STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE ASHKER,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 21, 1997

No. 188647

Wayne Circuit Court
No. 91-101922

Before: Griffin, P.J., and T.G. Kavanagh* and D.B. Leiber,** JJ.

PER CURIAM.

Plaintiff appeals the circuit court's summary disposition of her claims against Ford Motor Company. Plaintiff's complaint alleged civil conspiracy, violation of the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., intentional interference with economic advantage, intentional infliction of emotional distress, breach of contract, and intentional interference with a contractual relationship against Ford Motor Company (Ford), Ford Motor Credit (FMCC), and ten individual defendants. Plaintiff entered into a consent judgment with FMCC and the individual defendants following mediation, and only defendant Ford remained. The trial court granted Ford's motion for summary disposition, adopting defendant's brief and argument in its entirety. We affirm in part and reverse in part.

The circuit court erred in granting summary disposition to defendant regarding plaintiff's CRA claim. The economic reality test is the proper test to determine whether defendant Ford was plaintiff's employer. See *McCarthy v State Farm Insurance*, 170 Mich App 451, 455; 428 NW2d 692 (1988). The factors to be considered in applying the economic reality test are (1) control; (2) payment

---

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.
** Circuit judge, sitting on the Court of Appeals by assignment.

of wages; (3) hiring and firing; and (4) responsibility for the maintenance of discipline. *Wells v Firestone Co*, 421 Mich 641, 648; 364 NW2d 670 (1984).

Defendant exercised control over the termination procedure at FMCC. Ford's procedure for termination of long term employees required review by Ford personnel staff of the process and documentation of the termination. If the documentation was insufficient, Ford personnel had the authority to make an independent investigation of the grounds for termination. Presumably, if there were insufficient grounds for termination based upon the further investigation, the termination could be denied. Ford employees testified at deposition that the procedure was implemented by Ford in order to insure consistency of application throughout the corporation. This fact suggests "control" by Ford over FMCC employee relations. Regarding the right to discipline, evidence indicated that FMCC did not have an internal department for investigating civil rights and other employee complaints, but rather left such authority to Ford security staff. For instance, Ford staff had the authority to place a wiretap on plaintiff's phone in furtherance of their investigation of her complaints. Regarding compensation, plaintiff presented evidence that her "total compensation" originated at Ford, rather than FMCC. This "total compensation" included salary, stock options, vehicle lease discounts, and benefits. Plaintiff's health plan statements clearly indicate that "benefits have been provided by Ford Motor Company."

We therefore conclude that a genuine issue of fact remained whether Ford was "an employer" of plaintiff under the economic reality test, and for the purposes of the civil rights act. The circuit court erred in granting summary disposition on this issue.

Next, we find that the circuit court erred in dismissing plaintiff's complaint on the basis that defendant Ford was discharged from liability as a joint tortfeasor by plaintiff's consent judgment with the eleven other defendants. The settlement reached between plaintiff, FMCC and the individual defendants was entered pursuant to MCR 2.403(M), following those defendants' acceptance of the mediation evaluation against them. Ford was not a party to this consent judgment and it had no effect on Ford's potential liability.

We conclude, however, that summary disposition of plaintiff's civil conspiracy, intentional infliction of emotional distress, and interference with a contractual relationship claims was proper pursuant to MCR 2.116(C)(10).

A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. *Admiral Insurance v Columbia Casualty Insurance Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). In support of her claim, plaintiff presented the deposition testimony of Frank Holowicki, a member of Ford security staff, who indicated that he had attended a meeting where he and plaintiff's supervisors discussed the possibility that plaintiff was "setting up" the company for a lawsuit. There was no evidence, however, that the purpose of this meeting was to accomplish or encourage plaintiff's termination. Plaintiff further alluded to "volumes of testimony regarding inter-action [sic] between Ford personnel" regarding plaintiff. She did not, however, present this evidence at defendant's

motion for summary disposition, nor does she on appeal. Plaintiff cannot rest upon mere allegations, but must present specific facts showing a genuine issue for trial. MCR 2.116(G)(4). We conclude that the evidence presented by plaintiff does not rise to the level of "concerted action . . . to accomplish a lawful purpose by . . . unlawful means."

Next, we conclude that plaintiff has failed to raise a question of fact regarding the existence of a claim for intentional infliction of emotional distress. The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Duran v Detroit News, Inc*, 200 Mich App 622, 629-630; 504 NW2d 715 (1993). 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. *Johnson v Wayne County*, 213 Mich App 143, 161; 540 NW2d 66 (1995); *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 342; 497 NW2d 585 (1993).

First, plaintiff argues that the anti-Arab American conduct of FMCC employees constituted outrageous conduct. A party may be held liable for the actions of another which amount to intentional infliction of emotional distress on the basis of respondeat superior. See *Rushing v Wayne County*, 138 Mich App 121, 136; 358 NW2d 904 (1984), vacated on other grounds 436 Mich 247; 462 NW2d 23 (1990). To impose liability under the doctrine of respondeat superior, it is necessary to prove two basic elements: (1) that the actual tortfeasor is an "employee" of the defendant; and (2) that the tortfeasor was acting within the scope of his employment with the defendant. *Hooks v Western & Southern Life Insurance Co*, 268 Mich 421; 256 NW2d 459 (1934); *Peters v State*, 66 Mich App 560, 564 n 6; 235 NW2d 662 (1976). In *Linebaugh*, *supra*, 198 Mich App 335, this Court examined a similar fact situation. The plaintiff had sued her employer and a co-worker for intentional infliction of emotional distress based upon the co-worker's drawing and dissemination of a cartoon depicting plaintiff and another male co-worker engaged in a sexual act. Although this Court found the co-worker's action sufficiently outrageous as to warrant submission to a jury:

> With regard to the corporate defendant, Sheraton, we reach a different conclusion. Even if Herring were found to have intentionally inflicted emotional distress upon plaintiff, Sheraton would not be vicariously liable. An employer is liable only for the acts of its employee committed within the scope of employment. *McCalla v Ellis*, 129 Mich App 452, 460-461; 341 NW2d 525 (1983). Summary disposition was properly granted to the corporate defendant with regard to this claim. [*Linebaugh, supra*, 198 Mich App 343.]

We come to a similar conclusion in the instant case. Regardless of which employee left the offensive material on plaintiff's desk, his or her actions were not within the scope of their employment. Accordingly, defendant Ford cannot be held liable for this conduct on the basis of respondeat superior.

Plaintiff also cites as outrageous conduct Ford Employee Relations staff's choice of a team name for a bowling league of "Employee Relations Bowling Liberation Front," as well as their use of Arabic sounding nicknames on the roster. While we believe such conduct was highly inappropriate, tasteless and insensitive to persons of Arabic national origin, we cannot state that it was "atrocious, and utterly intolerable in a civilized community." Regarding plaintiff's suggestion that Ford personnel's failure to make sufficient inquiry into her case is outrageous conduct, we find that such failure does not support a finding of intentional infliction of emotional distress.

Finally, while termination of employment, even in the case of an at-will employment contract, can give rise to a claim for interference with a contractual relationship, the plaintiff must establish that the defendant stood as a "third party" to the contract or business relationship. *Feaheny v Caldwell*, 175 Mich App 291, 302-305; 437 NW2d 358 (1989), *Reed v Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). Plaintiff has failed to do so, and in her appellate brief concedes that had the circuit court found an employer/employee relationship existed between the parties, its dismissal of plaintiff's interference with a contractual relationship claim would have been proper. We conclude this claim was properly dismissed.

Affirmed in part and reversed in part. Remanded to the trial court for further proceedings regarding plaintiff's CRA claim only. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Thomas G. Kavanagh
/s/ Dennis B. Leiber