STATE OF MICHIGAN

COURT OF APPEALS

SUSAN HAMMER,

Plaintiff-Appellant,

v

BILL KNAPP'S MICHIGAN, INC., JAMIE L. BROWN, and SCOTT SMITH,

Defendants-Appellees.

UNPUBLISHED
March 3, 2000

No. 212837
Oakland Circuit Court
LC No. 94-484981-NZ

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

This case is before this Court pursuant to our Supreme Court's order remanding the case for consideration as on leave granted. See *Hammer v Bill Knapp's Michigan, Inc*, 458 Mich 852 (1998). On appeal, plaintiff challenges the trial court's orders granting defendants summary disposition in this sex discrimination action. We affirm.

This case arose out of plaintiff's employment and subsequent termination from defendant Bill Knapp's Restaurant in Rochester, Michigan. Defendant Scott Smith was plaintiff's former supervisor, and defendant Jamie Brown is the vice-president of defendant Bill Knapp's. Plaintiff began working for defendant Bill Knapp's in November 1991. During the period between October 1992 and October 1993, plaintiff received three performance evaluations, which all ranked her performance as "expected." In December 1993, plaintiff announced to defendant Smith that she was pregnant. In March 1994, plaintiff received her next review, which ranked her performance as "unacceptable." In May 1994, plaintiff was terminated. Upon her termination, she signed a Separation and Release Agreement, pursuant to which she received a severance package, totaling $4,683.18. Plaintiff thereafter filed a complaint against defendants, alleging sex discrimination (because of her pregnancy) in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and intentional infliction of emotional distress.

I

Plaintiff first argues that the trial court erred in granting defendants' second motion for summary disposition, which dismissed her claims for sex discrimination and intentional infliction of emotional distress. We disagree. A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is subject to de novo review. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion under MCR 2.116(C)(10), the court considers the pleadings, affidavits and other documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Id*. The motion is properly granted if the evidence shows that there is no genuine issue with respect to any material fact and the moving party is therefore entitled to judgment as a matter of law. *Id*. at 454-455.

A

To establish a prima facie case of discrimination under the ELCRA, a plaintiff must show discrimination by either disparate treatment or intentional discrimination. *Wolff v Automobile Club of Michigan*, 194 Mich App 6, 11; 486 NW2d 75 (1992). In order to establish a prima facie case of intentional sex discrimination, a plaintiff must show that she was a member of a protected class, that she was discharged or otherwise discriminated against with respect to employment, that the defendant was predisposed to discriminate against persons in the class, and that the defendant acted upon that disposition when the employment decision was made. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994). In order to establish a prima facie case of sex discrimination under the disparate-treatment theory, a plaintiff must show that she was a member of a protected class, and that, for the same conduct or performance, she was treated differently than a man. *Id*. If plaintiff establishes a prima facie case, the burden then shifts to defendant to articulate a legitimate, nondiscriminatory reason for its actions. *Id*. If the defendant satisfies this burden of production, the presumption raised by the prima facie case is rebutted. The burden of proof then shifts back to the plaintiff, who must show that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination. *Id*.

We hold that plaintiff failed to provide sufficient evidence to support her sex discrimination claim. Plaintiff has failed to identify any statements or other evidence of discriminatory intent by defendants. In fact, plaintiff admitted, during her deposition, that she did not have any evidence to support her discrimination theory, only a "feeling." Plaintiff in part bases this perception of a discriminatory predisposition on the comment of defendant Smith, made upon learning that plaintiff was pregnant, that he thought that she was not having any more children because her children were grown. However, plaintiff admitted that her children were, in fact, grown, and that defendant Smith thereafter congratulated her on the pregnancy. Further, defendant Smith continued to supervise plaintiff for more than three months after her announcement, and no other "negative" comments were made to plaintiff about her pregnancy.

Plaintiff nevertheless contends that her pregnancy announcement demarcates a sudden reversal in the character of her treatment and evaluation by defendant Smith. Plaintiff argues that her intentional discrimination claim is supported by her poor March 1994 evaluation, in which she received an unacceptable rating despite a financial analysis showing that the restaurant had improved under her leadership. We disagree.

Plaintiff agreed in her deposition that the previous reviews were fair. Plaintiff also, at one point in her deposition, maintained that the March 1994 review was poor "because of the management team that she was given." Consistent with her claim, however, plaintiff later indicated that she received the unacceptable rating because of her pregnancy. We find that the comments in the March 1994 review were job-related and were referenced to the previous review on October 1993, which discussed issues relating to plaintiff's managerial weaknesses. As such, the concerns expressed in her last two formal performance reviews were consistent. In addition, in the March 1994 evaluation, defendant Smith commented that plaintiff, "after hiring new staff, has not shown the ability to motivate this group to achieve results. Results . . . have gotten worse not better." This evidence indicates that defendant Smith did not merely fabricate faults as a pretext to terminate plaintiff. Accordingly, defendants were entitled to summary disposition on plaintiff's sex discrimination claim. See *Kroll v Disney Store, Inc*, 899 F Supp 344, 347-348 (ED Mich, 1995).

B

We likewise hold that plaintiff failed to establish a prima facie case of intentional infliction of emotional distress. The tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. See *Roberts v Auto-Owners INS, Co*, 422 Mich 594, 602; 374 NW2d 905 (1985); *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). In reviewing such a claim, it is initially for the court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995). In assessing a claim for intentional infliction of emotional distress, our Supreme Court has stated that the following considerations should be used to determine whether alleged conduct constitutes extreme and outrageous conduct sufficient to support a claim for intentional infliction of emotional distress:

> Liability has been found only where the conduct 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.* Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> *The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.* The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. [*Roberts, supra* at 603, quoting Restatement Torts, 2d, § 46, comment d, pp 72-73; emphasis added.]

Taking plaintiff's allegations as true, and assuming that the alleged conduct may not be desirable in the workplace, we nevertheless find that it is not "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." *Id*. Rather, the conduct complained of appears to be, at most, "mere insults, indignities, threats, annoyances, or petty oppressions," which are not actionable. *Id*. Accordingly, the trial court did not err in dismissing plaintiff's intentional infliction of emotional distress claim.

II

Plaintiff next argues that the trial court erred in granting defendants' third motion for summary disposition, wherein she was ordered to return the consideration received in exchange for signing the Separation and Release Agreement, because the motion was identical to defendants' first motion for summary disposition, which was dismissed. We disagree.

A review of the record shows that, in their first motion for summary disposition, defendants claimed that the release agreement signed by plaintiff barred her from bringing a cause of action against them. In denying defendants' first motion, the trial court addressed only plaintiff's ability to bring suit against defendants. In contrast, in defendants' third motion for summary disposition, defendants sought return of the consideration, which would resolve their counter-complaint. In granting defendants' third motion, the trial court noted that there were only two issues before the court: 1) which party was entitled to the consideration amount, and 2) whether defendant Bill Knapp's was obligated to amend plaintiff's 1994 W2 forms. Accordingly, contrary to plaintiff's claims, defendants' first and third motions resolved different issues.

In addition, we reject plaintiff's suggestion that she is entitled to the consideration under the circumstances of this case. It is a well-settled principle of Michigan law that settlement agreements are binding until rescinded for cause. Further, tender of consideration received is a condition precedent to the right to repudiate a contract of settlement. *Stefanac v Cranbrook Educational Community*, 435 Mich 155, 163; 458 NW2d 56 (1990); *Leahan v Stroh Brewery Co*, 420 Mich 108, 112; 359 NW2d 524 (1984). Accordingly, the trial court correctly ordered plaintiff to return the consideration to defendants, and properly granted defendants' third motion for summary disposition.

III

Plaintiff also argues that the trial court erred in granting defendants' second and third motions for summary disposition because they were filed beyond the dispositive motion deadline set forth in the trial court's December 24, 1994, case scheduling order. Again, we disagree.

The case scheduling order that plaintiff relies on set, among other things, an August 1, 1995 trial date, and a June 21, 1995 deadline for the completion of discovery and for filing all dispositive motions. When the August 1, 1995 trial date was ultimately adjourned for several months, the discovery deadline was also extended. For some reason, however, the scheduling order was never amended to reflect these changes. The record shows that neither party, nor the court, complied with the December 24,

1994, case scheduling order. Accordingly, once the trial date, as well as the discovery completion dates were changed, the initial case scheduling order implicitly no longer controlled. Because defendants' motions were timely under MCR 2.116(B)(2) and (D)(3), and because plaintiff has failed to indicate or demonstrate that she was prejudiced in any respect by the timing of defendants' second and third motions for summary disposition, we conclude that this issue is without merit.

IV

Finally, plaintiff argues that the trial court should have heard oral argument before deciding defendants' second motion for summary disposition. We disagree. We review a trial court's decision regarding a hearing for oral argument before deciding a motion for summary disposition for an abuse of discretion. *Fast Air, Inc v Knight*, 235 Mich App 541, 550; 599 NW2d 489 (1999). MCR 2.119(E)(3) specifically authorizes the court, in its discretion, to dispense with or limit oral arguments with regard to motions. *Id*. We find no abuse of discretion in this case, where the trial court was fully apprised of the parties' positions, by way of the parties' briefs, before rendering a decision. *Id*.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kathleen Jansen