STATE OF MICHIGAN

COURT OF APPEALS

DEANNE D'AMOUR,

Plaintiff-Appellant/Cross-Appellee,

v

WAYNE COUNTY, WAYNE COUNTY SHERIFF'S DEPARTMENT, WAYNE COUNTY SHERIFF, WAYNE COUNTY UNDERSHERIFF, COLEMAN PALMER, KARENKREYGER, KENNETH WILIAMS, PHILIP KOZLOWSKI, AREM KALOIAN, FRANK WOOD, EDDIE ROBINSON, LARRY CUNNINGHAM, DEREK BROWN, TERENCE WALLACE, STEVE ROBERTS, CASSANDRA NEWTON, KAREN COOK, ROBERT RYNICKI, STEVE GUYOT, and JIMMY CRANFORD,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
November 30, 1999

No. 211753
Wayne Circuit Court
LC No. 96-691204 NO

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the dismissal of her complaint pursuant to MCR 2.313(B)(2)(c) for failure to comply with court-ordered discovery in this action involving claims of sexual harassment and retaliation. On cross-appeal, defendants contend that summary disposition of plaintiff's claims should also have been granted under MCR 2.116(C)(10). We affirm.

Plaintiff contends that the trial court erred by dismissing plaintiff's complaint under MCR 2.313(B)(2)(c) for plaintiff's failure to provide discovery. We disagree. We review the sanction of dismissal of a complaint for noncompliance with a discovery order for an abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). An abuse of discretion exists when a decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the

exercise of passion or bias. *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985). The term discretion itself involves the idea of choice and abuse of discretion is far more than a difference of judicial opinion between the trial and appellate courts. *Spalding v Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959).

Pursuant to MCR 2.313(B)(2)(c), dismissal of a complaint is a possible sanction for discovery abuses. Under this rule, a trial court may dismiss a case with prejudice so long as noncompliance with a discovery order is willful. *Edge v Ramos*, 160 Mich App 231, 234; 407 NW2d 625 (1987). The trial court should consider whether failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion to dismiss, and the prejudice to defendant. *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994).

In this case, defense counsel contacted plaintiff's counsel in June 1997 and together they agreed to set plaintiff's deposition for July 18, 1997. On July 17, plaintiff's counsel canceled the deposition and indicated that the first available date on which to reschedule the deposition was August 15, 1997, at 9:30 a.m. The day before the scheduled deposition, plaintiff's counsel informed defense counsel that he could not start the deposition until 1:00 p.m. Plaintiff's counsel also indicated that he would not allow plaintiff to be questioned regarding the specifics of her allegations of sexual harassment and retaliation.

Defense counsel conducted the deposition within the limits set by plaintiff's counsel. At the conclusion of questioning for the day, plaintiff's counsel indicated that the first available date to continue the deposition was September 11, 1997, and the deposition was renoticed for that date. On September 9, 1997, plaintiff's counsel canceled the deposition.

On October 6, 1997, defendants filed their first motion to compel discovery, seeking an order compelling plaintiff to appear for her deposition and to respond to defendants' requests for production of documents. The motion was noticed for October 31, 1997. Following a hearing, the trial court entered an order compelling plaintiff to appear and answer questions.

At plaintiff's deposition on December 4, 1997, and again on December 29, 1997, plaintiff refused to answer any questions concerning whether she was dating anyone at the time of her hire and whether she had any physical relationships with any county employees. Defendants filed a second motion to compel discovery that was granted by the trial court with the admonishment that failure to answer defendants' questions would result in dismissal of plaintiff's complaint.

Discovery was ordered to be completed by January 31, 1998.[1] Plaintiff's deposition was scheduled for January 12 and 13, 1998. Although plaintiff's deposition was not completed on January 12, plaintiff's counsel indicated that plaintiff would not appear on January 13. Plaintiff's deposition was then noticed for Saturday, January 31. On January 30, 1998, plaintiff's counsel canceled the scheduled deposition, and the deposition was renoticed for February 13, 1998.

On February 13, 1998, plaintiff's deposition continued, but did not continue to completion. Plaintiff continued to refuse to answer the questions she had been ordered to answer. Plaintiff's counsel

became belligerent and engaged quite frequently in comments that were denigrating and insulting to defense counsel and often accused defense counsel of having "[the trial judge] in her back pocket." Ultimately, defense counsel asked plaintiff and her counsel to leave when it became apparent that plaintiff was not going to answer the questions.

A hearing was held on February 27, 1998, regarding defendants' motion to dismiss the complaint because of the violation of the court's order for discovery. Plaintiff's counsel did not appear, but sent an associate. At the hearing, the trial judge stated in part:

> I have never seen anything like this [transcript of the deposition on February 13, 1998], ever. . . . I have never read a transcript, never, where an attorney in the presence of his client, on the record, verbally attacks opposing counsel and denigrates opposing counsel in the fashion that [plaintiff's counsel] did.

The trial judge adjourned the matter because he wanted "time to calmly reflect upon" the case and the proper remedy.

Shortly thereafter, the case was reassigned to Judge Susan Bielke Neilson, and defendants renewed their motion to dismiss for failure to comply with the discovery orders. Judge Neilson reiterated her predecessor's concerns regarding plaintiff's and her counsel's conduct at the deposition, and also noted that:

> not suprisingly, a review of the transcript indicates that Plaintiff, herself, followed the lead of her counsel during the deposition and was herself, loud and abusive.
>
> The history of that matter demonstrates that Plaintiff and her counsel did not choose to be deposed on significant areas of her case, despite court orders compelling her to do so.
>
> In order to avoid doing so, Plaintiff, through her counsel, threatened Defense Counsel, verbally abused her, accused her of dishonesty and fraud in the most offensive terms, generally insulted her, and deliberately brought an end to any meaningful continuation of the deposition.

The court, finding that plaintiff's conduct was a direct violation of the court's order, granted defendants' motion and dismissed plaintiff's complaint on April 24, 1998.

In light of these facts, the trial court's sanction of a default, although harsh, did not evidence a perversity of will, a defiance of judgment, or the exercise of passion or bias. Defendants sought for several months to complete plaintiff's deposition before the deadline for completion of discovery, and plaintiff was afforded a number of opportunities to comply with the discovery requests and orders and failed to do so even though she had been warned that a failure to comply with the discovery request would result in dismissal of her complaint. Plaintiff's failure to comply with discovery as ordered constitutes "consciously dilatory behavior" that warrants the sanction imposed. *Edge, supra*; *Mink v Masters*, 204 Mich App 242; 514 NW2d 235 (1994).

We reject plaintiff's contention that the trial court erred by granting defendant's motion to compel discovery. Contrary to plaintiff's suggestion, the questions posed by defense counsel were not a "broad inquiry into plaintiff's entire sexual relationships." Cf. *Vinson v Superior Court*, 43 Cal 3d 833 (1987). Rather, given plaintiff's allegations of hostile work environment and sexual harassment, plaintiff placed at issue the matter of her relationships with county employees. The totality of the circumstances of the work environment are pertinent to a determination of whether a hostile work environment exists. See, e.g., *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993). Further, as noted by the trial court, in seeking damages for emotional distress, the full range of plaintiff's life experiences, including her dating and physical relationships at the pertinent time, is at issue. See, e.g., *Vance v So Bell Telephone & Telegraph Co*, 863 F2d 1503, 1516 (CA 11, 1989).

In light of our conclusion that the trial court did not abuse its discretion in dismissing plaintiff's complaint, we need not address the remainder of the issues raised by plaintiff.

On cross-appeal, defendants contend that the trial court should also have granted summary disposition under MCR 2.116(C)(10) because there was no genuine issue of material fact concerning plaintiff's inability to prove that she was sexually harassed or that her discharge was retaliatory. However, neither of these issues was argued or decided below, and this Court's review is limited to issues actually decided by the trial court. *Lowman v Karp*. 190 Mich App 448, 454; 476 NW2d 428 (1991).

Affirmed.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[1] Discovery had been extended to this date on plaintiff's motion.