# STATE OF MICHIGAN

# COURT OF APPEALS

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STACY KITCHEN,

Plaintiff-Appellee,

v

CITY OF BRIGHTON, TOWNSHIP OF BRIGHTON, BRIGHTON FIRE DEPARTMENT, and BRIGHTON AREA FIRE DEPARTMENT ,

Defendants,

and

BRIGHTON AREA FIRE AUTHORITY and BRIGHTON FIRE CHIEF LARRY LANE,

Defendants-Appellants.

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UNPUBLISHED
November 18, 2004

No. 247452
Livingston Circuit Court
LC No. 02-019190-CZ

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Defendants Brighton Area Fire Authority (BAFA) and Brighton Fire Chief Larry Lane appeal from the trial court's order denying the imposition of sanctions on plaintiff for frivolous actions under MCL 600.2591 and frivolous pleadings under MCR 2.114. Because the positions taken by plaintiff at the time of filing of the complaint presented an arguable cause of action, the trial court did not commit clear error. We affirm.

We review a trial court's denial of sanctions based on frivolous pleadings and claims for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a firm conviction that a mistake was made. *Id.*, 661-662 For the purposes of imposition of sanctions, a claim or pleading is "frivolous" if: (1) the party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe that the facts underlying his or her legal position were true; or (3) the party's legal position was devoid of arguable legal merit. *Id.*, 662. Whether a claim was frivolous must be based on the particular facts and circumstances and the claims or defenses at issue at the time they were made. *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). Under MCR 2.114, sanctions are mandatory if a court finds that a

pleading was signed in violation of a court rule or a frivolous action or defense was pleaded. *Attorney General v Harkins,* 257 Mich App 564, 576; 669 NW2d296 (2003).

Plaintiff's claims of sexual harassment and sex discrimination are based on Michigan's Civil Rights Act, (CRA) MCL 37.2101 *et seq.* To establish discrimination based on a hostile work environment within the meaning of the CRA, a 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 sex, (3) the employee was subjected to unwelcome sexual conduct or communication, (4) the unwelcome sexual conduct or communication was intended to or did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment, and (5) respondeat superior. *Radtke v Everett,* 442 Mich 368, 382; 501 NW2d 155 (1993)[1].

As the cause of action was contemplated at the time of filing, plaintiff's testimony provided some evidence of the elements required by the act to avoid the imposition of sanctions. Because the CRA prohibits discrimination based upon sex, plaintiff is a member of a protected group. *Asplaugh v Comm on Law Enforcement Standards,* 246 Mich App 547, 554-555; 634 NW2d 161 (2001). Plaintiff also alleged that Lane made comments to her based on sex. Plaintiff testified that she told Lane several times that such behavior was unwelcome. This unwelcome conduct in turn substantially interfered with plaintiff's employment, as she allegedly curtailed the number of fire calls to which she responded because she wanted to avoid contact with Lane. Furthermore, she testified that she searched for another job because Lane was verbally abusive to her. Plaintiff's deposition testimony provided some evidence in support of the first four elements of a hostile work environment claim as it was then constituted under the CRA. But because Lane was her supervisor, rather than her actual employer, she cannot establish the fifth element, respondeat superior, and the trial court properly granted Lane's motion for summary disposition. Additionally, there was a reasonable basis for plaintiff to believe that the BAFA could be liable for Lane's conduct on a theory of respondeat superior in that it was unclear who employed Lane because of the merger that created the BAFA,. Because plaintiff's testimony did provide some evidence in support of her claim, we cannot conclude that the suit was frivolous and the trial court committed clear error in denying Lane's motion for sanctions.

Plaintiff also brought a claim based on the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq.* In order to establish a prima facie case under the WPA, it must be shown that (1) the plaintiff was engaged in protected activity, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge. *Shallal v Catholic Social Services,* 455 Mich 604, 610; 566 NW2d 571 (1997).

Here, plaintiff gave testimony that she both reported and threatened to report Lane's suspected violations of the civil rights act to the BAFA. Further, plaintiff testified that during one incident she told Lane that she felt his behavior constituted discrimination and made clear

[1] Further defined in *Haynie v Dep't of State Police,* 468 Mich 302, 664 NW2d 129 (2003).

her intention to report him. On this and several other occasions, Lane stated that if she reported him, she would be fired. A causal connection between Kitchen's discharge and the allegedly protected activity could be inferred from the timing of her discharge in relation to her threats to report Lane.

However, proving that plaintiff was engaged in protected activity does not end the inquiry. As defendants point out, the primary motivation of an employee pursuing a whistleblower claim "must be a desire to inform the public on matters of public concern, and not personal vindictiveness**.**" *Shallal*, *supra*, 621. In her depositions, plaintiff testified that she desired to inform both the BAFA and the public about Lane's behavior. She testified that she believed the taxpayers had a right to know what occurred during the time working with Lane. Therefore, there is some evidence to support the contention that plaintiff desired to inform the public and did not take action out of personal vindictiveness.

Although the action failed, there is some evidence in the record that supports the trial court's denial of defendants' motion for sanctions. For this reason, the trial court did not clearly err, and we affirm.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood