STATE OF MICHIGAN

COURT OF APPEALS

VANESSA BOYD AND ERIC BOYD,

Plaintiffs-Appellants,

v

DETROIT BOARD OF EDUCATION, DEBORAH MCGRIFF, MICHAEL GOESCHEL and ARTHUR GREY,

Defendants-Appellees,

UNPUBLISHED
January 24, 1997

No. 177609

Wayne Circuit Court
LC No. 93-310034

Before: Reilly, P.J., and White and P.D. Schaefer,* JJ.

PER CURIAM.

Plaintiffs appeal by leave granted the circuit court's order granting summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) in this sexual discrimination and harassment case brought under the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. The circuit court also denied plaintiffs' motion for reconsideration.[1] We reverse.

I

Plaintiff Veronica Boyd (plaintiff) began working as an engineer trainee for the Detroit Board of Education (Board) in 1978 and, in 1979, earned her license as a boiler operator. Plaintiff was one of the first female boiler operators hired by the Board. From 1980, plaintiff held the position of senior boiler operator. She worked for defendant until 1993, when she took a leave of absence, allegedly as a result of defendants' discriminatory and harassing acts.

Plaintiffs filed a four-count complaint on April 7, 1993, alleging sexual discrimination, retaliation because of plaintiff's opposition to discrimination against female boiler operators, assault and battery, and loss of consortium by plaintiff's husband, Eric Boyd. Plaintiffs' complaint alleged that since her date

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

of hire in 1978, plaintiff had been subjected to continuous harassment and an intimidating environment because of the conduct of her supervisors and male employees, and that she had repeatedly reported the intimidation and harassment in writing to Board employees charged with investigating and abating sexual discrimination. Plaintiffs alleged that on June 29, 1992, plaintiff wrote a letter detailing specific instances of ongoing sexual discrimination and intimidations to defendant McGriff, and that rather than conduct a good-faith investigation, defendants either did not respond or performed a perfunctory investigation, concluding there was no basis for plaintiff's allegations, and then engaged in further conduct designed to harass, intimidate and demean plaintiff. Plaintiff alleged that defendant McGriff attended a union meeting at which female employees vented their frustration and anger at the ongoing sexual harassment, and that McGriff stated in response to plaintiff's and numerous others' complaints, "You have to learn to say 'no' that's what I do."

As to sex discrimination, plaintiff's complaint alleged that defendants McGriff, Goeschel and Grey were the Board's agents, that defendants had a duty to refrain from engaging in discriminatory conduct on the basis of plaintiff's sex, and that in violation of this duty, defendant Goeschel: held daily all male staff meetings where assignments of duties were made, excluding plaintiff; prohibited plaintiff from performing mechanical duties; assigned plaintiff to "coffee detail" stating "as long as you keep the coffee to full, I'll be happy;" wrote plaintiff up unfairly and made false statements in disciplinary reports; assigned plaintiff to "domestic only" tasks such as cleaning his toilet, mopping floors, dusting and cleaning the stove and refrigerator; and disallowed most of plaintiff's requests for overtime, despite her seniority and standing.

As to defendant Grey, plaintiff alleged that: he used or allowed intimidating tactics such as excessive discipline, swearing and yelling, all designed to create a hostile work environment; physically abused plaintiff by shoving her against the wall and pinning her behind a door, conduct which resulted in plaintiff's filing criminal charges and for which Grey was convicted of assault and battery on March 3, 1993; purposely mischaracterized plaintiff's performance as a means of subjecting plaintiff to excessive discipline; refused to investigate plaintiff's complaints of harassment; and assigned plaintiff to domestic only tasks, such as cleaning the bathroom, mopping floors, and dusting, and requiring plaintiff to clean the common area after the men finished their lunch. Plaintiff further alleged that, contrary to the Union contract, no disciplinary action was taken against Grey for his assault, and that in January 1993 plaintiff was transferred to a less favorable environment.

Under plaintiff's retaliation count, plaintiff alleged that defendants violated their duty to refrain from discriminating or retaliating against her because she opposed violation of the civil rights of female boiler operators by harassing her, creating false stories about her work conduct, and engaging in other conduct specifically designed to intimidate, demean and ostracize plaintiff.

Plaintiff's assault and battery count alleged that on or about November 4, 1992, defendant Grey assaulted and battered plaintiff with his hands and fists at Kettering High School, and was convicted of such on March 3, 1993. Plaintiff alleged that she suffered contusions, abrasions, bruises, and lacerations to her body and continues to suffer apprehension and distress.

On June 16, 1994, defendants Board, McGriff and Goeschel filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) and, alternatively, a motion in limine, arguing that plaintiff failed to show a continuing violation, thus all evidence prior to April 7, 1990, must be excluded. Defendants argued that plaintiff failed to show any policy of the Board that caused or resulted in discriminatory conduct. Defendants also argued that the doctrine of laches should bar all evidence prior to April 1990 or the prejudice to defendant would be overwhelming, arguing that plaintiff could not recall some of the dates and names of alleged offenders and that "many of the people have long since died or retired from the Board." Defendants also argued that plaintiff's sexual harassment/discrimination claim must be dismissed as a matter of law, because plaintiff could not prevail on a hostile environment harassment claim since a reasonable person in plaintiff's place could not be deemed to be working in a hostile environment. Defendants further argued that plaintiff's hostile environment claim failed because defendants held hearings on plaintiff's complaints and in two instances disciplined or transferred the offending male. Defendants argued that none of plaintiff's allegations against Goeschel and the Board constituted sexual harassment as a matter of law. Further, defendants argued that plaintiff "is stuck with her own testimony at deposition," that she failed to establish a prima facie case of discrimination because "by her own admissions" she was not treated discriminatorily, and that plaintiff failed to establish that she was treated differently because she was female, thus she did not establish a genuine issue of material fact upon which a reasonable jury could render a verdict in her favor.

Defendants' brief in support of the motion for summary disposition was supported with two exhibits, each containing dozens of pages of plaintiff's deposition testimony.[2] No affidavits or other documentary evidence were submitted. Plaintiffs' brief in response to defendants' motion was supported with seventeen exhibits, [3] including four pages of plaintiff's deposition testimony, which are discussed below.

A

Plaintiff testified in the excerpts of her deposition attached by defendants that she had problems with her in-field employment around 1979, including that the person responsible for training her, Bill Wright, did not train her, and because the men would walk in on her when she was in the bathroom because it had no lock on the door. Plaintiff testified that she complained to the chief engineer, Bill Kokelow, and nothing was done about the lock. Plaintiff testified that when she started the program with defendant there were two other women in her class of approximately fifty students, and that she was the only woman who completed the program. Plaintiff testified that in 1979 Larry Capella threw a rat at her while at Wilson school, that she complained about it to her supervisor, Mr. Muldoon, and that he did nothing. Plaintiff also testified that she was given conflicting instructions on how to operate the boilers at Wilson School, Capella telling her one way, and Muldoon another. Plaintiff testified that another problem she had at Wilson school was that she was given a key to the men's bathroom when she first started there, and was not given a key to a women's bathroom. Plaintiff complained to Capella. Also at Wilson school, plaintiff was trapped in the coal bin by two men, each of whom blocked an exit and jeered at her, saying things like, "where you going now? We could do anything to you we want to." Plaintiff held up her shovel and told them to let her out, the two men left, and she could hear them laughing with others in the engineer's office. Plaintiff complained to Muldoon. She filed

a Title IX grievance with her union, Local 547, and testified at deposition that she was the only female member in that union at the time. Plaintiff testified that the grievance spelled out the things that had gone on at Wilson school, that there was a hearing, and the ruling was in her favor. Plaintiff testified that the findings stated that care would have to be taken where the women were placed so that they would be placed with men sensitive to working with women. She also testified that "they immediately moved me because things were going on."

Plaintiff then went to Barbour Middle School and had no problems, and then transferred to Trombley school in the winter of 1980, with a promotion to boiler operator. She was at Trombley until May of 1981. At Trombley the relief engineer, Bob Bush, threatened to rape her one time when she had to climb inside a boiler to clean it, he said "you got to be careful how you go into these boilers. Make sure you always go . . . feet first because you know, you could go head first, get halfway in there, I could snatch your pants down and rape you, but your head is inside, you don't see me, so you can't say it's me. It could happen." Plaintiff reported the incident to the supervisor, Don Bush, who was the relief engineer's brother, who did nothing. Plaintiff testified that Bob Bush was a relief engineer and was not stationed at any one school, but that she saw him again at other schools, although she never again worked directly with him. After leaving Trombley, plaintiff went to Kettering High School in May 1981, with a promotion to 12-month boiler operator.

Plaintiff testified that she remained at Kettering for the remainder of her employment, except that she was sent to a different school in May of 1982, for a probationary period, after having an altercation with the chief engineer at Kettering, William Parker. Plaintiff testified that Parker hit her and she hit him back. Plaintiff testified that the incident occurred on a Friday, and that the following Monday, Parker mentioned that he had embarrassed her in front of so many people and that plaintiff laughed it off because she was not going to let him upset her. Parker then said something to the effect of "you think that's funny? Well I got a job for you." He sent her to wrap up a coil, a light on the end of a twenty-five foot cord. Plaintiff wrapped it up and brought it to him. Parker picked it up, shook it loose and dropped it, telling plaintiff to pick it up and wrap it up. Plaintiff replied that she had just done that and that he could do it. The entire crew was around them, and Parker picked up the cord and slung it at plaintiff, hitting her in the stomach. Plaintiff hit Parker back in the stomach, and Parker hit her again. Regarding that incident, plaintiff immediately called the principal, and Parker called Stewart Nantau at building operations. Nantau called plaintiff to the phone, chided her and told her to go home. A hearing was held, run by Nantau, and plaintiff was charged with being violent. She was reprimanded, placed on probation, and sent to another school for one year.

Plaintiff testified that she had reported Parker a number of times prior to that because he treated her differently than the men. Specifically, plaintiff testified that Parker called her his "nigger washer," and her job was to mop his floors, clean the boiler room, bathroom and his office. Plaintiff testified that she was referred to as "Parker's girl," and that she reported it to principal William Jones and her supervisor downtown, Nantau. The principal asked her to keep a record of incidents, which she did. Plaintiff testified that Parker "cursed her out real badly" in front of the entire boiler room crew for no reason, and that she reported that to the principal and to Nantau. She testified that "because I had reported so many things, they came out and had a conference." Plaintiff testified that she was not

included in that meeting, and that nothing changed after that. Plaintiff also testified that Parker once turned his back side to her and stuck it in her face, and that another time he put his feet up on the table where she was eating, and that she reported the incidents to Jones, an assistant of Nantau's, and Nantau.

At Post school, plaintiff was mistreated for the first six months; the men would call her by snapping their fingers or tapping on the table, not by using her name. Plaintiff testified that she did not have problems the second six months. After being at Post for a year during her one-year probation, she was returned to Kettering in 1983. There was an opening on the midnight shift, which plaintiff requested and received, and for which she received higher pay. When she returned to Kettering, Jeff McGuire was hostile to plaintiff. On one occasion he let go of a cart they were carrying together, which held sharp-edged filters, and plaintiff grabbed for it and cut herself. She testified McGuire did this on purpose. Plaintiff complained and also experienced other problems. She testified that assignments were handed out at the beginning of the day by Dave Mills, the engineer, who would speak only with the men. Plaintiff testified she was not included in the meetings, but that she could overhear some of the assignments. Plaintiff reported being excluded from the meetings to William Jones, who is now retired, and also reported to Jones that Mills did not allow her to seek medical attention when she cut herself.

Plaintiff testified that the next time she had problems at Kettering was with Goeschel in 1987, the year he took the chief engineer position there. She testified she had "severe" problems with Goeschel: in 1987 she told him a valve was leaking and he responded "don't you worry about it, me and the men will take care of it;" Goeschel wrote her up about twenty times for reasons that included not cleaning as he would clean, and bringing her son and some friends to play in the gym while she worked, for which she was reprimanded and placed on probation for ninety days; however, the probation lasted eight months. Plaintiff testified that Nantau told her, and that everyone knew, that for years the engineers had brought people into the building.

Plaintiff also testified that she had problems with an employee, Dave Austin, whom she thought was unstable, and believed that he would attack her. She reported incidents to Goeschel and Roy Solis in building operations, including him calling her his mother; that he would come to work, come into the office, close the door behind him, and stare at her on a daily basis; and that he would come in saying people were following him and everybody was out to get him. Plaintiff testified that nothing was done until the fourth time she put her complaints in writing. Austin was then removed from the building a few days later.

Goeschel was replaced with Arthur Grey as chief engineer in August 1992. Plaintiff left Kettering while Grey was still chief engineer. Plaintiff testified that she had problems with Grey, including cleaning assignments, and that on November 4, 1992, Grey assaulted her in the chief engineer's office with two witnesses present. Plaintiff testified that her paycheck and another female's, Dianne Nichols, paycheck had come up short three times, and that Grey was responsible for reporting their time. The checks did not include the midnight shift premium. The three were in Grey's office discussing it, and he told them he would take care of it. Plaintiff told Grey that she had checked with payroll, and payroll had told her that Grey had not submitted the proper form. Nichols asked him why

he did not just fill out the form, Grey jumped up and grabbed plaintiff by the arms, saying he was tired of "this shit," and pinned plaintiff against the door. Nichols screamed at Grey to let plaintiff go and called downtown. When she hung up, Grey pushed plaintiff, pinned her against the door, and stormed out of the office. A hearing was held at which Nichols, another witness, Tommy Grant, Grey and plaintiff testified, and the finding was "insufficient evidence." However, after a criminal trial, Grey was found guilty of misdemeanor assault.

Also attached to defendants' motion for summary disposition were excerpts of plaintiff's deposition of February 11, 1994. Plaintiff testified that the purpose of the boiler operator was to help provide heat, preventive maintenance, and safety, and that the first of the mechanical jobs was to start the boiler. The following colloquy ensued:

Q Have you ever [started the boiler] while with the board?

A Yes, I have.

Q Did you do that under Mr. Goeschel?

A Yes, I did.

Q Was it a regular part of your job?

A Yes.

Q Now, with regard to maintaining pressure, did you do that under Mr. Goeschel?

A Yes, I did.

Q Was that a regular part of your job?

A Yes.

Q You said that you have to take—check safety equipment and valves and blow down the water and the like?

A Yes.

Q Did you do that under Mr. Goeschel?

A I blew down the water, yes.

Q Regularly?

A Yes.

Q How about checking the valves and the like?

A No.

Q You did not do that?

A No.

Q Ever?

A Under Mr. Goeschel, no.

Q Under anyone else at the board did you not do that?

Q Uh-huh. Yes, I did.

Q Under anyone but Mr. Goeschel did you do that? I didn't ask that well. I'm sorry.

Except when you worked for Mr. Goeschel, did you do that mechanical duty under all the other supervisors for whom you worked?

A I didn't do that under Mr. Grey either.

Q Except for those two did you do it under all the others?

A I didn't do it under Mr. Ozanich.

* * *

Q You said you had another mechanical duty is to start the fans to push the heat through the building?

A Yes.

Q Did you do that under Mr. Goeschel?

A No.

Q Not ever?

A Depending on – because sometimes the persons that I worked with did not show up or someone would start that was new.

Q So, you did this on occasion?

A On occasion.

Q Under Goeschel?

A Yes.

Q Did you do this regularly under all the others for whom you worked?

A It depends on each engineer, if he decided that he wanted me to start the fans up.

* * *

Q You said you also test the water for chlorine level?

A Yes.

Q Did you ever do that under Goeschel?

A No.

Q Grey?

A No.

* * *

Q Did you do it regularly with regard to the other supervisors?

A Yes.

Plaintiff also testified that in November 1992 she and Dianne Nichols arrived at work (the midnight shift) and observed that the bathroom door was closed while the bathroom fan was on, which was unusual. Plaintiff testified that she and Nichols kicked the bathroom door open and found feces rubbed all over the stall, seat and floor, and toilet paper everywhere. Plaintiff reported it to the day-shift custodian, Marcus Swanson, when he arrived later that morning. Dianne Nichols reported it to Eugene MacLeod, downtown, when the offices opened later that morning. Plaintiff and Nichols also reported it to Grey. The bathroom was cleaned and there was no investigation to her knowledge. Plaintiff also testified that around March 1993 some memos were circulated regarding the sexual harassment policy from McGriff and indicating that the policies had to be posted. Plaintiff testified that the policies were not posted in the boiler room. The memos also stated that all nude or explicit material would have to be removed from the walls in the boiler room and that explicit joking must cease. Plaintiff testified that in mostly every boiler room she had been in, including Kettering's, there had been nude drawings on the wall. Plaintiff testified that when the memo was posted, someone had drawn around the arrow pointing to it and "made it into a woman with spread legs and exposed boobs and her arms wide open. Big smile on her face." Plaintiff testified that she knew that the day shift had seen it, that she saw it when she first came on duty on March 7, 1993, and that she reported it to MacLeod's office. A meeting was held several days later and the picture was removed.

Plaintiff also testified that beginning in the fall of 1992 and over a two or three month period, Dave Reese told her three times that she had better watch her back. Plaintiff testified that at the end of April or beginning of May 1993, she came to work and one of the men was laughing and said to her that there was a grave down there, in the tunnels at the end of the boiler room. Plaintiff testified that she reported it to MacLeod's office, and Al Robinson from that office came and measured the hole, which was six feet long, fourteen inches deep, and about fourteen to eighteen inches wide. Plaintiff testified that she did not know if there was an investigation, and that some men told her Dave Reese did it.

B

Plaintiff's brief in response to defendants' motion was divided into sections addressing the continuing violations doctrine, including sub-sections regarding present evidence of discriminatory treatment within the statutory period, defendant's policy of discrimination and continuing course of conduct; and the requirements of a prima facie case of sexual discrimination. Plaintiff's brief argued that when she complained about continuous sexual harassment and discrimination, she was subjected to further harassment, hostility and discrimination. The brief set forth a list of eight "examples" of hostile work environment sexual harassment and sexual discrimination occurring during the three-year limitations period.[4] Plaintiff further argued that one of the reasons defendant took no action regarding the female boiler operators was that defendant Board had no policy against sexual harassment until February 1993. Plaintiff argued that the Board consistently refused to consider, process, investigate or resolve plaintiff's complaints about sexual harassment, mentioning specifically the Board's conclusion that plaintiff's complaint against Grey for assaulting her lacked merit. Plaintiff argued the Board did not adequately investigate and take prompt action after receiving notice of the alleged hostile work environment. As mentioned above, plaintiffs' brief had seven exhibits attached. See note 3, *supra*.

At oral argument on July 8, 1994, defense counsel began argument by moving to strike plaintiff's brief, which was filed July 7, 1994, as untimely under MCR 2.116(G)(1)(a)(ii) and because plaintiff's attachments were "unacceptable and inappropriate," arguing they were not competent evidence.[5] The circuit court agreed that plaintiff's brief was untimely and thus violated the rule, but stated that it would also like to address the substantive claims.[6] Defense counsel argued that plaintiff's response brief did not address retaliation and laches, "so apparently she's conceded that," and that she did not deal with the continuing violation theory.[7] The court stated that it was going down the list on page six of plaintiff's brief in response to defendants' motion, and that plaintiff had to show a current violation, i.e., a violation occurring during the period of limitations. The circuit court continued:

> THE COURT: It's a heavy responsibility. And quite frankly, she cites—Ms. Boyd does—a couple memos complaining—they're her written memos. That's like citing one's complaint and saying that's evidence. The court—the appellant [sic] court's [sic] have not embraced for summary judgment purposes, the self-serving—self-fulfilling, if you will—statements and or pleadings as substantive evidence. And as a matter of fact six—Exhibit 6, which is the investigatory report—or the results of the report—where they interviewed, once she complained, they cited the appropriate law, they interviewed 17 people, the people that she recited, and they found no action at all. That in point of

fact, there's no showing that she was treated any differently than anyone else for that job, for that shift.

And the other Exhibit was I think 5, which is a—a memo from the supervisor, [Goeschel]. . .

* * *

in which he says for the person on midnight, once you got the boiler up and running at the school, here are the things that I want you to do. He doesn't say to you women. He's –he's talking to whoever I presume is . . .There's nothing that would indicate—it's that it isn't gender neutral.

* * *

I see no evidence by way of interviews or depositions with the union president or –other boiler operators, that someone on that shift doesn't have to do those tasks, male or female.

MS. CARLIS [plaintiff's counsel]: I'd like to respond, your Honor.

THE COURT: Sure. That's where I'm coming from.

MS. CARLIS: Okay, and I do see the problems that the Court is having with my attachment. And what I'd like to do, your Honor, **I'd like to have an opportunity to amend this to . . . put it in a form where the Court can consider what we believe is evidence that the only midnight boiler operator was Vanessa Boyd**, so . . .

THE COURT: Well, at Kettering High School.

MS. CARLIS: At Kettering High School

* * *

. . . this letter was directed to the midnight boiler operator at Kettering High School as the light [sic] will show and it followed, which the Court doesn't have before it, but it followed a series of complaints that Mike [Goeschel] made to Vanessa Boyd. He only wanted her to do housekeeping duties. He specifically took away all of the mechanical and the other responsibilities. There were complaints about that she made to . . .

THE COURT: I know she complained, but that is not competent evidence. That's like citing one's complaint in a civil suit.

MS. EDWARDS: And in her own deposition under oath she admitted to what, at least a dozen mechanical duties that she did do, and I attached those.

> THE COURT: I know you attached. I will concede that circumstantial evidence may be utilized, don't misunderstand me, memos and the like are competent, I'm not closing my mind, but . . . as the only substantive of [sic] evidence, one's self-serving memos, -- then—then it becomes a circular argument.

The circuit court also stated that as to the physical assault by Grey, "The fact that I get into a fight with that chap versus that person, doesn't make it a sexual fight, it makes it a fight."

Defense counsel argued that defendants took appropriate remedial measures by transferring Grey, and plaintiff's counsel responded that Grey was plaintiff's supervisor, and that the Board did an investigation and found insufficient evidence, and it was only after Grey was convicted of assault that the Board transferred him.

The circuit court entered an order granting defendants' motion under both MCR 2.116(C)(8) and (C)(10).

Plaintiffs filed a motion for reconsideration, which incorporated plaintiffs' response to defendants' motion and attached affidavits of five females who were or had once been boiler operators for the Board, as well as affidavits of plaintiff and her husband. The five female employees averred that from personal experience and observation they had knowledge that female engineers and boiler operators employed by the Board are victims of sexual harassment and discrimination, and each set forth specific incidents of discrimination. The women averred that they were never aware of the Board having any policy on sexual harassment until 1993, and that during a meeting concerning the hostile work environment of female boiler operators and engineers at the Board, they heard McGriff tell them to "just say no" to sexual harassment and discrimination and "that's what I do." Anna Teasley's affidavit set forth eight incidents or policies of harassment and discrimination, three of which involved plaintiff,[8] and stated that she worked with plaintiff for a year at Kettering High School and plaintiff was always at work and did her work well. Plaintiff Erick Boyd's affidavit stated that he had worked for the Board since 1974, and personally observed a grave at Kettering High School in May 1993, along with several others. Boyd answered that "The word was spreading around the building that someone had dug a grave for my wife," that he witnessed the effect of the hostile working environment on his wife, that she came home constantly depressed and unnerved about how she was treated and he would take her to get medication and to therapy, and that he was aware his wife was assigned to coffee detail, and would see her go to the store to purchase the supplies, among other things. Plaintiff's affidavit stated that since she began working at Kettering in 1983 she received merit raises every year and bonus raises. Plaintiff averred that she had never been written-up or disciplined for any type of insubordination. She further averred that in 1983 she was a day-shift boiler operator at Kettering and the midnight boiler operator was not assigned to do only housekeeping or domestic duties. Further, when she was a day-shift boiler operator in 1985 the midnight boiler operator was not assigned to do only housekeeping or domestic duties. Plaintiff averred that in 1986, she became a midnight boiler operator under Daniel Dobek, and that while she worked under Dobek in 1985 and Ray Rorison in 1987, her responsibilities included a number of mechanical duties. Plaintiff averred that when Goeschel became her supervisor in 1988 her responsibilities completely changed, that he told her to come to him concerning jobs and when she did so he would tell her that "the men and I will handle that," and "you keep the coffee pot full."

Plaintiff averred that she was then assigned to full coffee detail, including going to the grocery store and keeping records of the money collected. When she complained, he assigned her housekeeping duties which included cleaning the bathrooms, toilets, floors and dusting. Plaintiff further averred that her supervisor Arthur Grey would also not allow her to do mechanical jobs, limiting her and other women to cleaning jobs, and telling her he could not trust a woman to do mechanical jobs and "they'll tear up my building." Plaintiff averred that in November 1992, Grey assaulted her after she inquired about not being correctly paid for two consecutive months, and that the Board denied her complaint and said it had no merit. In May of 1993, the day after Grey was sentenced, she arrived at work and found a grave dug on her job site, by Dave Reese, who had previously told her that she "had better watch out." Two persons investigated the grave, measured the hole, and determined it was a grave from its size and shape. Plaintiff lastly averred that she was not aware of any sexual harassment policy of the Board until 1993 and that she knew that the sexual harassment and discrimination problems against female boiler operators and engineers at the Board were still continuing.

Plaintiffs' motion for reconsideration also attached excerpts from the deposition testimony of Dave Reese wherein he testified that he was suspended for three days for digging a 6' by 14-15" hole, which was around ten inches deep, in the tunnel under Kettering high school, because he was "angry at a supervisor" that he was doing more work than he should have been doing,[9] and that he smeared Swedish meatballs all over the bathroom walls "as a practical joke." Reese also testified that he recalled a nude drawing on a memo that had been posted in the boiler room.

The circuit court denied plaintiffs' motion for reconsideration, finding that plaintiff had failed to establish that defendants had committed a violation within the three-year limitations period.

II

A

A motion for summary disposition under MCR 2.116(C)(8) is tested by the pleadings alone. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Beaudin v Michigan Bell Telephone Co*, 157 Mich App 185, 187; 403 NW2d 76 (1986); *Marcelletti v Bathani*, 198 Mich App 655; 500 NW2d 124 (1993). Only if the allegations fail to state a legal claim is summary disposition proper under MCR 2.116(C)(8), *Doe v Mills*, 212 Mich App 73, 79; 536 NW2d 825 (1995).

The circuit court erroneously granted summary disposition under MCR 2.116(C)(8). Plaintiffs' complaint stated claims of hostile environment sexual harassment and sexual discrimination, as well as assault and battery. The circuit court did not accept the allegations and inferences arising from plaintiff's allegations as true.

A prima facie case of hostile environment sexual harassment consists of the following: 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 in fact 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, 383; 501 NW2d 155 (1993). A plaintiff need only show that but for the fact of her sex, she would not have been the object of harassment. *Id.* at 383.[10]

Plaintiff met the first two elements because she is a female and alleged that she was subjected to harassment on the basis of sex. *Id.* at 383. Plaintiff meets the third element because her complaint alleged that her male supervisors and fellow male employees subjected her to continuous harassment, which was offensive and harmful to plaintiff, including treating her differently than male employees in job assignments, discipline, making unwelcome comments, and unwelcome physical conduct, including assault and battery. Plaintiff also alleged that defendants' conduct created a hostile environment and interfered with her work, and that the individual defendants were agents of the Board. Plaintiff's complaint included a number of allegations of incidents which occurred within the three-year limitations period. Dismissal under MCR 2.116(C)(8) was thus improper.

Plaintiff also established a prima facie case of disparate treatment sex discrimination, i.e., that she was a member of a protected class, and that, for the same conduct or performance, she was treated differently than a man. *Schultes v Naylor*, 195 Mich App 640, 645; 491 NW2d 240 (1992). Plaintiff's complaint alleged that she was excluded from all-male staff meetings, at which assignments were made, was disciplined differently than males, was denied overtime, and that she was relegated to domestic tasks unlike her male counterparts, among other things. Again, plaintiff's complaint included several allegations of incidents which occurred within the three-year limitations period.

We conclude that the circuit court improperly dismissed plaintiffs' claims under MCR 2.116(C)(8).

B

Nor was summary disposition proper under MCR 2.116(C)(10). In ruling on such a motion, the circuit court must consider not only the pleadings, but also any depositions, affidavits, admissions, or other documentary evidence submitted by the parties and determine whether the kind of record which might be developed, giving the benefit of any reasonable doubt to the nonmoving party, would leave open an issue upon which reasonable minds might differ. *Linebaugh v Berdish*, 144 Mich App 750, 754; 376 NW2d 400 (1985). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The party opposing the motion then has the burden of showing that a genuine issue of disputed facts exists. *Id.* The nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by affidavits or as otherwise provided by court rules, set forth specific facts showing that there is a genuine issue for trial. *Ringewold v Bos*, 200 Mich App 131, 136; 503 NW2d 716 (1993). In order to avoid summary disposition, plaintiff had to establish a

genuine issue of material fact regarding whether a prima facie case of discrimination exists. *Schultes*, 195 Mich App at 645.

We first note that defendants submitted no affidavits in support of their motion. Moreover, the excerpts of plaintiff's deposition testimony defendants submitted, the details of which are set forth at pages 5-13, *supra*, when viewed in a light most favorable to plaintiff, did not support defendants' contentions that plaintiff admitted there was no discriminatory conduct or that plaintiff failed to establish that defendants discriminated against her within the three-year limitations period.[11] Defendants thus did not meet their initial burden of supporting their position with documentary evidence.

Ignoring for the moment deficiencies in defendants' motion, the next question is whether plaintiffs presented sufficient evidence to raise a genuine issue of material fact. We conclude that they did. In the few pages of plaintiff's deposition testimony plaintiff attached to her response brief below, she testified that on November 1, 1992, she arrived to work on the midnight shift along with Dianne Nichols and found feces smeared on the wall, toilet seat, and floor, and toilet paper streamed everywhere. She testified that she reported the incident to Marcus Swanson, and Nichols reported it "downtown," to Eugene Macleod. She testified that the incident was not investigated to her knowledge. Dave Reese admitted at deposition that he was responsible for both the "feces" incident,[12] for which he was apparently not disciplined, and the later "grave" incident. Further, included in plaintiff's seventeen exhibits attached to her response brief, were memos of defendants which corroborated, as did her deposition testimony, that plaintiff filed grievances and complained about discriminatory treatment and harassment on the job repeatedly, often to no avail. Plaintiff attached a memo dated March 12, 1991 from Goeschel to "Midnight Boiler Operator, Kettering H.S." which assigned the duties of cleaning the toilet and bathroom, mopping the boiler room, engineers office, and other areas, sweeping, dusting, changing burned-out light bulbs, emptying trash cans, etc., to the Kettering midnight boiler operator. The memo is carbon copied to plaintiff, the school principal, certain files, and a union local. Plaintiff argued at the hearing below that the memo was addressed to her, as she was the only midnight boiler operator. The circuit court determined there was no evidence to show that the memo was addressed to plaintiff alone and thus gender based, thereby failing to view the factual allegations in the light most favorable to plaintiff. When plaintiff's counsel requested an opportunity to show that the memo was directed at plaintiff specifically, the circuit court denied the request.

Moreover, the sizeable portions of plaintiff's deposition testimony that were before the circuit court, having been attached by defendants, further established that genuine issues of fact remained. Plaintiff testified at deposition as to several dozen incidents of unwelcome conduct or communications by defendants and male co-employees which she reported to superiors and/or her Union. A number of these incidents occurred within the three-year limitations period. Plaintiff presented evidence that as to several of these incidents, defendants did not promptly take appropriate remedial measures. *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 234; 477 NW2d 146 (1991). For example, in the case of Grey's assault of plaintiff in November 1992, defendants disciplined Grey only after plaintiff filed criminal charges which resulted in Grey's conviction.

The circuit court improperly dismissed plaintiffs' claims under MCR 2.116(C)(10), as genuine issues of fact remained as to her sexual discrimination and harassment claims.

III

Plaintiffs' appellate brief does not directly address the continuing violation doctrine, nor does it argue that plaintiff established a continuing violation. The doctrine of continuing violation may be applied only where the conduct occurring outside the statute of limitations period was such that the plaintiff had no reason to assume that she could file an action based on that conduct. *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986).

Plaintiff presented no testimony, and her affidavit submitted on her motion for reconsideration did not address or argue, that she was unaware that she could have filed suit before April 1990, as required by *Sumner*. As such, we conclude that plaintiff failed to establish a continuing violation, and the court did not err in granting summary disposition regarding claims arising more than three years before the filing of the complaint.

In light of our disposition we need not address plaintiffs' remaining argument that the circuit court abused its discretion in refusing to allow plaintiffs to amend their pleadings pursuant to MCR 2.116(I)(5) and by refusing to consider the affidavits and exhibits filed with plaintiffs' motion for reconsideration.

As to the argument that the court properly granted summary disposition because plaintiffs' brief was late and the factual support was provided in the form of plaintiff's letters of complaint, rather than by affidavit, we conclude that dismissing the case on these grounds is too drastic a sanction where a responsive brief was filed before argument, the deposition testimony provided by defendant belied the absence of a genuine issue of fact, the memo addressed to the Kettering midnight boiler operator supported plaintiff's claims, and facts were provided in the attachments to the brief, albeit in unsworn form. The circuit court could have adjourned the motion and assessed costs, if necessary.

Reversed and remanded for proceedings consistent with this opinion.

/s/ Maureen Pulte Reilly
/s/ Helene N. White
/s/ Philip D. Schaefer

[1] While, defendants argue that an order was not entered denying plaintiffs' motion for reconsideration, the circuit court record contains a "record request for a hearing on a motion (praecipe) order/judgment"

pertinent to this motion, which states that the motion was denied on July 15, 1994, and is signed by the circuit court.

[2] Plaintiff was deposed on December 22, 1993 and again on February 11, 1994.

[3] Memo from Equal Employment Opportunities representative to Assistant Superintendent of Office of School Housing outlining findings following hearing on plaintiff's grievance, dated June 11, 1979; memo from plaintiff to supervisor, union Local 547,and principal of Kettering High School regarding her numerous complaints of sexual harassment and discrimination, dated January 29, 1993; Letter from plaintiff to Mrs. White dated June 14, 1991, outlining Michael Goeschel's harassment; 1 page of deposition testimony; memo to "midnight boiler operator" from Goeschel, dated March 12, 1991; memo regarding report of investigation of plaintiff's Title IX grievance regarding sexual harassment from Program Associate to Director, Heating Plant and Housekeeping, dated November 12, 1991; letter to plaintiff from acting program supervisor stating there was insufficient evidence to support her claims of assault, dated November 18, 1992; 36th District Court Misdemeanor Register of Actions page stating Arthur Gray was sentenced to one year of probation on May 7, 1993, for assault and battery; three pages of plaintiff's deposition testimony describing finding bathroom walls smeared with feces; four newspaper articles, one entitled "Woman fears grave is meant for her," with photograph of plaintiff and story that grave digging was pattern of workplace harassment, another one entitled "McGriff to propose sexual harassment policy," dated January 5, 1993; memo regarding plaintiff's sexual harassment complaint from the director of Heating Plant, Housekeeping and Contract Management to the Area E Superintendent, dated August 5, 1991; Work Rules Re: Board Employees; letter from plaintiff to Mr. McKee regarding incidents, undated, but apparently written in mid to late January 1991; several medical documents and psychiatric medical report of plaintiff from Dr. Elaine M. Carroll, dated October 22, 1993, with diagnosis of Post Traumatic Stress Disorder and major depression; timeline showing application of continuing violation doctrine; Detroit police preliminary complaint form of complainant Deborah Sutherland regarding being struck by a male, Melvin Wilson; and Detroit Board of Education's Policy on Sexual Discrimination/Harassment dated February 23, 1993.

[4] Two of the eight examples are alleged to have occurred in January 1990, outside the limitations period.

[5] Defense counsel argued:

> She [plaintiff] has attached a newspaper clipping, and we just went through how accurate they are. She's attached a police report by another woman about another man, at another school, which involves race discrimination. She's involved—she's attached nothing that's required especially for a 2.116(C)(10). So, I would move to strike her response in its entirety for both of those reasons, there's no excuse.
>
> If your Honor, is not inclined to grant that, than [sic] I can go on, but if you are than [sic] I can stop.

[6] THE COURT: Well, I'm going to do—I want two things. No, I'm not inclined and stuff.

I think you're right that from a technical standpoint I—I don't know of any case and we've been through this. As a matter of fact, there's a lawyer who—steam comes out of his ears when he sees me walking down a hall and—because I invoked the plain english [sic] of the rule.

You have to file [sic] response. It says shall, it doesn't say may—says shall—on a summary. It's the most serious, if you will, motion in our rules. Shall says shall, it doesn't say discretionary, it's up to the Court, nor any of that sort of thing. If shall has any meaning, and if our rules have any meaning, then they should be plain english [sic] enforced. I enforced it. He's going to take it up. Maybe we'll finally see whether or not a panel of a Court of Appeals is prepared to enforce Michigan Court Rules literally. Or whether they'll say, never mind literal enforcement, unless it's our court. You can bet they would make an exception there, because they're trying to move files out of there.

Skipping that for a moment—so, I think you're correct from a technical standpoint, there had to be compliance and there was not compliance. It's noted. I'd also like to, however, address the substantive. That's why I'm not paying [sic] my hat on just that.

[7] As noted above, plaintiffs' brief in response to defendants' motion expressly addressed the continuing violations doctrine.

[8] Teasley averred that while working with other female crew members, including plaintiff, she had observed that females were treated differently than men, that while at Kettering she personally observed plaintiff being given the job of cleaning the bathroom when there were two other male boiler operators on duty at the same time, and that this occurred whether she worked days, afternoons, or midnight shifts. Teasley averred that plaintiff was singled out to do only housekeeping chores, and also singled out for her attendance and promptness, while there were men who came hours late, or not at all, who were never reprimanded or written up.

[9] Given Reese's earlier statements to plaintiff (see page 13, *supra*), the "grave's" connection to plaintiff would have been a jury question.

[10] Subsequent to *Radtke*, this Court in *Koester v Novi*, 213 Mich App 653, 667-670; 540 NW2d 765 (1995), held that gender-based comments to a female employee about her pregnancy, career choice, and child rearing were not, under the CRA, communications "of a sexual nature" that created a hostile work environment. Susequently, the Michigan Supreme Court stated in *Quinto v Cross & Peters*, 451 Mich 358, 368; 547 NW2d 314 (1996), "we assume without deciding that plaintiff is within the class protected and that a hostile environment claim may be maintained on conduct involving a

plaintiff's gender, age, or national origin," citing *Koester* in a "[b]ut see" footnote. Given *Radtke*, and the Court's discussion in *Quinto*, 451 Mich 368-369, we conclude plaintiff sufficiently established the sexual nature and motivation of the conduct and communications.

[11] While plaintiff's deposition testimony provided some indication that she may have overstated her claims regarding Grey and Goeschel assigning her to domestic-only tasks and excluding her from mechanical duties, the testimony did not totally undermine her claims that they assigned her domestic duties and restricted her mechanical duties.

[12] He asserted that the substance was swedish meatballs.