STATE OF MICHIGAN

COURT OF APPEALS

MICHELE GREEN and GREGORY VARTANIAN,

Plaintiffs-Appellants,

V

PARAGON INVESTMENT CO. LTD., d/b/a ROYAL OAK MUSIC THEATER, PROPHET PRODUCTIONS LTD., d/b/a BRASS RING PRODUCTIONS and CHARLES FOX,

Defendants-Appellees.

UNPUBLISHED
December 7, 2001

No. 226842
Oakland Circuit Court
LC No. 98-010501-NZ

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order dismissing their discriminatory discharge claims under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*, and plaintiff Vartanian appeals the dismissal of several other claims as well. We affirm the dismissal of plaintiff Vartanian's claims and reverse the dismissal of plaintiff Green's CRA claim.[1]

Plaintiffs are former employees of defendant Royal Oak Music Theater (ROMT). Defendant Charles Fox was the manager of the ROMT at pertinent times. Green began working at the ROMT as a bartender in July 1994; her employment was terminated in September 1998. Vartanian's employment as a security officer at the ROMT was terminated in May 1996. Pertinent to this appeal is an alleged extramarital affair between defendant Fox and plaintiff Vartanian's then-wife, Gina Vartanian, who was also an employee of the ROMT and one of Green's best friends.

I

[1] This appeal involves only Green's CRA claim against Fox and the ROMT, and Vartanian's claims against Fox only. The circuit court dismissed Green's CRA claim against Fox and the ROMT on statute of limitations grounds, MCR 2.116(C)(7). The court dismissed Vartanian's CRA claim regarding his second discharge, and the intentional infliction of emotional distress and defamation/interference with advantageous business relations claims under (C)(10).

Green argues that the circuit court erred in dismissing her CRA claim on statute of limitations grounds because plaintiffs filed suit on November 12, 1998, shortly after Green's September 1998 termination.[2] Green argues that the circuit court mistakenly believed that, because Fox's alleged extramarital affair with Gina Vartanian, and Fox's sexual assaults of Green occurred more than three years before plaintiffs filed their complaint, Green's discrimination claim under the CRA was time-barred.

Green asserts that the sexual discrimination against her arose when Fox, through his extra-marital lover (Gina Vartanian), attempted in or around September 1998 to force Green to sign a document containing lies regarding Fox's past sexual harassment of Green and Fox's affair with Gina. Green argues that her refusal to perjure herself by signing that document prompted Fox to terminate her employment.

Green further argues that the circuit court also could have properly denied defendants' motion for partial summary disposition based on the continuing violations theory, as Fox's prior discriminatory acts against Green were directly linked to Green's termination when she refused to lie about the occurrence of those acts.

A

This Court reviews de novo the circuit court's grant of summary disposition under MCR 2.116(C)(7). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (2000). A (C)(7) motion should not be granted unless no factual development can provide a basis for recovery. *Traver Lakes Community Maintenance Assn v Douglas Co,* 224 Mich App 335, 340; 568 NW2d 847 (1997).

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v Kleiman,* 447 Mich 429, 434, n 6; 526 NW2d 879 (1994). [*Maiden, supra* at 119.]

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[2] Plaintiffs filed their original complaint on November 12, 1998. Their first amended complaint alleged wrongful termination in violation of the CRA and intentional infliction of emotional distress as to both plaintiffs. Plaintiff Vartanian additionally alleged a third count, entitled "defamation and intentional interference with an advantageous business relationship."

Plaintiffs' first amended complaint alleged that Fox used his position to sexually harass and engage in non-consensual sexual touching of Green, which included forcing sexual acts on her, and plaintiff testified on deposition about four such incidents. However, plaintiffs' appellate brief acknowledges that Fox's sexual exploitation of Green occurred outside the three-year limitations period, and focuses on Green's termination in September 1998, alleging that it violated the CRA.

The period of limitations for a cause of action under the CRA is three years. MCL 600.5805(8); *Mair v Consumers Power Co*, 419 Mich 74, 77; 348 NW2d 256 (1984). A claim of discriminatory discharge accrues on the date the plaintiff is discharged. *Salisbury v McLouth Steel Corp*, 93 Mich App 248; 287 NW2d 195 (1979).

The CRA prohibits an employer from discharging an employee on the basis of gender. MCL 37.2202. It also provides that an employer may not use an employee's submission to or rejection of sexual advances as a factor in decisions affecting the individual's employment. MCL 37.2103(i)(*ii*).

B

At argument, defendants asserted that the record failed to establish that the request for the letter that Green claims precipitated her discharge occurred within the three-year period preceding the filing of the complaint. We conclude, however, that the record sufficiently supports that the request occurred shortly before Green's September 1998 discharge.

Regarding her discharge in September 1998, Green testified:

> *Q.* You said you were discharged when you refused to take affirmative steps to hide the extramarital affair?
>
> *A.* Gina wanted me to provide a letter stating that there never ever was an affair or that anything had happened to me. And I refused to do so.
>
> *Q.* When did she ask you for that letter?
>
> *A.* It would have been September, sometime before I was discharged.
>
> *Q.* So it was after the divorce was filed and before you were discharged?
>
> *A.* Correct.
>
> *Q.* And what kind of letter did she ask for?
>
> *A.* She wanted me to provide her with a letter stating that she had not had an affair and that nothing had happened to me.
>
> *Q.* And that nothing had happened to you?
>
> *A.* Yes.
>
> *Q.* That you had not been raped, correct?[3]

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[3] Green testified on deposition regarding several incidents of Fox engaging in nonconsensual physical contact with her in 1995. She testified that the first incident occurred in Fox's office, where she was counting money, as she did customarily, after hours. Fox forced her to have
(continued…)

A. Correct.

Q. And you refused to sign that kind of letter?

A. Correct.

Q. And then you were fired?

A. Yes.

Green testified that Gina filed for divorce sometime around August 1998. The quoted testimony sufficiently supports Green's claim that she was discharged shortly after being asked to sign the letter. Stated differently, defendants' contention that the letter incident occurred in September of 1995, rather than September of 1998, is based on a very strained reading of Green's testimony.

C

It is undisputed that Green's September 1998 discharge occurred within the limitations period. Defendants argue Green's discharge is not an actionable event under the CRA because being fired for refusing to sign a document denying the existence of an alleged affair between Fox and a third party does not fall within any recognized category of the CRA. We do not disagree with this proposition. Defendants do not, however, mention that the alleged document **also would have required Green to disclaim Fox's sexual misconduct toward Green**. Defendants do not frontally address this aspect of the document, and instead erroneously assert that "the document is not alleged to have any relevance to the alleged events between Green and Fox; they are utterly unrelated incidents."

Defendants further assert that the letter and discharge are simply an effect of past discrimination and thus not actionable. In *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), the Court noted that the "present effects of past discrimination" subtheory of the continuing violations doctrine, under which "a continuing violation existed where a party suffered timely effects or injury from a past untimely act of discrimination," ceased to be actionable after *United Air Lines, Inc v Evans*, 431 US 553; 97 S Ct 1885; 52 L Ed 2d 571 (1977). *Sumner*, at 528-529. However, Green's discharge on the basis that she would not lie regarding the occurrence of Fox's past acts of sexual discrimination against her is not an act that "was in fact only an effect of Fox's prior discriminatory acts." *Id.*

(…continued)

sexual intercourse with him, told her she could not tell anyone of the incident, and threatened to kill her if she did so. Green considered the incident a rape. Green testified that she did not tell anyone that night about the incident, that Fox called her on her car phone while she was driving home, and that he told her she could never tell anyone about what had happened, that no one would believe her, that she could never tell Gina, and that if she did she'd "be basically taken out," "[t]hey would find my body in an abandoned trunk somewhere." Green testified that Fox called her several times after and said she could not say anything and asked "are we clear on that?" She also testified regarding several other incidents of non-consensual touching.

Viewing the facts and inferences therefrom in a light most favorable to Green, Fox conditioned Green's continued employment on her signing a document denying his earlier sexual misconduct against her. Green's discharge was an adverse employment action taken in retaliation for Green's refusal to lie regarding Fox's sexual conduct towards her.[4] Although the dissent correctly observes that we have located no cases directly on point, neither are there cases reaching the opposite conclusion. The issue is whether gender was a factor in defendant's adverse employment action toward plaintiff. While the insistence that an employee lie does not in itself include a gender element, here, the subject matter of the lie was prior sexual conduct.[5] We conclude that this is an actionable event of sex discrimination under the CRA.

We need not address Green's argument that there was a continuing violation in light of the fact that Green does not seek to revive her right to sue on the past violations but only on the discharge, and our conclusion that the discharge is actionable.

II

Plaintiff Vartanian argues that his second discharge, in May 1996, occurred because he again began to believe that his wife, Gina, was still having an affair with Fox. Vartanian argues that it was because of Fox's animosity toward him arising out of the affair and Vartanian's renewed interest and concern in that affair that Fox fired him. Vartanian contends that it was clearly his marital status (i.e., the fact of his being married to Gina) that led to his May 1996 termination.

Regarding his intentional infliction of emotional distress claim, Vartanian argues that Fox's actions in carrying on an illicit affair with Vartanian's wife and then making slanderous remarks against Vartanian amount to outrageous conduct.[6] Regarding the defamation and

[4] We observe that this is not a situation where a plaintiff seeks to revive a stale claim by reviving stale accusations. Rather, plaintiff asserts that defendants sought a disclaimer of events that happened in the past and then discharged plaintiff for refusing to provide such a disclaimer. Defendants' actions revived the past conduct by conditioning plaintiff's continued employment on signing a letter which amounted to a submission to the prior sexual conduct. The discharge was a new discriminatory act.

[5] An analogous situation would be one in which an employer sexually molests a female employee on several occasions, which molestation the employee endures without complaint and, three years and a day later, the employer advises the employee that he has become a new man and must fire her because her presence is a reminder to him of his old ways. The female employee suffers a new adverse employment action that is directly linked to the employer's past discriminatory acts, and is in itself discriminatory. That the employer may also fire a male former drinking buddy, or, analogously, a male employee who refuses to lie about a different subject matter, does not change the discriminatory nature of firing the female for the reason that she reminds the employer of, or refuses to lie about, past sexual advances.

[6] Vartanian's intentional infliction of emotional distress claim alleged that Fox tried to alienate the affections of Vartanian's wife, that Fox paraded his illicit extra-marital affair with Gina Vartanian in front of Vartanian and his co-employees in an attempt to cause severe emotional distress to Vartanian, and that Fox commented to numerous people that Vartanian's jewelry business was "no more than a drug front," that Vartanian was a "drug dealer and wife abuser," and made "fake jewelry." Plaintiffs alleged that Vartanian's termination was contrary to public

(continued…)

intentional interference with advantageous business relations claim, Vartanian argues that defamatory statements may be the basis for an intentional interference claim, and that Vartanian's relationship with his other employers and potential employers was damaged as a result of Fox's comments about him and Fox's actions in attempting to have him fired.[7]

A

The CRA prohibits employment decisions based on marital status MCL 37.2202. ICLE, Employment Litigation in Michigan, § 3.60, p 3-68. The CRA "is aimed at 'the prejudices and biases' borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices and biases." *Miller v CA Muer Corp,* 420 Mich 355, 363; 362 NW2d 650 (1984) (holding that challenged antinepotism policies were not facially discriminatory, as neither policy facially treated employees differently on the basis of whether they were married, and there was no facial indication of adverse effect on married, single, divorced, separated, or widowed employees, but remanding for consideration whether policies as applied were discriminatory). The Legislature's intent in including marital status as a protected class in the CRA was to prohibit discrimination based on *whether* a person is married. *Id.* The relevant inquiry is whether discrimination occurred based on whether one is married, rather than to whom one is married. *Fonseca v Michigan State Univ*, 214 Mich App 28, 32; 542 NW2d 273 (1995). "To include the identity, occupation, and place of employment of one's spouse within the definition of 'marital status' might enlarge the protected class to include all married persons who desire to work with their spouse. Such a construction would invalidate most antinepotism policies." *Miller*, *supra* at 363.

Vartanian submitted an affidavit below, stating in pertinent part:

> 2. I was discharged on two separate occasions by Mr. Fox, who advised me that the grounds of my termination were totally unrelated to the discharge of my employment duties, which were satisfactory, but because Fox had been named in a complaint for divorce and identified as an adulterer.

(…continued)

policy because he attempted to include Fox as a party defendant in his divorce proceedings due to Fox's ongoing affair with Gina Vartanian; that Fox's statements and actions were not motivated by a legitimate personal or business interest and were not otherwise privileged; and that Fox's actions and/or inactions were undertaken with malice for the sole purpose of causing severe emotional distress.

[7] The count alleging defamation and intentional interference with an advantageous business relationship alleged that Fox wrongfully attempted to convince other employers to discontinue using Vartanian's services on an independent contractor basis; that Fox published to many individuals that Vartanian was a drug dealer, wife abuser, and made fake jewelry; and that Fox attempted to have the management of Fifth Avenue Billiards, Vartanian's present employer, fire Vartanian by making such wrongful and erroneous allegations, which constitute defamation per se.

> 3. Mr. Fox repeatedly denied having an extramarital affair with my wife, Gina Vaccarelli, despite being confronted with evidence to the contrary, including Gina's own admission to which Mr. Fox indicated and threatened to discharge me if he [sic] attempted to discuss or portray Mr. Fox as an adulterer.
>
> 4. In retaliation, because Mr. Fox was named in the divorce complaint and because I openly discussed the obvious affair with employees of the Royal Oak Music Theater in an attempt to investigate the truth, Mr. Fox terminated me from employment and advised others not to utilize my services.

We conclude that the circuit court did not err in dismissing Vartanian's CRA claims against Fox. Regarding Vartanian's second discharge in May 1996, he provided no legal authority to support, nor have we found any, that a discharge based on an "expected change" in marital status with respect to a particular individual, or a discharge resulting from referring to an employer (Fox) in divorce proceedings, constitutes prohibited discriminatory conduct against which Vartanian was protected under the CRA. As such, dismissal was proper under MCR 2.116(C)(10).

B

The elements of the tort of intentional infliction of emotional distress are: extreme and outrageous conduct, intent or recklessness, causation, and severe emotional distress. *Grochowalski v DAIIE,* 171 Mich App 771, 775; 430 NW2d 822 (1988). The defendant's 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." *Graham v Ford,* 237 Mich App 670, 674; 604 NW2d 713 (1999). Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions and other trivialities. *Tope v Howe,* 179 Mich App 91, 107; 445 NW2d 452 (1989). This Court recently concluded that a clergy member's misuse of his position as the plaintiff's pastor and counselor in order to achieve a sexual relationship with her did not rise to the required level of extreme and outrageous conduct to constitute intentional infliction of emotional distress. *Teadt v St John's Evangelical Church,* 237 Mich App 567, 582-583; 603 NW2d 816 (1999). We conclude that *Teadt* is dispositive of Vartanian's intentional infliction claim, and that the circuit court did not err in granting summary disposition to defendant.

C

Dismissal of Vartanian's remaining claims was also proper.

> The basic elements which establish a prima facie tortious interference with a business relationship are the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted. One is liable for commission of his tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another. [*Winiemko v Valenti,*

203 Mich App 411, 416; 513 NW2d 181 (1994), quoting *Northern Plumbing & Heating, Inc v Henderson Bros, Inc*, 83 Mich App 84, 93; 268 NW2d 296 (1978), quoting 45 Am Jur 2d, Interference, § 50, p 322.]

The period of limitations for an action charging defamation is one year. MCL 600.5805(7). However, defamation may support a claim of tortious interference with business relations, which is subject to a three-year statute of limitations. See *Wilkerson v Carlo*, 101 Mich App 629, 631-634; 300 NW2d 658 (1980).

Assuming that Fox's statements regarding Vartanian were defamatory,[8] Vartanian testified at deposition that the statements were made more than one year before plaintiffs filed their complaint. Any claim for defamation is thus time-barred. Although defamatory statements can form the basis for a claim of intentional interference with advantageous business relations, see *Hodgins Kennels v Durbin*, 170 Mich App 474, 477-478; 429 NW2d 189 (1988), rev'd in part on other grounds 432 Mich 894; 438 NW2d 247 (1989), and *Wilkerson, supra* at 631-634, Vartanian presented no evidence that any business relationship was adversely affected or discontinued as a result of Fox's statements. Summary disposition of the defamation/intentional interference with an advantageous business relationship count was thus proper.

We affirm the dismissal of Vartanian's claims. We reverse the dismissal of plaintiff Green's CRA claim against Fox and the ROMT to the extent that it is based on the allegation that her September 1998 discharge was in response to her refusal to sign a letter stating that Fox had not sexually assaulted her.

/s/ Helene N. White
/s/ Martin M. Doctoroff

[8] We note that Vartanian testified at deposition that he had sold drugs, and defendants submitted documentary evidence below of a drug conviction of Vartanian, and of a personal protection order Gina Vartanian obtained against plaintiff Vartanian.