STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY APPLEGATE, f/k/a BEVERLY KREAGER,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS; WILLIAM OVERTON, Warden of Adrian Temporary Facility; and BARRY McELMORE, Personnel director of Adrian Temporary Facility; in their official capacity and individually, and jointly and severally,

Defendants-Appellees.

UNPUBLISHED
May 7, 1996

No. 176191
LC No. 93-005827

Before: O'Connell, P.J., and Hood and C.L. Horn*, JJ

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). We affirm.

This is an employment discrimination action. In February of 1989, plaintiff began working for defendant Michigan Department of Corrections (MDOC) as a corrections officer at the Riverside Correctional Facility in Ionia. Plaintiff claimed that, over a ten month period, Officer Thomas Maier committed several acts of sexual harassment against her, including "coming on very strongly," brushing up against her, and touching her breasts or buttocks. Plaintiff eventually complained to their supervisor, Captain Daniel Cusack. Cusack told Maier to stop anything he was doing that was bothering plaintiff. As a result of plaintiff's allegations, Cusack reassigned Maier so that he and plaintiff had no contact. In 1990, plaintiff claimed that she suffered a nervous breakdown because of the sexual harassment.

In March of 1991, plaintiff and Maier were in a group of workers transferred to a temporary facility in Adrian. On occasion, plaintiff saw Maier, who allegedly called her names and made negative references to her relationship with Adrian Captain Lonnie Applegate, whom she began dating in April of

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

1991. Eventually, plaintiff complained to her supervisor, Lieutenant Daniel Bitner. On July 11, 1991, plaintiff filed a formal complaint against Maier. On July 31, 1991, as a result of the sexual harassment, plaintiff left work on medical leave because of depression. Plaintiff was ultimately terminated. Following an investigation of plaintiff's complaint against Maier, Overton concluded that Maier had sexually harassed plaintiff, and Maier was issued a written reprimand.

Plaintiff first argues that the trial court erred in granting defendants summary disposition because she stated a prima facie case of sexual harassment and retaliation as to McElmore and Overton. Plaintiff claims that MDOC is liable for the actions of McElmore and Overton under a theory of respondent superior.[1] A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *West Bloomfield v Karchon*, 209 Mich App 43, 48; 530 NW2d 99 (1995). When deciding a motion for summary disposition, a court must consider the pleadings and documentary evidence available to it. *Radke v Miller, Canfeld, Paddock & Stone*, 209 Mich App 606, 612; 532 NW2d 547 (1995).

Plaintiff seeks relief under the Elliot-Larsen Civil Rights Act which provides that 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 a person has made a charge, filed a complaint, testified assisted, or participated in a n investigation, proceeding, or hearing under this act. [MCL 37.2701; MSA 3.548(701).]

A plaintiff proceeding under Section 701 must show that his or her "opposition or participation was a significant factor in an adverse employment decision." *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F 2d 1304, 1310 (CA 6, 1989). However, the mere fact that an adverse employment decision occurs after a charge of discrimination is filed is not, standing alone, sufficient to support a finding that the adverse employment decision was made in retaliation to the discrimination claims. *Id.*, p 1314.

Plaintiff claims that, as a result of filing the formal complaint against Maier, she was subjected to several forms of retaliation by defendants. The first allegedly retaliatory incident occurred at Riverside in February of 1991, which the parties have termed the "cake incident." The "cake incident" occurred before plaintiff filed the complaint, but she did not receive a counseling memorandum for her role in the incident until August 14, 1991, which was after she filed her complaint against Maier.[2] We find that plaintiff has shown no more than chronology. Plaintiff presented no evidence that the issuance of the belated counseling memorandum for the "cake incident" was casually linked to her sexual harassment complaint. Moreover, the other officers involved in the cake incident, including Sergeant Terry Adams--the officer who eventually complained about plaintiff's conduct, also received counseling memoranda or other discipline. We therefore conclude that this incident does not amount to retaliation by defendants.

The second type of retaliation alleged by plaintiff concerned an investigation by MDOC officials of several employees, including plaintiff and Lonnie Applegate, in July of 1991, concerning an anonymous telephone caller who accused her of watching pornographic movies at work, sleeping on the job and receiving favoritism from her supervisors. We find that plaintiff has offered no evidence that defendants would not usually have investigated in response to such a report. Moreover, this allegedly retaliatory investigation resulted in plaintiff's and Lonnie Applegate's exoneration regarding all allegations. Again, we conclude that plaintiff has only established that this incident occurred after she filed her sexual harassment complaint which, standing alone, is insufficient to support a claim of retaliation. *Id.*

Finally, plaintiff claims that defendants retaliated by denying her additional time on medical leave of absence. The trial court concluded, and we agree, that plaintiff failed to causally link her filing of a complaint with defendants' decision to terminate her employment. Even if plaintiff successfully made that connection, the establishment of her prima facie case would merely shift the burden to defendants "to articulate a legitimate, nondiscriminatory reason for the discharge." *Sisson v Board of Regents of the University of Michigan*, 174 Mich App 742, 748; 436 NW2d 747 (1989). McElmore and Overton represented that they routinely discharged employees after six months of medical leave for economic reasons. The only information before defendants at the time they terminated plaintiff's employment was a letter from her doctor, psychologist Fred Petesky, who had been treating her for approximately two years. That letter, while giving a "target date" for her return on June 28, 1992 (four and a half months after her termination), stated that plaintiff's "[p]ossible return to work is difficult to estimate at this time." Given this uncertain prognosis, defendants' decision to terminate plaintiff was justified. This evidence was sufficient to meet defendants' burden of producing evidence that a valid purpose existed regarding why plaintiff was terminated.

The burden then shifted back to plaintiff to raise an issue of fact regarding whether defendants' reasons were merely a pretext, "by either a direct showing that a discriminatory reason motivated the employer or by showing that the proffered reason is not worthy of credence." *Id.* Plaintiff offered no direct evidence that defendants were motivated by a discriminatory reason. In opposition to the claims of McElmore and Overton, plaintiff produced MDOC records showing that several employees at Adrian, other than those classified as receiving workers' compensation, had been on medical leave for more than six months. We find that the records did not show that defendants' stated economic reasons for the discharge were not worthy of credence. The examples cited only a small minority of the employees on medical leave at Adrian. Further, plaintiff has not shown that these employees were similarly situated to her, or that their absence caused the same economic hardship for MDOC. We therefore conclude that the trial court properly granted defendants summary disposition on plaintiff's retaliation claim.

Plaintiff also argues that the trial court erred in granting defendants summary disposition because she stated a prima facie case of handicap discrimination. We disagree.

The Handicappers' Civil Rights Act (MHCRA) provides that an employer shall not: Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position. [MCL 37.2102(1)(b); MSA 3.548(102)(1)(b).]

In order to establish a prima facie case of handicap discrimination, a plaintiff must establish that: (1) the plaintiff is "handicapped" as defined in the act; (2) the handicap is unrelated to the plaintiff's ability to perform the duties of a particular job; (3) the plaintiff has been discriminated against in one of the ways set forth in the statute. *Doman v Grosse Pointe Farms*, 170 Mich App 536, 541; 428 NW2d 708 (1988). Once the plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to show legitimate, nondiscriminatory reasons for its action. *Crittenden v Chrysler Corp*, 178 Mich App 324, 331; 443 NW2d 412 (1989). If the employer rebuts the plaintiff's prima facie case, the burden shifts back to the plaintiff, who then has to show that the employer's reasons constituted a pretext for discrimination. *Id.*

The parties do not dispute that plaintiff's depression constituted a handicap. Nor do they dispute that on the date of her termination, plaintiff's handicap prevented her from performing her job.

The burden of going forward then shifted to defendants to show legitimate, nondiscriminatory reasons for plaintiff's termination. Again, McElmore and Overton met this burden by testifying that they routinely discharged employees after six months of medical leave for economic reasons.

The burden then shifted back to plaintiff to show that defendants' reasons for her termination were merely a pretext. As previously discussed, plaintiff failed to meet her burden of showing that defendants' reasons were merely a pretext. We therefore conclude that the trial court properly granted defendants summary disposition on plaintiff's handicap discrimination claim.

Affirmed.

/s/ Peter D. O'Connell
/s/ Harold Hood
/s/ Carl L. Horn

[1] It is clear, and defendants do not dispute, that Thomas Maier subjected plaintiff to ongoing hostile work environment sexual harassment. The claims against Maier, however, were dismissed by stipulation of the parties. The parties indicated at oral argument that dismissal was without prejudice, pending the outcome of this appeal.

[2] The "cake incident" involved plaintiff, in February of 1991, making a large chocolate cake in the shape of a female torso, decorated with the likeness of breasts and a vagina. She brought the cake into the

facility as part of a birthday party for an inspector, and allegedly made suggestive gestures and remarks with a piece of the cake from the vaginal area.