STATE OF MICHIGAN

COURT OF APPEALS

MARILYN DEJAEGHERE, DENNIS DEJAEGHERE, LYNN BEECHER, and GEORGE BEECHER,

Plaintiffs/Counter-Defendants/ Appellants/Cross-Appellees,

v

VILLAGE FOOD MARKET, INC., and NEIL BELL,

Defendants/Cross-Plaintiffs/ Appellees/Cross-Appellants.

UNPUBLISHED
January 10, 1997

No. 177532
Wayne Circuit Court
LC No. 93-321410-CZ

Before: Jansen, P.J., and Reilly and M.E. Kobza,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from various orders of the Wayne Circuit Court granting defendants summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue regarding any material fact and moving party entitled to judgment as a matter of law) as to all thirteen counts in plaintiffs' complaint. Defendants cross-appeal as of right from the trial court's order dismissing their counter-complaint which raised three counts. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiffs filed their complaint on July 29, 1993, in the Wayne County Circuit Court alleging sex discrimination, sexual harassment, intentional infliction of emotional distress, negligent failure to supervise, breach of implied duty of good faith, negligent evaluation and termination, fraud, misrepresentation, wrongful discharge, defamation, handicapper's discrimination (regarding Lynn Beecher only), and loss of consortium regarding Dennis DeJaeghere and George Beecher. On September 27, 1993, defendants filed a counter-complaint against Marilyn and Lynn only, alleging conversion, fraud, and unjust enrichment. The parties filed various motions for summary disposition at different times in the trial court. The trial court ultimately granted defendants summary disposition as to all counts of plaintiffs' complaint. The trial court then sua sponte dismissed defendants' counter-

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

complaint "based upon [its] understanding of the acts of this lawsuit." The order reflecting the sua sponte dismissal of the counter-complaint also does not state a basis for the dismissal.

On appeal, plaintiffs claim that the dismissal of the claims of intentional infliction of emotional distress, sexual harassment, handicapper's discrimination (regarding Lynn only), wrongful discharge (regarding Marilyn only), and defamation were improperly dismissed by the trial court. Defendants, in the cross-appeal, claim that the trial court erred in sua sponte dismissing their counter-complaint.

I

A

This case requires the recitation of a great deal of facts and is fact intensive based on its procedural nature. However, we note that only deposition excerpts were attached as exhibits to both parties' filings in the lower court. Both plaintiffs and defendants failed to insure that complete deposition transcripts were made part of the lower court record. Further, the court reporter, for an unknown reason, transcribed excerpted deposition testimony and inserted asterisks where other testimony was omitted. We are troubled by the parties' failure to insure that true and complete transcript testimony was filed. Moreover, the parties have failed to comply with MCR 7.210 by securing the full, original record in this Court for the appeal. Specifically, MCR 7.210(B) provides in relevant part:

> (1) Appellant's Duties; Orders; Stipulations
>
> > (a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 6.425(F)(2) or MCR 6.433, or as otherwise provided by the Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

Here, the parties did not stipulate that some portion less than the full transcript be filed, MCR 7.210(B)(1)(d), nor did the parties seek an order in the trial court that less than the full transcript be included in the record on appeal, MCR 7.210(B)(1)(c). Therefore, the integrity of the review process has probably been compromised in this case because we do not have the complete deposition testimony where such testimony could be critical in an appeal involving a motion brought under MCR 2.116(C)(10). Nevertheless, because neither party has complained, we proceed to determine the appeal based on the record presented. We warn the parties that the failure to comply with the court rules can lead to dismissal of the appeal. MCR 7.217(A).

B

Marilyn was hired as a cashier on April 4, 1987, and Lynn was hired as a cashier on October 5, 1987. Defendant Neil Bell was, at all relevant times, president of Village Food Market. Both plaintiffs were discharged from Village Food's employ in March 1993.

Marilyn testified at her deposition that Bell called her a "fucking cunt" four or five times. On one occasion, Marilyn told Bell, "Don't ever call me those words again. My husband doesn't use [that] language with me, and you won't either." Marilyn also spoke to Mr. Vahan Karibian (plaintiffs' immediate supervisor) about Bell. Apparently a meeting occurred regarding the language that Bell used, but Marilyn was not present.

Marilyn also testified that Bell asked her on many occasion if she "gave good head." Bell would brag about his prostitutes while at work. Bell and Sam Miniachi, a produce consultant, would discuss their sex lives by saying such things as, "I got good head. Did you, Sam?" and "Did you have fun in the whirlpool with _____?" Marilyn testified that she heard Bell tell Sam Hegarty every morning comments such as, "[d]id you lay her last night?" or "[w]hich one did you lay?" or "[w]hich one did [sic] you lay tonight?" or "[w]hich one gave you good head?" Marilyn later admitted that she was not present when these statements were made, but that she knew about them because Bell was taken to the warehouse with Karibian and Hegarty and consulted about his language.

In her affidavit, Marilyn stated that Bell would pound on the bathroom door while she was using the bathroom. She also stated that Bell made such comments to her as "you're a fucking cunt," asked whether she engaged in oral sex, and stated that she engaged in sex with co-employees.

In her deposition, Lynn testified that Bell would push her, grab her by the back of her neck and push her, and slammed the bathroom door on her leg. Bell slammed the bathroom door on her leg at least twice while she was on a break. Lynn further testified that Bell pushed her quite a few times, and that she told him to keep his hands off her.

In 1988, Bell asked an older cashier, in Lynn's presence, if the other cashier's pubic hair was gray. Bell "offered" to do a pelvic examination on Lynn in order to save her money in going to a doctor. Lynn also testified that Bell referred to her as a "fucking cunt" and a "fucking bitch" in front of others. Just after Lynn started working at Village Food, Bell said to her, "I bet I can make you wet." In 1992, in reference to her brother, Bell said to Lynn, "Is he fucking nuts that he would rather be here than go to dinner and get laid?"

Bell would ask Lynn and others, "Do you give good head?" In January 1992, Bell referred to Karibian's wife as "a fucking cunt," "a fucking Birmingham bitch," and "a spoiled rich bitch." When female salespersons came into the store, Bell would say, "Well, I wonder what Vahan does for them to get deals." Bell also said at a meeting at which most store employees were present, "You can fuck with my wife but not my money." Lynn testified that she told Bell that he was disgusting, and another time she told him to shut up. Most times, she would walk away from Bell's comments because she did not appreciate being talked to or referred to in such a manner.

Lynn also testified about an employee, Gamy, who would make a grab for her "once in a while." Gamy would remark to Hegarty about "which one he would sleep with, which one Sammy would sleep with, me or Marilyn." Bell testified that Gamy worked at the store for little over a year, and that he was fired for sexual harassment of female employees.

With respect to her handicapper's claim, Lynn testified that a physician found evidence of moderately severe carpal tunnel syndrome in her right arm on July 22, 1992. She would wear a brace to work in 1992, and her hours were cut to three hours per day on the cash register. Bell testified that the brace on Lynn's arm did not affect her ability to perform her duties. Lynn would do stock work when not working the register, and she thought that stock work was more difficult than working the register. If she was stocking items and dropped something, Bell would make remarks such as, "What's the matter? You wimping out on me?" or "What's the matter? You can't handle it?" or "Oh, poor baby. Your arm is getting tired?" Lynn did not always wear the brace when she was stocking items because it would slow her down and Bell would call her names.

At his deposition, Bell admitted that he used the words "fuck" and "cunt" in his vocabulary at work, and that it was possible that he used them in the presence of Lynn and Marilyn. While at work, Bell also admitted to discussing oral sex, but he did not remember doing so in the presence of Marilyn or Lynn, or other female employees. It was possible that Bell made the statement, "I wonder if she gives good head." He could not recall if he made such a statement in the presence of female employees. Bell admitted to referring to women as "bitches" and he has referred to customers as "Grosse Pointe bitches" and "Grosse Pointe cunts." It was also possible that Bell referred to males in the workplace as "dicks" and that he may have done so in the presence of Lynn and Marilyn.

Plaintiffs also submitted the affidavit of Samuel Hegarty, who worked at Village Food Market from 1987 to 1991. He stated that he heard Bell refer to Marilyn and Lynn as a "fucking cunt." Hegarty was present at a meeting held to discuss Bell's language. There, Bell stated that "he could call the women workers whatever he wanted, as he paid them, and he could treat them however he wanted." Hegarty once told Bell that Marilyn and Lynn were upset by the sexual comments being made to them, and Bell replied that they were "troublemakers." Hegarty once saw Bell pound on the bathroom door while Marilyn was inside, and immediately afterward, Bell told Hegarty, "Women talk too much, drink too much coffee, and go to the bathroom too much." Hegarty also saw Bell grab Lynn by the neck and push her just after Bell had said to Hegarty, "Those cunts up front need to be put in their place."

Defendants contended in their counter-complaint that plaintiffs had stolen from the store, falsified records, and had intentionally undercharged their friends and families.

II

On appeal, plaintiffs argue that the trial court erred in granting defendants summary disposition regarding their claims of intentional infliction of emotional distress, sexual harassment, Lynn's handicapper's discrimination claim, Marilyn's wrongful discharge claim, and defamation. This Court reviews de novo the trial court's ruling regarding a motion for summary disposition. *Johnson v Wayne Co*, 213 Mich App 143, 148-149; 540 NW2d 66 (1995).

A motion brought under MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. *Id.*, p 149. The court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the opposing party. MCR 2.116(G)(5). The opposing party may not rest upon mere allegations or denials in the pleadings, but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The court's task is to review the record evidence, and all reasonable inferences from it, and decide whether a genuine issue of any material fact exists to warrant a trial. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The trial court is not permitted to assess credibility or to determine facts on a motion for summary disposition. *Id.*

III

We first turn to plaintiffs' claims of intentional infliction of emotional distress. The elements of this tort are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Johnson, supra*, p 161. Liability for such a claim has been 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.*

When ruling on the motion for summary disposition, the trial court made the following findings:

> THE COURT: Actually, after examining the briefs in this regard, I would be shocked that any women would work in an environment where there is so much foul language and would give this Court the impression that they are risking their lives and limbs by going to work at this particular grocery store every day.
>
> As far as I am concerned, I am going to have to make a determination that this conduct is not that extreme. It is not that outrageous. I am not going to judge the credibility at this point in time of any complainants or any witnesses.
>
> As far as what I can read thus far, we find that any and all the plaintiffs' testimony is inherently incredible. And I am going to dismiss Count IV [intentional infliction of emotional distress].

First, to the extent that the trial court found that "any and all the plaintiffs' testimony is inherently incredible," it erred. The trial court is *not* permitted to assess credibility or to determine facts when

deciding a motion for summary disposition. *Skinner, supra*, p 161. Further, we disagree with the trial court that Bell's conduct was not that extreme or outrageous. Rather, we find that the facts as alleged by plaintiffs are sufficient to show extreme and outrageous conduct on behalf of defendants, and that defendants acted in a reckless or intentional manner. See, e.g., *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 342-343; 497 NW2d 585 (1993).

However, we find that while there is evidence that Bell's conduct caused Lynn to suffer emotional distress, there is no evidence that Bell's conduct caused Marilyn to suffer emotional distress. Bell's repeated vulgar language to Lynn and the evidence that he would grab her by the neck and slam a bathroom door on her leg, as well as make fun of her arm brace, is sufficient evidence for a rational trier of fact to conclude that his conduct was so outrageous and so extreme that it goes beyond all possible bounds of decency in a civilized society, and that this behavior was done in a reckless or intentional manner. Lynn also presented evidence that she suffered a panic attack at work in 1990, which she described as "like a breakdown." Lynn attributed the attack to the stress of work and receiving a "penny raise." Therefore, there is evidence that Lynn suffered from emotional distress caused by Bell's actions. Accordingly, the trial court's grant of summary disposition in favor of defendants on the intentional infliction of emotional distress claim with regard to Lynn is reversed and we remand for further proceedings on that claim.

With regard to Marilyn, however, a review of the record reveals no evidence that she suffered from emotional distress as a result of Bell's actions. Because that element has not been proven by any record evidence, we affirm the trial court's grant of summary disposition to defendants on Marilyn's claim of intentional infliction of emotional distress.

IV

We next turn to plaintiffs' claims of sexual harassment. Plaintiffs' sexual harassment claim is premised upon a hostile work environment. MCL 37.2103(h)(iii); MSA 3.548(103)(h)(iii). Five elements must be shown to establish a prima facie case of hostile work environment sexual harassment: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of sex; (3) the employee was subjected to unwelcome sexual conduct or communication; (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).

Defendants do not challenge the first or fifth elements and they have clearly been proven by plaintiffs in this case. We find that plaintiffs have presented evidence on the other three factors of a hostile work environment claim. With respect to the second element, plaintiffs presented evidence that they were subjected to communications or conduct on the basis of their sex. Both plaintiffs testified at their depositions that Bell made numerous sexual comments directly to them. For example, Bell called plaintiffs a "fucking cunt" and a "fucking bitch" directly to them, and asked them specifically whether they "gave good head." Further, Bell told Lynn that he "could make her wet" and Bell would talk

about his prostitutes in the workplace. Such comments would not have been made to plaintiffs but for their sex. Accordingly, there is sufficient evidence that plaintiff were subjected to communication on the basis of their sex.

This Court's opinion in *Linebaugh* does not compel a different result. There, the plaintiff sued a co-worker and her employer because of a sexually explicit cartoon drawn by the co-worker which showed the plaintiff and another co-worker engaging in a sexual act. This Court upheld the dismissal of the plaintiff's hostile work environment claim, finding that the harassment complained of (the drawing) was not based on the plaintiff's gender, but was "gender neutral." We cannot conclude that Bell's comments toward plaintiffs in the present case were "gender neutral" because the comments were clearly directed toward plaintiffs on the basis of their sex.

We also find that there was sufficient evidence presented on the third element of the claim. Plaintiffs have shown that they were subjected to unwelcome sexual conduct. Marilyn told Bell to never call her those words again, and refused to work the following morning until there was a meeting to discuss the language used by Bell. Lynn also told Bell that he was disgusting and she told him to shut up. Normally, Lynn would walk away from the comments. Further, Hegarty told Bell that Marilyn and Lynn were upset by the sexual comments being made to them, and Bell replied that they were troublemakers. Thus, plaintiffs have shown that the sexual comments directed to them were unwelcome.

Finally, there was sufficient evidence to raise a jury question regarding whether a reasonable person, in the totality of the circumstances, would have perceived that the unwelcome sexual conduct or communications substantially interfered with plaintiffs' employment or were intended to or did in fact create an intimidating, hostile, or offensive work environment. *Radtke, supra*, p 394. Accordingly, the trial court erred in granting summary disposition to defendants on both plaintiffs claims of hostile work environment sexual harassment.

V

Next, we address Lynn's handicapper's discrimination claim. Plaintiff must first establish a prima facie case of handicapper's discrimination. She must show that (1) she is handicapped as defined in the Handicapper's Civil Rights Act (HCRA); (2) the handicap is unrelated to her ability to perform the duties of the particular job involved; and (3) she has been discriminated against in one of the ways set forth in the statute. *Merillat v Michigan State Univ*, 207 Mich App 241, 245; 523 NW2d 802 (1994).

Defendants do not dispute that Lynn was handicapped as defined in the HCRA; that is, that her carpal tunnel syndrome was a handicap. Further, they do not dispute that the handicap was unrelated to her ability perform the duties of her job. Even Bell admitted in his deposition that the brace on Lynn's arm did not affect her ability to perform her job duties. Defendants do, however, dispute whether Lynn has proven the third element of a prima facie case. MCL 37.1202(1)(c); MSA 3.550(202)(1)(c) provides:

An employer shall not:

* * *

> Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

Lynn contends that the evidence that her hours at the cash register were reduced and that Bell teased her about the arm and brace were sufficient to preclude summary disposition. After she began to wear her brace for her carpal tunnel syndrome, Lynn testified that her hours at the cash register were reduced and that she was moved to stock shelves and make orders. Lynn also testified that stocking items was more difficult than working at the cash register, and that she would have preferred working more hours at the cash register rather than stocking items. Further, there was evidence that, if Lynn dropped an item while stocking, Bell would make comments such as, "What's the matter? You wimping out on me?" or "What's the matter? You can't handle it?" or "Oh poor baby. Your arm is getting tired?"

Although this evidence is minimal, we believe that, taken in a light most favorable to plaintiff and drawing reasonable inferences from the evidence, it is sufficient to create a material factual dispute regarding whether defendants discriminated against her with respect to a term of her employment (working full-time as a cashier) because of a handicap that is unrelated to plaintiff's ability to perform the duties of the job.

Accordingly, the trial court's grant of summary disposition in favor of defendants regarding Lynn's handicapper's discrimination case must be reversed because Lynn has presented sufficient evidence to prove a prima facie case of handicapper's discrimination.

VI

Next, we address Marilyn's claim of wrongful discharge. She contends that she had a just-cause employment relationship with Village Food Market and that she was discharged in violation of her just-cause contract. We find that the trial court did not err in granting summary disposition in favor of defendants on this claim because plaintiff inappropriately attempted to contradict her deposition testimony with her affidavit in order to create a material factual dispute.

At her deposition, Marilyn testified that she was never promised that she would work at Village Food forever and that whether she would remain at Village Food was determined by her employer. She also testified that she knew she could be discharged if defendants were dissatisfied with her, and that she could leave Village Food if she ever became dissatisfied there. Following her deposition, Marilyn signed an affidavit which stated in relevant part:

1. That at the time I sought employment at Village Food Market, Inc., I was told by the president of the company, Neil Bell, that so long as I did my job, I would have a job with the company.

2. Although there is no way I could prevent my employer from firing me, it was my understanding that it would be contrary to what I was told for the company to fire me if I was doing my job.

3. That at all times, I did my job, and therefore, my firing was contrary to what I was told about the terms of my employment.

The affidavit submitted by plaintiff clearly contradicted her earlier deposition testimony and could not be used to create a genuine issue of material fact. *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 202; 536 NW2d 784 (1995); *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 243; 477 NW2d 146 (1991). Moreover, even if we were to consider plaintiff's affidavit in this regard, it is insufficient to create a material factual dispute regarding whether there was a just-cause employment contract. The affidavit is not sufficiently specific to prove a just-cause employment contract and our Supreme Court has made clear that the "so long as" language is not sufficient to create a just-cause employment contract. *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627; 473 NW2d 268 (1991); *Rood v General Dynamics Corp*, 444 Mich 107; 507 NW2d 591 (1993).

Accordingly, the trial court did not err in granting defendants summary disposition with respect to Marilyn's wrongful discharge claim.

VII

Next, plaintiffs argue that the trial court erred in sua sponte dismissing their claim of defamation and in failing to articulate any reason for dismissing the defamation claim.

In their complaint, plaintiffs contended that defendants defamed them by telling customers and others that they were discharged for undercharging merchandise for their friends and family. Defendants did *not* move for summary disposition on this count below. The trial court, on its own motion, dismissed the defamation count without articulating any basis for doing so and without giving the parties the opportunity to brief the issues. This was improper. See *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 88-90; 492 NW2d 460 (1992) (Corrigan, J., concurring). Therefore, we reinstate the defamation count and remand for further proceedings. We offer no opinion with regard to the merits of plaintiffs' defamation claim, but note that defendants are not precluded from properly raising a motion for summary disposition on this count.

VIII

Last, we address defendants' cross-appeal. In their counter-complaint, defendants filed a three-count complaint alleging conversion, fraud, and unjust enrichment. The trial court again sua sponte dismissed defendants' counter-complaint without any basis for doing so. As previously stated, it was

improper for the trial court to sua sponte dismiss these claims when the parties did not brief the issues, did not request such an action, and where the trial court gave no legal basis for its decision. Accordingly, defendants' counter-complaint is reinstated in its entirety and we offer no opinion regarding the merits of the claims. Plaintiffs are not precluded from raising their own motion for summary disposition should they so choose.

In sum, we reverse the trial court's grant of summary disposition in favor of defendants with regard to Lynn's claim of intentional infliction of emotional distress, both plaintiffs' claim of sexual harassment, Lynn's claim of handicapper's discrimination, and we reinstate both plaintiffs' claim of defamation. We affirm the trial court's grant of summary disposition in favor of defendants with regard to Marilyn's claim of intentional infliction of emotional distress and her claim of wrongful discharge. We also reverse the trial court's decision to dismiss defendants' counter-complaint and order that the counter-complaint be reinstated in its entirety.

Affirmed in part, reversed in part, and remanded for further proceedings. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza