

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ANITA NELSON,

Plaintiff-Appellee,

v

ALGER MAXIMUM CORRECTIONAL  
FACILITY and DEPARTMENT OF  
CORRECTIONS,

Defendants-Appellants.

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UNPUBLISHED

July 3, 2003

Nos. 239224; 240230

Marquette Circuit Court

LC No. 99-036400-NZ

Before: Smolenski, P.J., and Griffin and O’Connell, JJ.

PER CURIAM.

In Docket No. 239224, defendants appeal as of right challenging the circuit court’s orders denying their motion for summary disposition of plaintiff’s retaliation claim and entering judgment for plaintiff on the jury’s subsequent verdict on the retaliation claim in the amount of \$20,000. In Docket No. 240230, defendants appeal as of right from the court’s orders granting plaintiff attorney fees and costs, resulting in a total judgment of \$53,898.33. We reverse.

Plaintiff, identifying herself as Native American and suffering from a disability and disfigurement in one eye, brought suit against defendants in 1999, alleging workplace hostility pursuant to the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, and the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.* Plaintiff amended her complaint to allege “repeated acts of coercion, intimidation, threatening behavior and interference with the rights she has exercised.” Plaintiff sought both damages and injunctive relief.

On defendants’ motion for summary disposition, the trial court dismissed the counts pursuant to the PWDCRA, but allowed the counts pursuant to the CRA to go to the jury. After trial, the jury found that defendants had not created a hostile workplace for plaintiff because of her race or ethnicity, but that defendants had created such an environment in retaliation for plaintiff’s conduct in filing a grievance or complaint asserting her rights as a Native American. The jury awarded plaintiff \$15,000 in past and present damages, and \$5,000 in future damages. The trial court later awarded interest, court costs, and attorney fees, bringing the total judgment to \$53,898.33. This appeal followed.

Defendants argue that the trial court erred in failing to dismiss plaintiff’s retaliation claim. We agree. When reviewing a trial court’s decision on a motion for summary disposition

pursuant to MCR 2.116(C)(10) or for directed verdict, this Court views the evidence presented until the time of the motion, in a light most favorable to the nonmoving party to determine whether a factual question existed over which reasonable minds could differ. See *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999) (standard for summary disposition); *Oakland Hills Dev Corp v Lueders Drainage Dist*, 212 Mich App 284, 289; 537 NW2d 258 (1995) (standard for directed verdict).

The CRA prohibits retaliation against a person “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). A retaliation claim requires proof that the plaintiff was engaged in a protected activity, and that the defendant took adverse action against the plaintiff in response. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

This Court has recently held that an adverse employment action is not a function of the plaintiff’s “subjective perception,” but rather requires “an objectively verifiable employment action.” *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 314; 660 NW2d 351 (2003). What is required is an adverse effect on the terms or conditions of the plaintiff’s employment. *Id.* at 314. This does not include ostracism or isolation by co-workers. *Id.* at 315. Instead, an adverse employment action “typically . . . takes the form of an ultimate employment decision, such as . . . termination[,] . . . a demotion[,] . . . a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.” *Id.* at 312 (internal quotation marks and citations omitted).

However, “a supervisor’s failure to respond to an employee’s complaints of harassment in retaliation for the employee’s opposition to a violation of the CRA can constitute an adverse employment action for the purposes of a retaliation claim . . . .” *Meyer v City of Center Line*, 242 Mich App 560, 572; 619 NW2d 182 (2000). This rule is framed, however, in relation to “sufficiently severe” harassment. *Id.* at 571. Thus, isolated instances of ostracism by co-workers will not normally meet this standard.

Accordingly, where a plaintiff is imputing to an employer liability for hostility imposed by various employees on a retaliation theory, the plaintiff must prove general workplace hostility, in response to the plaintiff’s assertion of rights, that is so severe and pervasive that it constitutes a genuine and objectively verifiable change in the plaintiff’s conditions of employment. *Peña, supra* at 314; see also *Meyer, supra* at 571-572.

Application of the rules governing retaliation is complicated in this case, however, by questions of how and whether retaliation was actually pleaded. Count III of plaintiff’s amended complaint does not use the word “retaliation,” but instead complains of “repeated acts of coercion, intimidation, threatening behavior and interference with the rights she has exercised” under the CRA. The language actually pleaded reflects not subsection (a) of MCL 37.2701, then, which specifically proscribes retaliation, but rather subsection (f), which more generally states that a person or persons shall not “[c]oerce, intimidate, threaten, or interfere with a person” in the exercise of rights under the act.

Plaintiff argues that she presented her “retaliation” claim not as the term is used in MCL 37.2701(a), but in the general dictionary definition sense of the word pursuant to MCL 37.2701(f). The issue, then, is whether attempts to “[c]oerce, intimidate, threaten, or interfere

with a person” in the exercise of rights under the act, pleaded as an adverse employment action taken in response to the plaintiff’s assertion of rights, is actionable conduct even if they do not measure up to retaliation as the term has been construed in relation to MCL 37.2701(a). We conclude that, under these facts, they cannot.

“[R]emedial statutes are to be liberally construed to suppress the evil and advance the remedy.” *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988). “To the extent possible, each provision of a statute should be given effect, and each should be read to harmonize with all others.” *Michigan Basic Prop Ins Ass’n v Ware*, 230 Mich App 44, 49; 583 NW2d 240 (1998). Where a specific statutory provision differs from a related general one, the specific one controls. *Gebhardt v O’Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994).

A distinction may be drawn between retaliation and other forms of coercion, intimidation, or interference. To “retaliate” is to “return like for like, esp. to return evil for evil,” or to “pay back in kind.” *The American Heritage Dictionary of the English Language* (1985). Inherent in the meaning of the word is that the retaliator is acting in response to some perceived action in kind. Thus, a person imposing some kind of hardship on another is *retaliating* only if that person is acting in response to some hardship first imposed by the other on that person. An employer demoting an employee for filing a claim may thus be retaliating; not so a fellow worker who directs some mischief at the employee for filing a claim but who is not herself targeted, or whose interests are not otherwise directly threatened, by that claim.

A co-worker, then, can coerce, threaten, intimidate, or interfere with an employee who has filed a discrimination claim against their employer without engaging in retaliation.<sup>1</sup> An employer, on the other hand, cannot but retaliate if taking adverse action against an employee in response to that employee’s naming of the employer as a defendant. Thus, in this case, to the extent that plaintiff is charging defendants with responsibility for any coercion, intimidation, threats, or interference that followed from her decision to file suit against defendants, plaintiff is alleging retaliation. Because plaintiff cannot prevail on count III of her amended complaint without proving retaliation in fact, this Court’s strictures concerning such claims come to bear fully. *Peña, supra* at 312-316; *Meyer, supra* at 571-572.

Plaintiff points to no actual, formal, change in her job status, and so relies entirely on a theory of vicarious liability to impute to defendants the several unpleasantries she reports in connection with her having asserted her rights. These include meetings where plaintiff was reminded that litigation could be expensive, and where her supervisor allegedly emphatically denied an allegation of misconduct, a later confrontation with the supervisor at which the supervisor allegedly behaved with excessive belligerence in expressing displeasure at how plaintiff was performing a particular task, two instances of unwelcome physical contact from the warden, and the inclusion of plaintiff’s likeness in a retirement present for the warden that featured a “gallery” of employees who had implicated the warden in various adverse proceedings.

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<sup>1</sup> This is true except in the fictional or indirect sense where a fellow employee chooses to take personally an action against the employer, or where one regards an action against the employer as an action against every employee.

Assuming, without deciding, that each of these incidents were initiated by defendants' employees in response to plaintiff asserting her rights,<sup>2</sup> they nonetheless do not add up to a sufficiently severe and pervasive pattern of hostility as to constitute an objectively verifiable, and materially adverse, employment action. *Peña, supra; Meyer, supra*. Accordingly, we vacate plaintiff's award of damages for retaliation.

Because plaintiff can no longer be considered the prevailing party in the action, we likewise reverse the trial court's award of costs and attorney fees attendant to that judgment. On remand, defendants are free to renew their petition for an award of costs. Because plaintiff's retaliation claim against defendants fails as a matter of law, her injunctive claim, over which the trial court retained jurisdiction, should be dismissed as well.

Our resolution of this case obviates the need to address defendants' remaining issues on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Peter D. O'Connell

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<sup>2</sup> "To establish causation, the plaintiff must show that his participation in activity protected by the CRA was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).