# STATE OF MICHIGAN

# COURT OF APPEALS

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LOURDES EMKE and THOMAS EMKE,

Plaintiffs-Appellants,

v

LIGON BROTHERS MANUFACTURING COMPANY,

Defendant-Appellee.

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UNPUBLISHED
January 29, 1999

No. 198015
Lapeer Circuit Court
LC No. 94-020138 CZ

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Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

This is a national origin discrimination case. Plaintiffs appeal as of right from the trial court's decision granting summary disposition to defendant pursuant to MCR 2.116(C)(10).[1] We affirm.

On appeal, a trial court's decision to grant summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court examines the entire record including "affidavits, pleadings, depositions, admissions, and documentary evidence" and, construing all reasonable inferences arising from the evidence in the light most favorable to the nonmoving party, will uphold the trial court's grant of summary disposition where "there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Marcelle v Taubman*, 224 Mich App 215, 216-217; 568 NW2d 393 (1997). "A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995).

On appeal, plaintiff claims that the trial court erred in granting summary disposition to defendant on her claims of discrimination and constructive discharge.[2] Specifically, she claims that, while employed as a quality control inspector by defendant, she was subjected to harassment based upon national origin, and that this harassment resulted in her constructive discharge. We disagree.

The Michigan Civil Rights Act prohibits discrimination on the basis of "national origin." MCL 37.2202(1)(a) and (b); MSA 3.548(202)(1)(a) and (b). Here, plaintiff alleges that defendant violated

the act by creating a hostile working environment or by knowingly allowing such an environment to be created. To make out a prima facie case of discrimination on the basis of hostile work environment, plaintiff must show that:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of [her protected status]; (3) the employee was subjected to unwelcome . . . conduct or communication [involving her protected status]; (4) the unwelcome . . . conduct 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. [*Quinto v Cross and Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996) (quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993)).]

Plaintiff was born in Mexico City, Mexico, and therefore clearly belongs to a protected group by reason of her national origin. However, the evidence presented below fails to establish the remaining elements of a prima facie case.

At her deposition, plaintiff testified that her coworkers would not talk to her, would ignore her, would barely answer her questions, excluded her, gave her a hard time, and were always looking to catch her making a mistake. Plaintiff claimed that she had been told that her coworkers had said that she was lazy, that she was stupid, that she would not get anywhere because of her accent, and that she had lied on her resume. Plaintiff acknowledged, however, that she had not witnessed any of these comments, and did not produce any of the people who reported the comments to her. Plaintiff also told a coworker that she believed that her other coworkers felt that she was a "dumb Mexican," but admitted that no one had actually said so. Further, plaintiff complained that, when she was reassigned to sorting parts in the production department, her coworkers made jokes and said that she was stupid. Additionally, plaintiff noted that an offensive cartoon had been found in the lunchroom several months after she stopped working for defendant, which depicted a naked woman (who plaintiff claimed was supposed to be her) and a half-naked man wearing a sombrero (supposedly the president of the company). However, there were no names on the cartoon and no identifying marks on the naked woman.[3]

Plaintiff's allegations, even when taken as true and construed most favorably to her, offer no support, other than her own subjective belief (based on hearsay, speculation and conjecture), that her coworkers treated her inappropriately *because* of her national origin. See *Meagher v Wayne State University*, 222 Mich App 700, 719; 565 NW2d 401 (1997) ("disputed facts must be established by admissible evidence"). At best, plaintiff showed that her coworkers ignored her and complained about her, not that they did so because of her national origin. Additionally, she failed to show that their conduct was so offensive that "a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Quinto, supra*, 451 Mich at 369 (quoting *Radtke, supra*, 442 Mich at 394). Therefore, she has failed to make out a prima facie case of discrimination on the basis of national origin. *Quinto, supra*, 451 Mich at 368-369.

Plaintiff also failed to show that defendant knew about the alleged discrimination and either condoned or encouraged it, or failed to take prompt remedial action. Plaintiff testified that, on one occasion, she complained to her boss that her coworkers were "constantly saying that [she] did bad things;" in response, her boss talked to his superior and held a department meeting. Plaintiff's coworkers were "upset" and complained about her performance. According to plaintiff, her superiors "wanted to make sure we could all communicate instead of having our little conflict between shifts." On another occasion, she complained to the owner that she "was mistreated" by her coworkers, that she had been unfairly transferred to the production department, and that she was qualified for her former quality control job. However, plaintiff failed to show that she complained about the alleged ethnic harassment, and thus failed to show that she gave defendant notice and an opportunity to take corrective action. Therefore, plaintiff has failed to establish the element of respondeat superior necessary to hold a defendant liable when the harassment is inflicted by coworkers rather than supervisors. *Radtke, supra*, 442 Mich at 396-397.

As to plaintiff's claim of constructive discharge, we note that it cannot stand independently of the underlying discrimination action, which plaintiff has failed to sufficiently support. See *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). Further, plaintiff failed to show that the alleged harassment was "so severe that a reasonable person in the employee's place would feel compelled to resign." *Champion v Nation Wide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996). She also failed to come forth with evidence that her transfer to the production department -- with no loss of pay -- was "a result of [her] response" to the alleged harassment. *Champion*, *supra*, 450 Mich at 711.

Finally, plaintiff maintains that the trial court erred in dismissing her slander claim. We disagree. According to plaintiff, the slander consisted of two separate incidents: a coworker's alleged comments that plaintiff had lied in her resume, and the offensive cartoon described above.

> The elements of a cause of action for libel are: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. [*Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 338; 497 NW2d 585 (1993).]

Provided that plaintiff could establish that her coworker actually said that she had lied in her resume, plaintiff might have a cause of action against him. Similarly, if she could identify the person who drew the cartoon and further prove that it referred to her, she might have an action against the author. However, plaintiff has failed to show that either person was an agent of the employer, nor that he or she acted "while in the discharge of his duties as an agent for [the defendant], or that it was done in relation to a matter about which his duties as an agent required

him to act;" therefore, she cannot maintain a libel or slander action against defendant. *Linebaugh, supra*, 198 Mich App at 340-341.

Affirmed

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey

[1] Plaintiff Thomas Emke alleged only loss of consortium. Because that claim is not separately addressed on appeal, "plaintiff" will refer only to Lourdes Emke.

[2] Plaintiff does not challenge the dismissal of her claim of intentional infliction of emotional distress.

[3] The only name on the cartoon was Dr. Jack Kevorkian's.