STATE OF MICHIGAN

COURT OF APPEALS

JUDITH A. SWAN,

Plaintiff-Appellant,

v

BOB MAXEY LINCOLN MERCURY and SYLVIA MAXEY, Personal Representative of the Estate of ROBERT H. MAXEY,

Defendants-Appellees.

UNPUBLISHED
April 24 2001

No. 216564
Wayne Circuit Court
LC No. 96-605022-CL

Before: Sawyer, P.J., and Murphy and Saad, JJ.

PER CURIAM.

Plaintiff appeals from a judgment of the circuit court entered on the jury's verdict of no cause of action. We affirm.

Plaintiff was employed by defendant Bob Maxey Lincoln Mercury as the business manager (also referred to as the finance and insurance manager) until her discharge. The stated reason for her discharge was her involvement with a fellow employee, Alvin Taylor, to produce a fraudulent letter on Ford Motor Credit Corporation letterhead for Taylor to use in obtaining a home mortgage. Plaintiff denied any involvement with that letter. After her discharge, she filed the instant action alleging sexual harassment by Bob Maxey, Sr., during her employment, as well as sexual and racial discrimination. Following a jury trial, a verdict was rendered in favor of defendants.

We first consider plaintiff's arguments that the evidence overwhelmingly supported her claims of harassment and discrimination. We disagree. First, we note that plaintiff's arguments go little farther than the allegation that she presented a prima facie case on these issues. We would agree that plaintiff presented a prima facie case, particularly with respect to the sexual harassment claim. That is, plaintiff presented sufficient evidence that, if believed by the jury, the jury would have been justified in ruling in plaintiff's favor. However, that does not compel the conclusion that the jury could only reasonably decide in plaintiff's favor. Defendants presented a strong defense. If defendants' witnesses were believed, as apparently they were, the jury was justified in returning the verdict that it did. That is, the jury could reasonably conclude that Bob Maxey, Sr., never harassed plaintiff and that, although plaintiff was a white female and Alvin

Taylor was a black male, there were legitimate business reasons for terminating plaintiff over the incident while allowing Taylor to remain employed.[1]

Next, we consider plaintiff's argument that the trial court erred in refusing to submit her claim of retaliation to the jury. We disagree. The trial court is not obligated to submit a claim to the jury that is not substantiated by the evidence. *Jaworski v Great Scott Supermarkets, Inc.*, 403 Mich 689, 697; 272 NW2d 518 (1978). In light of the jury's verdict of no cause of action on the claim of sexual harassment, we are not persuaded that the trial court erred in concluding that the retaliation claim was not supported by the evidence.

Finally, we consider plaintiff's evidentiary issue. Plaintiff argues that the trial court erred in allowing into evidence a tape recording of a conversation between Bob Maxey, Sr., and plaintiff. We disagree. Apparently, Maxey, Sr., had a suspicious wife and she had arranged for his telephone conversations to be recorded on an on-going basis, beginning some years before plaintiff began working for defendants. The recording machine automatically started whenever the telephone handset was picked up. There was evidence presented that Maxey was aware that his wife had his telephone conversations recorded.[2] Specifically at issue is a conversation on October 6, 1992, when Maxey, Sr., telephoned from his home to plaintiff at the office.

Plaintiff argues that the recording should have been excluded from evidence because it was obtained in violation of the Michigan eavesdropping statute, MCL 750.539 *et seq.*; MSA 28.807 *et seq.* We disagree. This Court has previously held that, while the eavesdrop statute is violated when a third-party records the conversation of others without the knowledge of all parties to the conversation, the statute is not violated when a participant to the conversation records the conversation, even if the other participant to the conversation is unaware that it is being recorded. *Sullivan v Gray*, 117 Mich App 476, 481; 324 NW2d 58 (1982).

We cannot say that the trial court clearly erred in concluding that Maxey, Sr., was aware of the automatic recording equipment attached to his home telephone and, therefore, consented to the recording and, in fact, caused the recording to happen by placing the call from his home

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[1] Specifically, because plaintiff, as business manager, dealt with Ford Motor Credit on essentially a daily basis, her continued employment presented a direct problem in the dealership's dealings with Ford Motor Credit. On the other hand, Taylor, as a salesman, had little or no direct involvement with Ford Motor Credit and, therefore, could reasonably be viewed as not presenting the same threat to the dealership's relationship with Ford Motor Credit. Additionally, Maxey, Jr., cited the fact that Taylor came forward and divulged his involvement, while plaintiff continuously denied any wrongdoing.

[2] Both Maxey's son, Bob Maxey, Jr., and his wife, Sylvia Maxey, testified that Maxey, Sr., knew that Sylvia Maxey had his telephone calls recorded. Sylvia Maxey testified that Maxey, Sr., knew where the recording machine was located and where she kept the tapes of the telephone conversations. Additionally, there is a comment by Maxey, Sr., during the course of the telephone conversation at issue which suggests that he was aware that the call was being recorded.

telephone. Therefore, the trial court did not err in concluding that the recording did not violate the eavesdrop statute.[3]

Affirmed. Defendants may tax costs.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Henry William Saad

[3] We would also point out that the parties, and the trial court, all appear to assume that if the recording did violate the eavesdrop statute, it would be inadmissible at trial. Although we need not address that issue, we do wish to point out that that is an assumption that we are not comfortable making. We are not aware of any case which holds that illegally obtained evidence is not admissible in a civil action. In fact, in *Kivela v Dep't of Treasury*, 449 Mich 220, 226; 536 NW2d 498 (1995), the Supreme Court held the Treasury Department could make use of evidence illegally obtained by the police in a civil tax proceeding so long as there was no showing of collusion between the agency using the evidence and the agency which illegally obtained the evidence.