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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

KELLY KING,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 17 M1 300017
)	
DONALD LEVINE and DEPAUL LAW)	The Honorable
SCHOOL,)	Catherine A Schneider
)	Judge Presiding.
Defendants-Appellees.)	

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* An allegation that a mediator made a disrespectful remark to a plaintiff does not state a cause of action for intentional infliction of emotional distress unless the remark is extreme and outrageous. A plaintiff must allege physical injury to state a claim that a defendant's negligence caused her to suffer emotional harm. The trial court does not abuse its discretion by denying leave to amend a complaint when the proposed amended complaint fails to state a viable cause of action.

¶ 2 Kelly King sued Donald Levine and DePaul University, alleging Levine's conduct as a mediator working at DePaul University caused her to suffer emotional distress. The circuit

court dismissed the complaint with prejudice for failure to state a claim for relief. King moved to vacate the dismissal order and attached to her motion a proposed third amended complaint. The court denied the motion to vacate and denied King leave to file the proposed third amended complaint. On appeal, King contends that her complaint and proposed third amended complaint state viable claims for relief. We find that the alleged misconduct is not so outrageous as to warrant compensation for intentional infliction of emotional distress. We also find the allegations insufficient to state claims for assault, negligence, or negligent infliction of emotional distress. Accordingly, we affirm the trial court's judgment.

¶ 3

I. BACKGROUND

¶ 4

In November 2016, plaintiff Kelly King, attended a mediation in the case of *Lewis v. Finko*, 15-L-7598, a case involving her father, Marcus Lewis. King assisted her father in the mediation that took place in a conference room at the DePaul University Law School where Levine served as the mediator. Shortly before the mediation began, King excused herself from the mediation room briefly, and to leave she needed to pass by Levine. As she passed by Levine, he pulled his chair to the table. When she returned, he did not move his chair for her to pass. She alleged that he gazed at her, "looking at her up and down the length of her body." Lewis asked Levine to move so that King could return to her seat. Levine said, "I thought you was going to hop over my lap." Levine let some seconds elapse before he stood up, pushed in his chair, and allowed King to pass.

¶ 5

After the mediation, Lewis sent an email to Levine requesting an apology for his conduct toward King. Levine answered that King and Lewis "misconstrued" his conduct. On November 15, 2016, King filed a complaint with the Attorney Registration and Disciplinary

Commission (ARDC) describing Levine's conduct. The ARDC answered that Levine "denied he made the statement" King attributed to him, and the ARDC closed its investigation. Lewis then contacted DePaul University, who also found no cause to act.

¶ 6 In January 2017, King filed a *pro se* complaint against Levine and DePaul University. In her amended complaint, she attempted to state causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence.

¶ 7 King filed a motion asking the court to order the ARDC to produce all documents related to its investigation of King's complaint against Levine. The court denied the motion.

¶ 8 The circuit court granted the defendants' motion to dismiss the complaint with prejudice pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2016).

¶ 9 King filed a motion to vacate the dismissal order and sought leave to file a third amended complaint. She attached a copy of the proposed amended complaint, which Lewis joined, also acting *pro se*. They alleged that DePaul University selected Levine to act as mediator. King alleged that Levine's conduct caused her to fear Levine, and she added a count for assault. The court denied the motion to vacate and denied the request for leave to amend the complaint. King now appeals.

¶ 10 II. ANALYSIS

¶ 11 On appeal, King argues that her complaint and proposed third amended complaint state viable claims for relief. Defendants' motion to dismiss the complaint "admits as true for the purpose of the motion, all facts well pleaded together with all reasonable inferences which could be drawn from these facts." *Hubbard v. Aetna Insurance Co.*, 37 Ill. App. 3d 666, 669 (1976). "[A] cause of action should not be dismissed pursuant to section 2-615 unless it is

clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery."

Marshall v. Burger King Corp., 222 Ill. 2d 422, 429 (2006).

¶ 12 In the negligence count, King alleged that her fear and distress justified an award of damages. The count states a cause of action only if King alleged facts warranting an award of damages for emotional distress. See *Schweih's v. Chase Home Finance, LLC*, 2016 IL 120041. Our supreme court in *Schweih's* reasserted that "the pleading requirements for a direct victim's recovery for negligently inflicted emotional distress include an allegation of a contemporaneous physical injury or impact." *Schweih's*, 2016 IL 120041, ¶ 44. Because King has not alleged that Levine's conduct caused any physical injury or impact, she has not stated a cause of action for negligence or negligent infliction of emotional distress.

¶ 13 King also has not stated a cause of action for assault. A defendant commits assault when he "places another in reasonable apprehension of receiving a battery." *People v. Floyd*, 278 Ill. App. 3d 568, 570 (1996). "An attempt to kiss or fondle a woman without her consent has been held to be an assault." *Fields v. Cummins Employees Federal Credit Union*, 540 N.E.2d 631, 640 (Ind. App. 1989), disapproved on other grounds; *Wine-Settergren v. Lamey*, 716 N.E.2d 381 (Ind. 1999); see *Maksimovic v. Tsogalis* 177 Ill. 2d 511 (1997). We find no allegations that could support a finding that King reasonably feared Levine would physically harm or fondle her. King did not allege that Levine approached or grabbed her. She admitted that she could have walked around the table the opposite way to get to her seat, and she would not pass close to Levine. The proposed amended complaint does not state a viable claim for assault.

¶ 14 To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege that the defendant acted in a manner " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.' " *Rosenberg v. Packerland Packing Co.*, 55 Ill. App. 3d 959, 963 (1977) (quoting Restatement (Second) of Torts, sec. 46, comment d (1965)). " 'The extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relation or position which gives him actual or apparent power to damage the plaintiff's interests.' " *Milton v. Illinois Bell Telephone Co.*, 101 Ill. App. 3d 75, 79 (1981) (quoting Prosser on Torts § 56 (W.P. Keeton 4th ed. 1971)).

¶ 15 King alleged both that Levine made an offensive comment and that he blocked the way to her seat in the conference room. "[P]hysical harassment may include *** impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on the basis of sex." (Emphasis omitted.) *Lyle v. Warner Brothers Television Productions* 132 P.3d 211, 221 (Cal. 2006). Blocking a plaintiff's movements at work constituted harassment in *Hathaway v. Runyon*, 132 F.3d 1214 (8th Cir. 1997); *Farfaras v. Citizens Bank & Trust of Chicago*, 433 F.3d 558, 561 (7th Cir. 2006); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 392 (1st Cir. 2002); and *Godfrey v. Perkin-Elmer Corp.*, 794 F. Supp. 1179, 1183 (D.N.H. 1992). However, even in the employment context, the law does not always provide a remedy for such harassment. "[C]laims of bad manners, rude behavior and hurt feelings do not state a claim for emotional distress." *Godfrey*, 794 F. Supp. at 1189. Plaintiffs must show "severe or pervasive" misconduct to recover for harassment. *Hathaway*, 132 F.3d at 1221.

¶ 16 "The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents sexual harassment law from being expanded into a 'general civility code.' (*Oncale v. Sundowner Off-shore Services, Inc.*, 523 U.S. 75, 81 (1998)). The conduct must be extreme: ' "simple teasing," [citation] offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." ' (*Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). The harassment cannot be occasional, isolated, sporadic, or trivial; the plaintiff must show a ' "concerted pattern of harassment of a repeated, routine or a generalized nature." ' (*Aguilar v. Avis Rent A Car System, Inc.*, 980 P.2d 846 (Cal. 1999))." *Jones v. Department of Corrections & Rehabilitation*, 62 Cal. Rptr. 3d 200, 208 (2007).

¶ 17 The Restatement (Second) of Torts standard for a cause of action for intentional infliction of emotional distress "plainly anticipates outrages far beyond the indignities and insensitivity that too often taint our daily lives." *Clay v. Advanced Computer Applications, Inc.*, 536 A.2d 1375, 1385 (Pa. Super. 1988), rev'd in part on other grounds, 559 A.2d 917 (Pa.1989); see *Rosenberg*, 55 Ill. App. 3d at 963. The single incident described here does not amount to the kind of extreme and outrageous conduct needed for civil liability. See *Rosenberg*, 55 Ill. App. 3d at 963.

¶ 18 We affirm the dismissal of King's complaint. Because the proposed third amended complaint does not state a viable cause of action, the trial court did not abuse its discretion when it denied King's motion for leave to file her third amended complaint. *Loyola Academy*

v. S & S Roof Maintenance, Inc., 146 Ill. 2d 263, 273 (1992); *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004).

¶ 19

III. CONCLUSION

¶ 20

The complaints and the proposed third amended complaint alleged misconduct that is not sufficiently outrageous for the court to find intentional infliction of emotional distress. Because King alleged no physical injury she has not alleged facts that could support a finding of negligence or negligent infliction of emotional distress. The facts alleged also cannot support a finding that King reasonably feared that Levine would injure her or touch her offensively, so she has not stated a claim for assault. Accordingly, we affirm the judgment dismissing King's complaint for failure to state a cause of action.

¶ 21

Affirmed.