

STATE OF MICHIGAN
COURT OF APPEALS

VIVIAN JOHNSON, MD,

Plaintiff-Appellant,

v

MILLENNIUM TREATMENT SERVICES,
L.L.C., DARLENE KAKOS and JUNE
ABRAHAM,

Defendants-Appellees.

UNPUBLISHED

May 1, 2007

No. 271705

Oakland Circuit Court

LC No. 2005-066404-CZ

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

COOPER, P.J. (*dissenting*).

I agree with my colleagues in the majority as to plaintiff's claims under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, and the Michigan Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, because I agree that plaintiff failed to demonstrate that the hostile work environment to which she was subjected was causally linked to plaintiff's conduct and complaints about methadone dispensing practices at Millennium. Plaintiff failed to produce evidence from which a reasonable trier of fact could conclude that she was retaliated against for complaining about and reporting alleged violations of drug dispensing laws at Millennium.

However, I write separately because I disagree with the majority as to plaintiff's claim of intentional infliction of emotion distress. I would reverse the trial court and remand on that count, because I believe that the use of racial epithets as alleged by plaintiff here and supported by the affidavits of two co-workers creates, at a minimum, questions of fact on the elements of intentional infliction of emotion distress sufficient to survive summary disposition.

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) extreme and outrageous conduct, (2) intent or recklessness; (3) causation, and (4) severe emotional distress." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004) (internal citation and quotation marks omitted). The conduct "must be 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.* (internal citation and quotation marks omitted). "It is for the trial court to initially determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Id.* "But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery." *Id.*

The majority finds that the insults complained of by plaintiff amount to nothing more than insults, indignities, threats, annoyances, petty oppressions or other trivialities, which are insufficient as a matter of law to be considered extreme and outrageous conduct. I cannot agree that racial epithets may be dismissed so easily; the intentional use of racial harassment to cause another person emotional distress certainly falls within the category of outrageous conduct that should be actionable at law.

Viewing the evidence in the light most favorable to the party opposing the motion, as we must on a summary disposition motion brought under MCR 2.116(C)(10), the allegations made in plaintiff's deposition here are compelling.

When asked "what racist comments did Darlene Kakos make in your presence?," plaintiff responded:

Darlene did this regularly when I would come in and there was no one in the station. She was – she had told me one time, You know, I don't care what goes on, no n----- tells me what to do. And she also one day I came in, and she said, One n-----, two n-----, three n-----, four, five n-----, six n-----, n-----s no more. And you know, she just – every time I came in when she was pissed, apparently, she would start saying that.¹

When asked "What racist comment did June Abraham make?," plaintiff replied:

June Abraham told me that they take down n-----s every day, and they had a plan in place for me and they were going to take me down, too.

Plaintiff's testimony about racial harassment, standing alone, would give me pause, but supported as it is by the affidavits of co-workers, I find that it clearly creates, at a minimum, questions of fact as to the elements of plaintiff's intentional infliction of emotion distress claim.

Cheryl Treasvant, a receptionist at Millennium, stated in her affidavit:

I often heard Darlene Kakos use racist and degrading adjectives and words in reference to Dr. Johnson. Millennium's management also was aware of Ms. Kakos' abusive dealings with Dr. Johnson, but no one dared discipline Ms. Kakos. . . .

The way Ms. Kakos and Millennium related to Dr. Johnson was very shameful and degrading because Kakos and the management constantly harassed Dr. Johnson

Matthew Martus, a therapist at Millennium, stated in his affidavit:

¹ Unfortunately for any potential claim of hostile work environment, when asked whether she reported Kakos' obnoxious behavior to any supervisors at Millenium, plaintiff stated that she did not, "because they weren't going to do anything about it."

Darlene Kakos, to my knowledge and personal observation was very offensive and hostile to Dr. Johnson in words and by conduct. Ms. Kakos' discriminatory and hostile disposition towards Dr. Johnson was obvious to everyone at the Warren facility, including the management. Other employees and I were much surprised that the management did not discipline Ms. Kakos or protect Dr. Johnson against such endless harassment from Ms. Kakos.

Plaintiff and at least two co-workers found the conduct of defendant Kakos to be extreme and outrageous, and plaintiff, at least, found the behavior of defendant Abraham also to be extreme and outrageous. I agree. Because I cannot find that racial harassment is petty or trivial, I cannot find that the conduct of these two defendants amounted to no more than "petty oppressions or other trivialities." Plaintiff's claim is supported by more than sufficient evidence to survive summary disposition, and she should have her day in court.

While I agree with the majority that plaintiff has failed to support her CRA and WPA claims against defendant Millennium, as to the claim of intentional infliction of emotion distress, I would remand for trial so that defendants Kakos and Abraham might have to answer for their outrageous behavior in a public forum.

/s/ Jessica R. Cooper