

STATE OF MICHIGAN
COURT OF APPEALS

JESSICA SCHUSTER,

Plaintiff/Counter-Defendant-
Appellee,

v

THOMAS A. ENDICOTT, P.C.,

Defendant/Counter-Plaintiff,

and

THOMAS A. ENDICOTT,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
February 12, 2008

No. 275330
Lenawee Circuit Court
LC No. 05-052057-NZ

Before: Gleicher, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant, Thomas A. Endicott, appeals as of right a judgment for plaintiff. We affirm. This hostile work environment sexual harassment case arises out of conduct and communication directed at plaintiff during her employment for defendants, Thomas A. Endicott and his dentist office, Thomas A. Endicott, P.C.¹

The proofs established that Endicott routinely used sexually explicit language and imagery around plaintiff, a dental hygienist, and other female members of his staff. He kept pornographic images on his computer in a way that made them readily visible to other staff members, and he often included female staff members in sexually suggestive conversations. For example, he frequently provided vivid reports of his sexual conquests to the women in the office, and he once asked plaintiff to bear his children. On another occasion, he asked her into his office so she could compare computer images and determine whether a woman's breasts had grown

¹ Thomas A. Endicott is the lone appellant in this case, so our references to Endicott allude to him alone.

larger over the years. He then described, in graphic detail, a sexual encounter he had experienced on a trip out west, and asked her outright if the conversation made her uncomfortable. She told him that it did and left. Nevertheless, the sexually hostile behavior persisted unabated, and Endicott's unwelcome, sexually explicit manner pervaded the office environment.

On St. Patrick's Day 2005, when Endicott found plaintiff bending over a file, he pinched her buttocks. When she told him he was out of line, he laughed and explained that she was not wearing green. About a month later, without any hope that the office's hostile atmosphere would improve, the women in the office staged a mass walkout. Plaintiff was unable to secure full-time employment for nine months, and she personally paid thousands of dollars in expenses for counseling until she could no longer afford it.

On appeal, Endicott only raises two issues. He first contends that the trial court abused its discretion when it denied defendant's motion to adjourn so that he could obtain substitute counsel. Endicott also asserts that the trial court exceeded the limits of what reasonable minds would deem just compensation for the injury plaintiff sustained. We disagree with both arguments.

In this case, Endicott requested an adjournment on the day of trial to substitute his attorney for one who would procure eight witnesses that he claimed were necessary for the presentation of his defense. An oral motion to adjourn and a late addition to a witness list each require a showing of good cause. MCR 2.503(B)(1); MCR 2.401(I)(2). A trial court's decision on a motion to adjourn for the substitution of counsel is reviewed for abuse of discretion. *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). The decision to adjourn trial so a party may procure a witness "is also within the trial court's discretion, and cases where a denial was proper have always involved some combination of numerous past continuances, failure of the movant to exercise due diligence, and lack of any injustice to the movant." *Tisbury v Armstrong*, 194 Mich App 19, 21; 486 NW2d 51 (1992). "A denial because of the absence of a witness is proper where the movant fails to provide an adequate explanation and show that diligent efforts were made to secure the presence of the witness." *Id.*

In this case, the trial court had issued a scheduling order that recommended the deposition of all anticipated witnesses because adjournments would not be granted to procure their attendance at trial. Nevertheless, defense counsel moved for an adjournment on the morning of trial to procure a witness who was recovering from a torn retina in a hospital in West Virginia. Defense counsel had neither deposed the absent witness nor subpoenaed her. The motion followed two other granted requests for interruptions in the day's proceedings so that Endicott could stabilize his blood sugar. The situation was also remarkable because Endicott, having been convicted of criminal activities arising out of his dissolved dental practice, was present at the government's expense and only through the combined efforts of the Department of Corrections and the trial court. No explanation was offered for defense counsel's failure to subpoena the witness or move for an adjournment earlier. Under the circumstances, the trial court did not abuse its discretion by denying an adjournment for this absent witness.

Following the second recess to address Endicott's medical issues, Endicott personally moved for a continuance, this time to obtain substitute counsel who would procure the eight absent witnesses he thought were necessary to present his defense and counter-claim. The

ensuing record reflects that Endicott had been dissatisfied with his counsel's efforts for several months, and that he did not know exactly what many of the witnesses would say because they were referred to him by his investigative service.² In response, his trial counsel assured the court that the witnesses were duplicative to evidence that would be presented. Endicott fails to demonstrate how the decision to proceed with trial extinguished any of defendants' claims or defenses. Both Endicott and his collections manager ultimately testified regarding the motives and credibility of plaintiff's witnesses, the loss of Endicott's assets, and their whereabouts on the St. Patrick's Day in question.

Furthermore, Endicott clearly did not exercise due diligence in moving to adjourn and substitute counsel. Endicott admitted that for eight months he had been in contact with another attorney to replace his trial counsel, and he claimed to know well in advance about his trial attorney's lack of contact with the witnesses he wanted to present. Although Endicott had not requested an adjournment before, he originally failed to answer the complaint, which significantly delayed the proceedings while the trial court set aside the default and reset the matter for trial. Under the circumstances, the trial court did not abuse its discretion by denying Endicott's belated motion to adjourn trial.

Next, Endicott claims that the trial court awarded plaintiff excessive compensatory damages. However, Endicott did not preserve this issue in the trial court with a motion for remittitur or new trial, so we will only consider the issue if our failure to do so would result in manifest injustice. MCR 2.611(A)(1)(d); *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 315; 660 NW2d 351 (2003); *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007). Here, the trial court's award was not so extreme that it clearly amounts to manifest injustice. The trial court provided moderate compensation to plaintiff for her lost wages, medical costs, and reasonable attorney fees. Endicott argues, however, that plaintiff's injuries were too minimal to support the trial court's \$90,000 award for pain and suffering. We are not persuaded that the award suggests manifest injustice. Plaintiff's testimony supported a finding that she experienced serious stress, humiliation, and fear, all of which eventually led to her leaving her employment and seeking counseling. Because Endicott fails to demonstrate how the award was completely out of proportion to the emotional injuries plaintiff has suffered, we will not disturb the award on appeal. *Laurel Woods Apts, supra*.

² Defendant did not raise any issue with his trial attorney's inability to protect his right to a jury trial, so that issue is not preserved. *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007). We do not find any manifest injustice resulting from the trial court's failure to consider an issue that was not argued as a reason for adjournment and most likely would not have resulted in a jury trial even if Endicott had raised it. Therefore, we do not address Endicott's arguments related to his trial counsel's failure to preserve his right to a jury trial. *Id.*

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly