

STATE OF MICHIGAN
COURT OF APPEALS

NANCY L. TAIT and BRIAN J. TAIT,

Plaintiff-Appellants/Cross-Appellees,

v

CHRYSLER CORPORATION, CHARLES L.
HICKS and R.L. SCHMIDT,

Defendant-Appellees/Cross-Appellants.

UNPUBLISHED
August 20, 1996

No. 178254
LC No. 93-317445-NZ

Before: Bandstra, P.J., and Markman and M. D. Schwartz, * JJ.

PER CURIAM.

Plaintiffs appeal by right a circuit court order granting defendants' motion to dismiss their complaint for failure to comply with a discovery order. Defendants cross-appeal by right the court's order denying their motion to enforce a settlement agreement. We affirm.

Plaintiff was employed by defendant Chrysler. The present action arises out of her sexual discrimination action against Chrysler and two of her supervisors. In her complaint, she summarized her allegations regarding the individual defendants as follows:

She was sexually harassed by her direct supervisor, . . . Hicks, who repeatedly used sexually explicit language, touched her in an offensive manner, made sexual propositions to her and threatened her with adverse performance reviews if she failed to comply and, on one occasion, sexually assaulted her by having sexual intercourse with her against her will. She was also sexually harassed by her subsequent direct supervisor, . . . Schmidt, who made derogatory comments about [plaintiff] and other female employees, touched her in an offensive and unpermitted manner and made improper and unwanted sexual advances while discussing her performance review.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff's deposition was taken in August and October 1993. At her deposition, she referred to a calendar (which she had not yet provided to defendants) on which she made notations regarding contact with Hicks. She admitted to previously destroying some calendar pages for a variety of reasons, including the fact that she couldn't decipher her own notes, they were blank and because she "tried to forget as much as [she] could from that year." She admitted that in reporting the alleged harassment to Chrysler, she "enhanced" allegations against Schmidt to compensate for not reporting allegations against other Chrysler employees and did not tell the truth in her allegations against Hicks. She refused to provide copies of the calendar pages to defendants at that time. Her counsel stated that he would review the material with his client within a week and produce the requested material.

In November 1993, having not yet received the documents, defendants filed a motion to compel discovery. The court granted the motion in a December 9, 1993 order, in which it specifically ordered plaintiff to produce all her original journals within fifteen days of the motion hearing and to cease and desist from "altering, redacting or destroying any additional documents."

In March 1994, still not having received the documents, defendants filed a motion for sanctions and dismissal for plaintiff's failure to comply with the court's discovery order. The court granted sanctions against plaintiff in the form of costs. Plaintiff's counsel filed a motion to withdraw that the court granted on March 25, 1994.

In April 1994, still not having received the documents, defendants filed a motion to enforce settlement agreement or to dismiss for failure to comply with the court's discovery order. The written agreement at issue was signed by plaintiff's former counsel. The court denied this order. In May 1994, defendant filed a renewed motion to dismiss due to failure to comply with the court's discovery order. The court granted the motion. It subsequently denied plaintiff's motion for reconsideration.

The issue on appeal is whether the trial court erred in dismissing plaintiff's action on the basis of her failure to comply with its discovery order. In *Barlow v Crane-Houdaille, Inc*, 191 Mich App 244, 251-252; 477 NW2d 133 (1991), this Court held:

The trial court is authorized to impose sanctions where a party fails to obey an order to provide or permit discovery. The court may impose such sanction as it deems just. MCR 2.313(B). The court's decision will not be overturned on appeal absent an abuse of discretion. The sanction of dismissal is appropriate where the failure to provide discovery is in violation of a direct order of the court. It is a drastic step which should be taken cautiously. However, it may be warranted where a party wilfully or intentionally fails to comply with a discovery order. [Citations omitted.]

Here, the trial court directly ordered plaintiff not to destroy documents and to provide the requested documents; it sanctioned plaintiff with costs for failure to timely comply with the discovery order and allowed her additional time to produce the documents. The court provided plaintiff with several opportunities to produce the documents before resorting to dismissing her case. The court apparently

found willfulness or intentional failure to comply on plaintiff's part. Plaintiff had the documents in her possession at her August and October 1993 deposition. The court ordered plaintiff to provide the documents in December 1993. Her failure to promptly do so indicates willfulness and intentional failure to comply with the court's order. Her contention that the documents were lost or destroyed when she changed attorneys in March 1994 does not excuse her failure to provide them before that date. Further, the loss of only specific calendar pages sought by defendants in the context of instructions that she not destroy these documents is suspicious.

The documents at issue were material to her credibility in her claims against all three defendants. Her credibility was called into question by her deposition admissions that she had not told the truth in reporting certain instances of harassment by Hicks and Schmidt. The documents specifically related to her credibility in making charges of sexual harassment and in truthfully describing the nature of her relationships with those against whom she made such charges. Accordingly, we find no abuse of discretion in the trial court's dismissal of plaintiff's action against all three defendants on the basis of her failure to comply with the discovery order.

We affirm the order granting defendants' motion to dismiss plaintiffs' complaint. Such affirmance makes it unnecessary for us to deal with defendants' cross-appeal concerning the court's denial of their motion to enforce the settlement agreement.

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

/s/ Michael D. Schwartz