presence of the employee.” Plaintiff argues that since Dye admitted searching through her desk (a storage area) without her present, defendant intentionally invaded her privacy in an illegal manner. Plaintiff further argues that Dye’s monitoring of plaintiff’s telephone calls and his undetected observation of her and Baird, were illegal invasions of plaintiff’s privacy and “were intentionally performed outside defendant’s duties as a corrections officer and were intentionally performed to bypass the law.” We disagree.

Plaintiff takes the quote from *Smith, supra*, out of context. When determining whether an employee’s activity is governmental, we look to the general activity of the defendant rather than to the specific allegedly tortious act. See *Payton v Detroit*, 211 Mich App 375, 392; 536 NW2d 233 (1995). The Court in *Smith, supra*, stated: “We think that to use anything other than the general activity standard would all but subvert the broad governmental immunity intended by the Legislature.” 428 Mich at 609. Here, plaintiff incorrectly focuses on Dye’s specific conduct rather than the general nature of his activity. Dye monitored plaintiff’s calls and watched her actions with Baird in an effort to determine whether her actions were interfering with her work and to see if she was complying with his direct order to keep her personal relationships “off” the job. In this sense, defendant engaged in the general activity of trying to effectively ensure the efficiency of the staff.<sup>2</sup> The trial court did not err.

#### IV

In light of our determination that plaintiff’s invasion of privacy claim was properly dismissed because it was subject to governmental immunity, we need not consider plaintiff’s argument that the trial court erred in dismissing her defamation claim. Furthermore, in light of our determination that plaintiff’s discrimination and harassment claims were properly dismissed, we need not consider defendants’ cross claim that plaintiff failed to raise any issue of material fact to support her assertion of constructive discharge.

Affirmed.

/s/ Henry William Saad

/s/ Janet T. Neff

/s/ Kathleen Jansen

<sup>1</sup> Indeed, at oral argument plaintiff’s counsel conceded that the harassment claim was barred by the statute of limitations.

<sup>2</sup> Furthermore, plaintiff’s claim that Dye went through her desk for unauthorized reasons is unfounded. Plaintiff fails to demonstrate that Dye had any illegitimate reason to search her desk. In fact, plaintiff testified at deposition that there were “a whole host” of legitimate reasons for Dye and others to search her desk and that she did not know whether Dye had searched her office for legitimate reasons