STATE OF MICHIGAN
IN THE 42ND CIRCUIT COURT FOR THE COUNTY OF MIDLAND

YVETTE M. CORMIER,

Plaintiff,

Case No.: 15-2463-NZ-B

v.

Hon. Michael J. Beale

PF FITNESS – MIDLAND, LLC, a Michigan Limited Liability Company; PLA-FIT FRANCHISE, LLC, a New Hampshire Limited Liability Company; Jointly and Severally,

Defendants.

OPINION AND ORDER GRANTING SUMMARY DISPOSITION

Defendants filed Motions for Summary Disposition under MCR 2.116(C)(8) claiming Plaintiff has failed to state a claim upon which relief can be granted. Plaintiff obviously opposes the Motions for Summary Disposition. This Court is not called upon to determine whether transgender persons have any protected rights for use of a locker room facility, rather the issue is whether Plaintiff has stated any valid cause of action against a business allowing transgender persons to use the locker room that corresponds with their gender identity. The following analysis is limited to that review.

I. STATEMENT OF FACTS

Defendants operate fitness training facilities. One of their marketing slogans is "Home of the Judgment Free Zone." The significance of this slogan becomes apparent later in this opinion. Defendant Pla-Fit Franchise, LLC (PF Corporate) is a New Hampshire Limited Liability Company and franchisor of the Planet Fitness business model. Defendant PF Fitness – Midland, LCC (PF Midland) is the owner and franchisee of a Planet Fitness facility here in Midland.

Plaintiff was a member of the Planet Fitness facility in Midland from January 8, 2015 to March 4, 2015. Plaintiff signed a Membership Agreement when she joined agreeing to assume the risk of any injury at Planet Fitness from use of equipment or the facilities in general. She further agreed to waive any claims against Planet Fitness, its affiliated companies and their

respective officers, directors, employees, members, agents, and independent contractors arising out of her use of the facilities. The Agreement also contains a clause limiting Defendant's liability from a dispute arising out of the parties' contractual relationship to only actual compensatory damages.

On February 28, 2015, Plaintiff went to PF Midland's gym to exercise and entered the women's locker room. Plaintiff came into contact with a "large, tall man" inside the common area of the women's locker room. The person she encountered self identifies as Carlotta Sklodowska who was not a member of Planet Fitness but there as another member's guest. Plaintiff left the locker room and informed the front desk a man was in the women's locker room. The front desk employee told Plaintiff about Defendants' policy allowing individuals to use the locker room for whichever gender they self identify. The PF Midland employee told Plaintiff that she could wait until the other individual was done using the locker room if she was uncomfortable with the policy. Plaintiff left the PF Midland facility and contacted PF Corporate to inquire about men being permitted in the women's locker room.

PF Corporate informed Plaintiff that Planet Fitness has a "judgement-free zone" policy and would not judge whether an individual is a man or a woman for use of the facilities. Plaintiff returned to PF Midland's gym daily from March 2, 2015 to March 4, 2015 and warned other women of the locker room policy and admonished them to be careful while using the facilities designated for women. Defendants contacted Plaintiff on March 4, 2015, requesting she stop warning others of Defendants' "judgment-free zone" policy. Plaintiff was given an ultimatum to either accept the policy or her membership would be terminated. She refused to submit to the "judgment-free zone" policy; therefore, Defendants terminated Plaintiff's Planet Fitness membership on March 4, 2015. Plaintiff filed suit against Defendants on March 13, 2015 and a Second Amended Complaint on June 30, 2015.

Defendants filed Motions for Summary Disposition and a hearing on those motions was held on October 9, 2015. The following addresses each of the claims raised by Plaintiffs to determine if they survive summary disposition. This Court shall only address the legal issues presented in this case. It is not the function of this Court to address the side issues associated with this case such as rights for those identifying themselves as transgender, thus this decision shall not endeavor to speak to those issues except where necessary to decide this case.

A motion for summary disposition under MCR 2.116(C)(8) shall only be granted where the claim is so clearly unenforceable that no factual development could justify the claim for relief. *Stott v Wayne County*, 224 Mich App 422; 569 NW2d 633(1997). The Court must accept as true all factual allegations contained in the complaint as well as any reasonable inferences that may be drawn from those allegations. *Singerman v Municipal Serv Bureau*, 455 Mich 135; 656 NW2d 383 (1997).

II. Invasion of Privacy

Michigan Courts recognize the tort of invasion privacy. *Lewis v LeGrow*, 258 Mich App 175; 193; 670 NW2d 675 (2003). There have been four applications identified for the invasion of privacy cause of action: (1) intrusion upon another's seclusion or solitude, or into another's private affairs, (2) public disclosure of private facts about another individual, (3) publicity that places someone in a false light, and (4) appropriation of another's image or likeness. See *Dalleye v Dykema Gossett*, 287 Mich App 296; 306; 788 NW2d 679 (2010); *Lewis*, 258 Mich App at 193.

The only possible theory of invasion of privacy from the four identified above is intrusion into another's seclusion or solitude. "There are three necessary elements to establish a prima facie case of intrusion upon seclusion: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable man." *Lewis*, 258 Mich App at 193 (citation omitted). Additionally, "[a] necessary element of this type of invasion of privacy is, of course, that there be an '*intrusion*'". *Harkey v Abate*, 131 Mich App 177, 181; 346 NW2d 74 (1983) (emphasis added).

In *Harkey*, the plaintiff and her daughter used the restrooms at defendant's roller-skating facility which they discovered had see-through panels in the ceiling of the restroom that permitted surreptitious observation from above of the interior, including the separately partitioned stalls. *Id* at 179-180. Defendant allegedly had personally viewed plaintiff and her daughter while they used the restroom. *Id.* The Court held "plaintiff and her daughter in this case had a right to privacy in the public restroom in question." *Id.* at 182. The Court reasoned the intrusion into seclusion "does not depend upon any publicity given to the person whose interest is invaded, but consists solely of an intentional interference with his or her *interest in solitude or seclusion* of a kind that would be highly offensive to a reasonable person. The Court

continued, "[i]n our opinion, the installation of the **hidden** viewing devices **alone** constitutes an interference with that privacy which a reasonable person would find highly offensive." *Id* (emphasis added). The Court finds the hidden nature of the device was significant in the *Harkey* decision to find an intrusion on the solitude or seclusion was established. There was no subterfuge in this case to encroach upon Plaintiff's privacy or intrude upon her seclusion to create an invasion of privacy cause of action.

Plaintiff has complained of seeing a "large, tall man" in the common area of the women's locker room. She was in the common area of the locker room, not in a stall that can be closed and locked like the situation in *Harkey*,. A common area of a locker room, which is open to other patrons, is not a place in which a reasonable person would expect to be in solitude or secluded because multiple patrons may use it at the same time. Plaintiff may have reasonably expected only women would be present in the women's locker room, even in the common area; however, she could no longer reasonably expect only women would use the facility after being told about the "judgment-free zone" policy of Planet Fitness. There was no intrusion upon the solitude or seclusion of Plaintiff by the presence of the clothed male in the common area of the restroom. Plaintiff's counsel acknowledged Defendants could operate a unisex restroom if they wanted and not create a cause of action. The Court does not find any basis for a claim of intrusion seclusion by Defendants' actions in this case.

Additionally, there was no intrusion in this case to support an invasion of privacy claim. Plaintiff admits she did not change in the locker room the day she saw Carlotta Sklodowska. Unlike *Harkey*, she does not allege Defendants secretly (or Carlotta Sklodowska) observed Plaintiff in various states of undress because she did not change in the locker room. Neither Complaint filed by Plaintiff alleges anyone (male or female) ever saw her, or that she saw anyone else, in a state of undress.

Plaintiff alleges Defendant's created a policy that *could* allow for intrusion into her seclusion, but Plaintiff has not alleged actual intrusion into her seclusion. The Court finds there has been no allegation which would constitute an intrusion for the invasion of privacy cause of action to survive. Merely creating a policy which a person may utilize to intrude upon another person's seclusion would be an extension of the tort of right to privacy beyond the parameters which have been adopted by the appellate courts of this state when they created it. Therefore,

Plaintiff has failed to state a claim upon which relief may be granted and summary disposition is granted under MCR 2.116(C)(8).

III. Elliott-Larsen Civil Rights Act [ELCRA]

The ELCRA, MCL 37.2101 et seq, provides a statutory cause of action for discrimination in certain situations. MCL 37.2302(a) states a person shall not "[d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, *sex*, or marital status." *Id.* (emphasis added). This is known as the public accommodation provision of the ELCRA. A similar provision is applicable to private clubs in MCL 37.2302a and provides for equal use of the facilities by all adults entitled to use them.

A "place of public accommodation" is defined by statute as:

> [A] business, or educational , refreshment, entertainment, recreation, health, . . .facility, or institution of any kind . . . whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. MCL 37.2301(a).

There is no question Midland PT fits this definition and is subject to the protections of the statute. *Clarke v K Mart Corp*, 197 Mich App 541, 544; 495 NW2d 820 (1992). Plaintiff must present a prima facie case of sex discrimination with evidence that is legally admissible and sufficient. *Schellenberg v Rochester Michigan Lodge No 2225, of Benev & Protective Order of Elks of USA*, 228 Mich App 20, 33; 577 NW2d 163, 169 (1998), citing *Schultes v Naylor*, 195 Mich App 640, 645; 491 NW2d 240 (1992). Failure to present a prima facie case of sex discrimination requires dismissal of the claim.

A. Hostile Environment Sexual Harassment

MCL 37.2103(i)(*iii*) relates to claims of sexual harassment due to hostile environment. This type of sexual harassment is defined in the statute as:

> Discrimination because of sex includes, sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when: . . .
> (*iii*) The conduct or communications has the purpose or effect of substantially interfering with an individual's . . . public accommodations or public services,. . . or creating an intimidating, hostile, or offensive . . . public accommodations, public service . . . environment. [*Id.*]

Plaintiff has asserted a claim for sexual harassment due to a hostile environment in a public accommodation. A prima facie claim under MCL 37.2302(a) consists of four elements:

> (1) discrimination based on [sex] (2) by a person, (3) resulting in the denial of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations (4) of a place of public accommodation. *Moon v Michigan Reprod & IVF Ctr, PC*, 294 Mich App 582, 593; 810 NW2d 919 (2011), citing *Haynes v Neshewat,* 477 Mich 29, 35; 729 NW2d 488 (2007).

Few cases analyze hostile environment sexual harassment claims in the context of public accommodations; however, the Michigan Supreme Court has held, in a hostile work environment situation, that "as a threshold matter, plaintiff must allege facts showing that she was subjected to 'unwelcome sexual advances,' 'requests for sexual favors,' or 'conduct or communication of a sexual nature' before she can establish actionable sexual harassment under a hostile work environment theory or a quid pro quo theory." *Corley v Detroit Bd of Ed*, 470 Mich 274, 279; 681 NW2d 342 (2004). This Court does not see any basis for a different interpretation for the same provision where employment and public accommodation are both listed together. The analysis shall be the same in the application of what constitutes sexual harassment.

The word "sexual" can be understood as meaning "of or pertaining to sex" or "occurring between or involving the sexes: sexual relations" and the term "nature" can be understood as a "native or inherent characteristic." *Corley*, 470 Mich at 279. Therefore, "actionable sexual harassment requires conduct or communication that inherently pertains to sex." *Id.* "Verbal or physical conduct or communication that is not sexual in nature is not sexual harassment." *Id.* at 280.

Plaintiff does not need to prove the harassing conduct or communication arose from a sexual desire pertaining to the plaintiff; however, "conduct or communication that is gender-based, but that is not sexual in nature, cannot constitute sexual harassment as that term is defined in the [ELCRA]." *Robinson v Ford Motor Co*, 277 Mich App 146, 155; 744 NW2d 363 (2008); *Haynie v State of Michigan*, 468 Mich 302, 304; 664 NW2d 129 (2003). Accordingly, if the alleged discriminatory conduct is gendered based but not sexual in nature, it does not constitute sexual harassment under the ELCRA as interpreted by the appellate courts of this state.

The existence of a hostile environment for sexual harassment is determined according to an objective reasonableness standard rather than subjective perceptions of a plaintiff. *Radtke v Everett*, 422 Mich 368, 388; 501 NW2d 155 (1993). The trial court's inquiry into whether

Plaintiff established a hostile environment is guided by "objectively examining the totality of circumstances." *Id.* at 387. "[T]he purpose of [ELCRA] is to combat serious demeaning and degrading conduct . . . . " *Id.* The trial court should consider the following factors when examining the totality of the circumstances:

> Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or mere offensive utterance . . . . *Quinto v Cross & Peters Co*, 451 Mich 358; 370 n 9; 547 NW2d 314 (1996).

A hostile environment claim under Michigan law is actionable "when the work environment is so tainted that, in the totality of circumstances, a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Radtke*, 442 Mich at 372. A plaintiff must establish the sexual harassment complained of was severe or pervasive enough to seriously affect the psychological wellbeing of the individual being harassed. *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich App 309, 317; 385 NW2d 778 (1986). A single incident is generally insufficient to establish a hostile environment. See *Radtke*, 422 Mich at 395.

Plaintiff's Second Amended Complaint fails to plead facts alleging she was subjected to unwelcome sexual advances, requests for sexual favors, or conduct or communication of a sexual nature. Additionally, implementing a policy allowing individuals to use the facility based upon their own gender identity does not constitute conduct or communication inherently pertaining to sex. Further, the Second Amended Complaint fails to allege Plaintiff was subjected to actual sexual harassment, instead it asserts what could happen as a result of Defendants' policy.

Plaintiff first raised the case of *Slayton* v *Michigan Host,* Inc, 144 Mich App 535, 376 NW2d 664 (1985) at the summary disposition hearing; however the Court finds it is distinguishable from the case at bar. In *Slayton*, the plaintiff was employed as a waitress at one of the defendant's restaurants and "claimed that the work uniform requirement of high heeled shoes, short skirt, and low cut blouse was discriminatory and subjected her to sexual harassment." *Slayton*, 144 Mich App at 540. Defense counsel in that case offered pictures of attire worn by waitresses in other restaurants which were admitted by the trial court to show "the customary practice in the industry and that the defendant was 'not alone' in requiring its

waitresses to wear scanty and revealing costumes." *Id.* at 542. The Court held it was error to allow admission of those pictures because "it would be anomalous to allow the customary practices of an industry to determine whether the discrimination is valid." *Id.* at 543. The Court reasoned "that the prohibition against sex discrimination in the Elliott-Larsen Civil Rights Act was 'intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id.* (quoting *Sprogis v. United Air Lines, Inc,* 444 F2d 1194, 1198 (CA 7, 1971)).

In this case, unlike *Slayton*, there was no disparate treatment of men and women. Defendants' policy is non-discriminatory because it allows biological males who identify as females to use the women's locker room and biological females who identify as males to use the men's locker room. There is no disparate treatment because everyone is treated the same by the policy and thereby precludes application of the ELCRA under the theory from *Slayton, supra.*

Plaintiff has failed to establish an actionable hostile environment sexual harassment claim so Defendants are granted summary disposition under MCR 2.116(C)(8).

B. Quid Pro Quo Sexual Harassment

The first two subsections of MCL 37.2103(i) define what is commonly referred to as "quid pro quo" sexual harassment. See *Hamed v Wayne Co,* 490 Mich 1, 9-10, 803 NW2d 237 (2011). These provisions state:

> Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
> (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
> (*ii*) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing. MCL 37.2103(i)(i) & (ii). MCL 37.2103(i).

The Court, and parties, have found no case law examining a quid pro quo sexual harassment case in the context of a public accommodation situation; however, in the employment context, "an employee must, by a preponderance of the evidence, demonstrate: (1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute, and (2) that her employer or the employer's agent used her submission to or rejection of

the proscribed conduct as a factor in a decision affecting her employment." *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d 910, 915 (2000) (citation and internal quotation marks omitted). Additionally, our Supreme Court has held "as a threshold matter, plaintiff must allege facts showing that she was subjected to 'unwelcome sexual advances,' 'requests for sexual favors,' or 'conduct or communication of a sexual nature' before she can establish actionable sexual harassment under . . . a quid pro quo theory." *Corley*, 470 Mich at 279, quoting MCL 37.2103(i).

Likewise, in the public services context, our Supreme Court has held:

> A plaintiff alleging quid pro quo sexual harassment affecting public services must show by a preponderance of the evidence (1) that he or she was subjected to any of the types of unwelcome sexual conduct or communication described in the statute and (2) that the public service provider or the public service provider's agent made submission to the proscribed conduct a term or condition of obtaining public services or used the plaintiff's submission to or rejection of the proscribed conduct as a factor in a decision affecting his or her receipt of public services. [*Hamed v Wayne Co*, 490 Mich 1, 10; 803 NW2d 237 (2011).]

The elements are essentially the same in both the employment and public services contexts, thus it stands to reason the analysis applies in a quid pro quo public accommodations claim of sexual harassment. Plaintiff must plead facts alleging: (1) she was subjected to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature and (2) Defendants or their agents made submission to the proscribed conduct a term or condition of obtaining accommodations or used Plaintiff's submission to or rejection of the proscribed conduct as a factor in a decision affecting his or her receipt of public accommodations.

Plaintiff has failed to plead she was subjected to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature. Additionally, Defendants' policy does not inherently pertain to sex rather it is at most a gender based policy, which is not sexual in nature. Finally, once again the Second Amended Complaint focuses on what could happen because of Defendants' policy rather than allege facts of what had happened. Therefore, Plaintiff has failed to state a claim for quid pro quo sexual harassment under either subsection of the statutory provision and summary disposition is granted to Defendants under MCR 2.116(C)(8).

C. Retaliation for ELCRA Claim

The ELCRA has a provision protecting those who report violations from having adverse action taken against them.

> Two or more persons shall not conspire to, or a person shall not:
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701(a).]

Like hostile environment and quid pro quo sexual harassment, most case law involving ELCRA retaliation claims are in the context of employment situations. A prima facie case of retaliation in the employment situation requires the a plaintiff show: (1) he was engaged in a protected activity; (2) that this was known by the defendant; (3) the defendant took an employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. *Garg v Macomb Co Cmty Mental Health Services (amended on denial of reh)*, 472 Mich 263, 273; 696 NW2d 646 (2005). Complaining about allegedly unlawful conduct to company management is classic opposition activity. *Wasek v Arrow Energy Services, Inc*, 682 F3d 463, 469 (CA 6 2012).

Plaintiff complained to Defendants' management, at both the local and corporate level, about the incident and about Planet Fitness's policy. However, there was no violation of the ELCRA by implementation of the "judgment-free zone" policy; therefore, Defendants could not have improperly retaliated against Plaintiff in violation of the Act. Defendants merely exercised their contractual right to terminate Plaintiff's membership as a result of her complaint about company policy which was not illegal in nature. Once again, this Court does not engage in any determination as to the desirability or efficacy of the policy as adopted by Defendants; however, it has not been shown to violate the ELCRA. Plaintiff conceded it would be permissible for Defendants to implement a single sex locker room facility is they wanted without violating the ELCRA. Therefore, Plaintiff has failed to state a claim for retaliation under MCL 37.2701(a) and summary disposition is granted under MCR 2.116(C)(8).

D. Injunctive Relief Under ELCRA

Under MCL 37.2801(1), "[a] person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both." Plaintiff seeks an injunction prohibiting Defendant from enforcing their "judgment-free zone" policy claiming it violates the

ELCRA. However, as noted above, Plaintiff has failed to establish the Defendants' policy does violate the ELCRA, therefore, an injunction would be inappropriate. Summary disposition is granted under MCR 2.116(C)(8).

IV. Breach of Membership Contract

A. Violation of MCL 2.113(F)

Defendants seek dismissal of Plaintiff's claim of breach of contract under MCR 2.113(F)(1) which states "[i]f a claim . . . is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit unless the instrument is . . . (b) in the possession of the adverse party and the pleading so states . . . . " MCR 2.113(F)(1). Defendants argue Plaintiff failed to attach a copy of the Membership Agreement to the Complaint as required by MCR 2.113(F)(1); however, Plaintiff relies on subsection (b) because the document was in Defendants' possession. The Second Amended Complaint fails to state the document was in Defendants' possession as required by subsection (b); therefore, Plaintiff's Complaint was filed in violation of MCR 2.113(F). However, the Court does not dismiss the breach of contract claim for the technical rule violation as leave to amend shall be freely granted to permit correction of such a discrepancy. The merits of the claim for breach of contract follow.

B. Termination of Membership Agreement

The Membership Agreement Plaintiff signed on January 28, 2014, contains a section directly above the signature line, entitled "RELEASE OF LIABILITY ASSUMPTION OF RISK CLUB RULES BUYER'S NOTICE & RIGHT TO CANCEL." The section provides, in part:

> I have been given the opportunity to ask questions related to my use of the facilities, exercise equipment, or my participation in exercise programs and other services. I further agree to comply with Planet Fitness' membership policies and club rules that may be communicated to me from time to time either in writing, through club signage or verbally. Planet Fitness may, in its sole discretion, modify the policies and any club rule without notice at any time. Planet Fitness reserves the right to refund the pro-rated cost of unused services and terminate my membership immediately for violation of any membership policy or club rule. By signing below, I acknowledge and agree to all the terms on the form and back of this agreement.

Additionally, paragraph four on the back of the agreement, entitled Rules & Regulations, states:

> You agree to follow Planet Fitness' membership policies and club rules. Planet Fitness may, in its sole discretion, modify the policies and any club rule without notice at any time. Club rules vary by location and all signs posted in a club or on the premises or verbal communication shall be considered a part of the rules of Planet Fitness. Planet Fitness reserves the right to refund the pro-rated cost of unused services and terminate your membership immediately for violation of any membership policy or club rule.

Plaintiff's Second Amended Complaint alleges Defendant breached the Membership Agreement in the following way:

> 69. Without any notice to Plaintiff, and without publication in any manner, Defendants instituted a policy which allowed for men to use the women's facilities at the gym simultaneously with women.
> 70. After Mrs. Cormier refused to submit to Defendant's sexual harassment and unreasonable policy, Defendants wrongfully terminated Mrs. Cormier's membership agreement and breached the contract.

The Membership Agreement allowed Defendants to implement, change or modify policies and club rules, without notice at any time. Additionally, it authorized oral notification of any policies and rules of the organization. Plaintiff was informed by both the desk clerk at the Midland facility, and the corporate office of Planet Fitness, regarding the "judgment-free zone" policy when she complained of the male in the women's locker room. Gender self-identification was noted to be included in the "judgment-free zone" policy. At a minimum, these communications constituted notice to Plaintiff of the policy or rule regarding use of the women's locker room by those who self identify as women.

The Membership Agreement allows Defendants to immediately terminate a member's membership for failure to comply with a policy or club rule. Defendants terminated Plaintiff's membership after she – as acknowledged in the Second Amended Complaint – refused to submit to Defendants' policy permitting self identified women in the women's locker room. Defendants exercised their right under the Membership Agreement to terminate Plaintiff's membership and refunded the pro rata share of the membership payment to her. There are no questions of material fact which would support a breach of the Membership Agreement, thus summary disposition is granted under MCR 2.116(C)(8).

V. Intentional Infliction of Emotional Distress

Michigan Courts have recognized the tort of intentional infliction of emotional distress. *Bhama v Bhama*, 169 Mich App 73, 78-79; 425 NW2d 733 (1988).

> To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff. Only when a plaintiff can demonstrate that the defendant's conduct is '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 will liability attach. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities do not give rise to liability for intentional infliction of emotional distress. Initially, the trial court must determine whether a defendant's conduct qualifies as so extreme and outrageous as to permit recovery for intentional infliction of emotional distress. *Dalley v Dykema Gossett*, 287 Mich App 296, 321; 788 NW2d 679 (2010).

"The test to determine whether a person's conduct was extreme and outrageous is whether recitation of the facts of the case to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Lewis*, 258 Mich App at 196. "In reviewing claims of intentional or reckless infliction of emotional distress, it is generally the trial court's duty to determine whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Where reasonable minds may differ, whether a defendant's conduct is so extreme and outrageous as to impose liability is a question for the jury." *Id.* at 197 (citations omitted).

Plaintiff's Second Amended Complaint asserts a claim of intentional infliction of emotion distress and alleges(1) Defendants' policy was extreme and outrageous; (2) Defendants intentionally instituted a policy with reckless disregard for the consequences; (3) the policy resulted in Plaintiff using the locker room in the presence of a man, (4) Defendants threatened and coerced Plaintiff to submit to the policy after she complained, (5) Plaintiff was caused embarrassment and humiliation; and (6) this resulted in Plaintiff suffering severe emotional distress. However, it fails to allege facts showing Defendants' conduct was 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. The policy may be offensive to Plaintiff and uncomfortable for her, but subjective offense is not the standard for the evaluation.

Plaintiff opposes the policy but fails to allege any specific acts perpetrated causing her emotional distress. She merely alleges Defendants recklessly instituted a policy that could expose unclothed women and children to a transgender person in the locker room; however,

nothing to establish she personally suffered such an impact. There has been insufficient showing of actions by Defendants involving Plaintiff which are intolerable in a civilized community. Individuals may be uncomfortable in certain situations presented by the "judgment-free zone" policy; however, Defendants have adopted a policy they wish to establish for inclusiveness of their members, and it does not go beyond the bounds of decency to allow them to do it. Individuals will be uncomfortable in either situation as long as a facility has only men and women locker rooms and people self identify as being of the opposite sex from their biological status. Once again, this Court does not address the bigger social issue involving transgender persons use of public facilities as it is not necessary for decision on this case.

The tort of intentional infliction of emotional distress requires conduct actually taken against Plaintiff and not as a prophylactic claim to address future potential occurrences. This Court's obligation is to consider whether the alleged tortious behavior comports with the required elements of the cause of action, not whether future behavior may sustain the necessary burden. Plaintiff has failed to meet the minimum level of factual allegations to sustain a claim of intentional infliction of emotional distress, therefore the claim is dismissed under MCR 2.116(C)(8).

VI. Michigan Consumer Protection Act

The Michigan Consumer Protection Act (MCPA), MCL 449.901, et seq, "prohibits unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce and defines such prohibited methods, acts, or practices . . . . " *Zine v Chrysler Corp*, 236 Mich App 261, 278-79; 600 NW2d 384 (1999). The provisions of the MCPA are to be construed with reference to the common-law tort of fraud. *Mayhall v. A H. Pond Co, Inc,* 129 Mich App 178, 182-183; 341 NW2d 268 (1983).

> In order to show fraud or misrepresentation, plaintiff must prove: (1) that defendant made a material misrepresentation; (2) that the representation was false; (3) when defendant made the representation, defendant knew that it was false, or made it recklessly without knowledge of its truth or falsity; (4) that defendant made it with the intent that plaintiff would act upon it; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff suffered injury. [*Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208; 544 NW2d 727, 732 (1996).]

A material fact for application of the MCPA is "one that is important to the transaction or affects the consumer's decision to enter into the transaction." *Zine* 236 Mich App at 283. For purposes of the MCPA, a "transaction" is the business conducted between the parties. *Id.* at 280.

Plaintiff alleges Defendants violated the MCPA by representing there were separate locker rooms for men and women and failing to disclose a material fact; i.e. that members and guests could use the locker room that corresponds to their self identification gender. The Second Amended Complaint fails to state a prima facie case for fraud under the MCPA because it fails to allege that Defendants made a material misrepresentation or omission intending Plaintiff would act upon it, nor that Plaintiff acted on the misrepresentation or omission. That is, she would not have joined the gym if she had known about the policy. In fact, Plaintiff continued to use the facilities, including the locker rooms, after learning of the policy and the possible presence of a self identified female. Plaintiff cannot honestly sustain a claim that she would not have joined the gym if she knew of the "judgment-free zone" policy instituted by Defendants, as her actions clearly indicate otherwise. Plaintiff has failed to state a claim for violation of the MCPA.

VI. Exemplary Damages

"Exemplary damages are a class of compensatory damages that allow for compensation for injury to feelings." *McPeak v McPeak*, 233 Mich App 483, 487; 593 NW2d 180 (1999) (citation omitted). "[A]n award of exemplary damages is justifiable only where it is first shown that defendant's conduct was malicious, or so willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights." *Bailey v Graves*, 411 Mich 510, 515; 309 NW2d 166 (1981). Additionally, "[i]n order to justify an award of exemplary damages, the act or conduct complained of must be voluntary and the act must inspire feelings of humiliation, outrage, and indignity. *McPeak*, 233 Mich App at 487.

In this case the Membership Agreement included a limitation on liability to "actual compensatory damages" and prevents awards of "indirect, special, incidental or consequential damages . . . . " Defendants argue this prevents an award of exemplary damages; however, as exemplary damages are compensatory damages, they are not limited by the limitation on liability. Therefore, the Membership Agreement does not preclude a award of exemplary damages.

Although exemplary damages are not barred by the Membership Agreement, Plaintiff has failed to plead facts sufficient to warrant such damages. None of the allegations include conduct on Defendant's part that "was malicious, or so willful and wanton as to demonstrate reckless disregard of plaintiff's rights." *Bailey*, 411 Mich at 515. Additionally, exemplary damages are a form of relief rather than an independent cause of action, therefore exemplary damages are not

recoverable since Plaintiff has failed to state a claim upon which relief may be granted for any other cause of action .

CONCLUSION

For the reasons stated above, Defendants' Motions for Summary Disposition are granted in full. Plaintiff's Complaint is hereby dismissed.

IT IS SO ORDERED.

Dated: 1-4-16

HON. MICHAEL J. BEALE, Circuit Judge