

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA PAIGE,

Plaintiff-Appellant,

and

JULIE COCH, MARTINA PICKETT, LINDA
CARTER, GWENDOLYN FORD CROSSLEY,
OLIVER GLENN, LONNIE NICHOLS, ALAN
GOLDSBY, DEREK STEWART, and
ROSENAUL HICKS,

Plaintiffs,

v

DETROIT EDISON COMPANY,

Defendant-Appellee.

UNPUBLISHED

July 29, 2003

No. 235644

Wayne Circuit Court

LC No. 98-841455-NO

LINDA CARTER,

Plaintiff-Appellant,

and

JULIE COCH, MARTINA PICKETT,
GWENDOLYN FORD CROSSLEY, CYNTHIA
PAIGE, OLIVER GLENN, LONNIE NICHOLS,
ALAN GOLDSBY, DEREK STEWART, and
ROSENAUL HICKS,

Plaintiffs,

v

DETROIT EDISON COMPANY,

Defendant-Appellee.

No. 235645

Wayne Circuit Court

LC No. 98-841455-NO

CAROLYN MARSHALL,

Plaintiff-Appellant,

and

JULIE COCH, MARTINA PICKETT, LINDA
CARTER, GWENDOLYN FORD CROSSLEY,
CYNTHIA PAIGE, OLIVER GLENN, LONNIE
NICHOLS, ALAN GOLDSBY, DEREK
STEWART, and ROSENAUL HICKS,

Plaintiffs,

v

DETROIT EDISON COMPANY,

Defendant-Appellee.

No. 235677
Wayne Circuit Court
LC No. 98-841455-NO

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Eleven plaintiffs brought employment discrimination actions against defendant. Although plaintiffs sought certification as a class, the trial court denied certification. The eleven individual cases continued as a consolidated matter. Eight of the cases were settled. The remaining three, which are the subject of this appeal, were dismissed by the trial court by grants of summary disposition in favor of defendant. Those three plaintiffs appealed and the appeals were consolidated.

Case Number 235644, Paige v Detroit Edison Company

Plaintiff Paige alleges that she was subject to numerous incidents of sexual harassment and discrimination throughout over thirty years of employment with defendant, which commenced on September 22, 1969.

On appeal, plaintiff Paige first argues that the trial court erred in granting defendant summary disposition on her claim that she was subjected to a hostile work environment due to sexual harassment. We review a decision to grant or deny summary disposition de novo. *Haynie v State of Michigan*, ___ Mich ___; ___ NW2d ___ (No. 120426, rel'd 6/11/03), slip op at 5.

In *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993), the Michigan Supreme Court identified five essential elements to establish a hostile work environment:

- (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.

See also *Chambers v Tretco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000), and *Haynie, slip op* at 8.

Plaintiff's brief on appeal identifies the following alleged incidents which establish a hostile work environment:

- 1) In 1996, Supervisor Walt Thomason intimidated Plaintiff for nearly the entire year by refusing to talk to her, give her phone messages, refusing to give her work, and spent most of the day staring at plaintiff "with hostility and intimidation;"
- 2) In December 1996, plaintiff was assaulted in her office by two field supervisors after she refused a request by one of them to take action which violated defendant's rules;
- 3) From 1996 to 1998, plaintiff was continually exposed to male supervisors and coworkers watching sexually explicit and sexually offensive television programs on an office television, despite a 1995 directive that the television should be limited to the weather channel;
- 4) In 1997, supervisor Tom McManus "drilled" plaintiff on her job and called women "fucking bitches" when they called in;
- 5) In 1997, when computer repairmen would come to the office and plaintiff inquired if they were there to repair her computer, supervisor Herrick would interrupt and say, "Don't listen she doesn't know what she is talking about."
- 6) When plaintiff questioned supervisor Fetterman about vacation schedules, he responded by saying, "Just like a woman, you turn around everything I say";
- 7) In a 1998 meeting between management and union, when plaintiff's union representative inquired about plaintiff returning to the foreman's job, Director Mark Baustert stated, "We'll take men from the public safety area first";

8) During the 1998 impeachment trial of President Clinton, supervisor Schneider, while reading President Clinton's grand jury testimony on the internet, asked plaintiff if she wanted to read the parts of the testimony which referred to "dirty parts" and a part which made reference to a "cigar";

9) In 1998, supervisors Durkin and Fetterman would question plaintiff about her work and treat her in a belittling and intimidating fashion.

In *Haynie, supra* at 12, the Supreme Court held that "only conduct or communication that is sexual in nature can constitute sexual harassment, and thus, conduct or communication that is gender-based, but that is not sexual in nature, cannot constitute sexual harassment." Therefore, harassment that is "based on gender that is not at all sexual in nature" cannot constitute sexual harassment. *Id.* at 13. In looking at the items identified by plaintiff as actions which created the hostile work environment, only items 3 and 8 are arguably sexual in nature. Furthermore, plaintiff must also show that she was subjected to the harassment because of her sex. *Id.* at 8; *Radtke, supra* at 382. Plaintiff makes no such showing.

With respect to the sexually explicit television shows, plaintiff provides no basis from which to conclude that the selection of such shows was because plaintiff was a woman. Indeed, with respect to at least one such incident, a male co-worker testified in his deposition that he was offended by the sexually explicit movie on the TV and asked the offender to change the channel.¹ Despite the request, the offending party would periodically return to the offensive movie. However, the fact that he did so despite the request of a *male* co-worker to change the channel weakens, rather than strengthens, plaintiff's case. That is, ignoring the request of a *male* co-worker to not watch the sexually explicit movie suggests that the motivation for watching it was not because plaintiff was a woman.

It is insufficient that plaintiff found the television programs to be offensive. If co-workers watched the programs merely despite the fact that plaintiff and others found them to be offensive, it only means that those who insisted on watching the programs are rude and insensitive. It does not make it actionable. It becomes sexual harassment only if the programs were watched because plaintiff was a woman in order to harass her. And plaintiff makes no showing of this.

Turning to the remaining item on plaintiff's list, the grand jury testimony of former President Clinton. According to plaintiff, a supervisor was either watching the testimony on tape or on the internet and asked plaintiff if he could show her the "dirty parts," including a portion referring to a cigar. Because this conduct was directed specifically at plaintiff, there is a somewhat stronger showing that it was intended to harass plaintiff. However, plaintiff does not point to any evidence that the supervisor did so because plaintiff is a woman. That is, plaintiff does not make a showing that her gender was the motivating factor in this incident.

¹ Apparently there was a "free preview" on the premium channels for the cable system that day and that night during plaintiff's shift one of the co-workers turned the TV to the movie channel that was showing a movie with nudity and sexual content. When asked to change the channel, the co-worker did, but periodically changed it back. Not only did plaintiff complain, but also one or more male co-workers did as well.

For the above reasons, we conclude that plaintiff has not made the requisite showing of sexual harassment by means of creating a hostile work environment. Accordingly, summary disposition in favor of defendant was appropriate.

Next, plaintiff argues that the trial court erred in dismissing her claim of sexual discrimination resulting in disparate treatment in employment. Again, we review the trial court's decision de novo. *Haynie, supra*. The trial court dismissed this claim on the basis that plaintiff had failed to show any adverse employment action, an essential element of an employment discrimination claim. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). In her brief on appeal, plaintiff cites the following as the adverse employment actions which occurred: 1) that she gave up her position as temporary foreman because of the discriminatory treatment she received, 2) that in 1997 when a union representative inquired about plaintiff returning to the foreman's job, Director Baustert stated, "We'll take men from the public safety area first," 3) that plaintiff was bypassed for the position of Storm Coordinator, 4) that men were selected for various other positions for which she was qualified, and 5) that she failed to receive a position of Streetlight Analyst for which she applied in 1997 in favor of male candidates.

With respect to item 1, plaintiff cannot show that the action accrued to the benefit of a male, an essential aspect of plaintiff's claim. See *Town v Michigan Bell Telephone Co*, 455 Mich 688, 694; 568 NW2d 64 (1997) (the plaintiff must show that others outside the protected class were unaffected by the employer's adverse conduct). In fact, plaintiff testified in her deposition that she did not know whether, after she stepped down as temporary foreman, she was replaced with a woman or not and whether her replacement was subjected to the same treatment. Similarly with item 2, plaintiff points to no evidence that the position at issue was filled with a man rather than with plaintiff. Thus, although the statement may have a discriminatory appearance, plaintiff has not demonstrated that defendant did, in fact, act discriminatorily in filling the position.² Once again with item 3, plaintiff being passed over for the Storm Coordinator position, plaintiff points to no evidence that the position was filled with a man rather than with a woman.

Turning to item 4, that she was passed over for various positions in favor of men, the only position she specifically identifies is a May 1996 application to be an Area Leader--Ombudsman. Although plaintiff does submit an exhibit that she filled out an application for the position and that the available positions were filled by four men, that documentation does not reflect that she actually applied, or if she did, that she was qualified, for the position. Specifically, plaintiff refers us to a document entitled "Personnel Activity Form," of which section I is the "Application Flow Log." The instructions indicate that an applicant is to be listed only if they are minimally qualified for the position. The log lists ten applicants, nine of whom were men, with four of them men being hired for the position. Plaintiff does not explain why she was not on the list; accordingly, we can only assume that either she did not actually apply or she was omitted from the list because she was not qualified for the position.

² For that matter, it is not entirely clear whether the statement reflected a desire to fill the position with a man or with someone from Public Safety rather than from plaintiff's department.

This leaves item 5 on plaintiff's list, that she was passed over for the position of Streetlight Analyst in favor of male candidates. Plaintiff states that of the three positions filled, two men, but "only" one woman, were selected. This fails to demonstrate any adverse employment action. The fact that a woman was selected hardly reflects discrimination against women in the filling of the positions. Moreover, the fact that two men were selected does not reveal any discrimination. Had plaintiff been selected instead of one of the male candidates, then the situation would be that "only" one man was selected while two women were. In other words, we do find that plaintiff has demonstrated that members of the unprotected class were favored over members of the protected class where multiple positions were filled and one more position went to a member of the unprotected class than to the protected class.

For the above reasons, we agree with the trial court that plaintiff has made no showing of an adverse employment action by defendant against plaintiff.

Next, plaintiff argues that the trial court improperly dismissed her retaliation claim. We disagree. The elements of a prima facie case of retaliation were reviewed by this Court in *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000):

To establish a prima facie case of retaliation under the Civil Rights Act, a plaintiff must show (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

Plaintiff argues that she established the following claims of retaliation: (1) that she was forced to work Christmas Eve and Christmas Day in retaliation for complaining about pornography being watched on the department television and (2) that she filed nine formal complaints regarding the work environment in 1995 and 1996, after which she was passed over for three promotions.³

With respect to the first item, the adverse employment action must be materially adverse and cannot be a mere inconvenience. *Meyer, supra* at 569. Having to work two holidays does not constitute a materially adverse employment action. As for the second item, plaintiff simply fails to establish the causal connection between her filing of complaints and being passed over for promotion.

Turning to the second item, plaintiff must establish a causal connection by showing that her engaging in a protected activity was a significant factor in the adverse employment action. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). In the case at bar, plaintiff simply presents no evidence establishing a connection between her complaints and her not receiving the promotions. She merely speculates that the complaints were the reason she was passed over for the promotions.

³ Plaintiff's brief does not specifically identify which promotions she is referring to. Presumably, however, they are the promotions identified in the previous issue.

For the above reasons, we conclude that plaintiff failed to establish a prima facie case of retaliation. Accordingly, the trial court properly granted summary disposition.

Plaintiff's final claim is that the trial court erred by refusing to consider incidents which occurred outside the three-year period of limitations (i.e., before December 30, 1995). Plaintiff relies on *Sumner v The Goodyear Tire & Rubber Co*, 427 Mich 505, 528; 398 NW2d 368 (1986), for the proposition that events outside the period of limitations may be considered if there is a continuing course of conduct with at least one discriminatory act occurring within the limitation period. However, as discussed above, plaintiff has failed to establish even one discriminatory act within the limitation period. Accordingly, plaintiff's argument is without merit.

Case Number 235645, Carter v Detroit Edison Company

Plaintiff first argues that the trial court erred by granting summary disposition before the completion of discovery. As this Court explained in *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994):

This Court has held that a grant of summary disposition is premature if granted before discovery on a disputed issue is complete. *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994). However, a disputed issue must be before the court. *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983). If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence. *Michigan Nat'l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993); *Pauley, supra*.

The trial court concluded that further discovery was unnecessary because plaintiff admitted in her deposition that she was not subjected to any harassment or discrimination within the period of limitations (i.e., after December 30, 1995). In her deposition, plaintiff testified as follows:

Q Is there anything that has happened since you've been in the relay lab that you consider discriminatory or sexual [sic] harassing or racially harassing?

A This is in the relay lab?

Q Yes.

A Discriminatory, I wouldn't say any harassment. Discriminatory, no. I don't know. I don't know how to explain the lab because I look at it – I was brought there to help them do technical things, technical work.

Even though they have work available they don't allow me to do it and they haven't made any attempts to train me to do any of it.

Q What types of work are you referring to?

A They have different types of electrical relays that they put settings on and they do testings with.

Q Okay. Who does that work?

A The engineers or the field technicians.

* * *

Q How long did you work in Rick Warner's group?

A Up until December of '95.

Q And, in December of '95 you went to the relay lab; right?

A Right.

Q And, we talked at some length last time about the relay lab and what you're doing there. During the time that you worked in the service building, from August until December of '95, did anything happen in the service building that you felt was sexually harassing?

A No.

Q Did anything happen there that you felt was racially harassing?

A You're talking when I was working for Lee Ellis?

Q Yes. Uh-huh. In the service building.

A But where at, though? You talking when I was working with Ellis or in the relay lab?

Q Before you went to the relay lab. This August to December time frame.

A No.

Q Okay. Did you feel that you were discriminated against because of your gender or your race by anyone when you were working in the service building?

A No.

Clearly, plaintiff testified in her deposition that she was not sexually or racially harassed after August 1995. Plaintiff having testified that no harassment occurred within the period of limitations, no further discovery could yield evidence of such harassment. Accordingly, summary disposition on plaintiff's harassment claim was not premature.

Plaintiff was slightly more equivocal regarding whether she was discriminated against in the relay lab. While initially saying that she wasn't, her testimony did go on to suggest that she was discriminated against in the nature of the work assignments she received at the lab.

However, in looking at the details of her testimony, it only reflects plaintiff's own beliefs that there was a discriminatory motivation in not assigning work to her. In fact, the work she believed she should have been assigned was done by engineers and field technicians, individuals who were both black and white and male and female. Further, she testified that she never followed up with the dispatch center or with her union regarding the lack of work assignments.

The trial court granted summary disposition approximately three months before discovery closed. Plaintiff's own deposition testimony at best indicated that there may have been discriminatory motivation in work assignments in the relay lab, though the persons actually performing the work were both men and women and whites and minorities. Moreover, plaintiff does not specifically identify what discovery would have been completed in the remaining three months or what evidence would have been pursued. She merely argues that it might have produced something beneficial. It is not necessary to delay summary disposition to allow a party to engage in a "hunting expedition" in hope of finding factual support for their claim. *Neumann v State Farm Mutual Automobile Ins Co*, 180 Mich App 479, 485-486; 447 NW2d 786 (1989).

For the above reasons, we do not believe that the trial court was premature in granting summary disposition before the close of discovery.

Next, plaintiff argues that the trial court improperly granted defendant summary disposition on the discrimination claim because the lack of work assignments in the relay lab supported a discrimination claim. We disagree. As discussed above, plaintiff must show that any employment action accrued to the benefit of someone who is not a member of the protected class. *Town, supra*. Plaintiff makes no such showing. Indeed, plaintiff's own testimony is that the engineers and technicians performing the work were not all white males. Moreover, plaintiff admitted in her deposition she never followed up with the dispatch center (which made the assignments) or with her union regarding the nature of the assignments she received. Thus, plaintiff offers only mere speculation as to why she did not receive the desired work assignments.

Plaintiff further argues that she was discriminated against in being turned down for promotions. However, plaintiff again fails to demonstrate that the employment action accrued to the benefit of a member of the unprotected class. *Town, supra*. Plaintiff is unable to identify who received those promotions and whether or not they were minorities. With respect to the only exception, for the position of Relay Engineering in the General Office Building, plaintiff indicates that the position went to a white female, who plaintiff alleges was less qualified than herself for the position. Plaintiff, however, points to absolutely no evidence that race was a factor in the employment decision.

Plaintiff additionally argues that the trial court erred in not considering the technicians and engineers as comparable to her in assessing her discrimination claim. Plaintiff admits that those individuals were in a different bargaining unit, but was not certain if that affected the assignment of work in the Relay Lab. As discussed above, the technician and engineer group was not comprised solely of white males. Accordingly, even if that group is considered comparable to plaintiff, plaintiff is unable to show that members of the unprotected class accrued a benefit due to the employment action or that plaintiff's race or gender had any effect on the work assignment. In sum, while different job responsibilities for the different bargaining units might explain the work assignments and strengthen defendant's defense, the lack of any such

differences does little to enhance plaintiff's case and support her claim that there were discriminatory motivations in the work assignments.

Plaintiff next argues that the trial court erred in dismissing her hostile work environment claim because she had made out a prima facie case of a hostile work environment. However, as discussed above, plaintiff admitted in her deposition that she suffered no harassment during the relevant period under consideration (i.e., the three years immediately preceding the filing of her complaint). Accordingly, plaintiff's hostile work environment claim fails based upon plaintiff's own admission.

Plaintiff's final argument is that the trial court erred in dismissing her retaliation claim before the completion of discovery. Again, however, plaintiff fails to make any showing, or even an allegation, of what evidence she would have sought with further discovery. Once again, she provides nothing more than the speculation that a fishing expedition might have yielded favorable evidence. As discussed above, that is insufficient to conclude that the trial court prematurely granted summary disposition. *Neumann, supra*.

Case Number 235677, Marshall v Detroit Edison Company

Plaintiff Marshall has been employed by defendant since 1977 and alleges various claims of discrimination and harassment. She first argues on appeal that the trial court erred in dismissing her claims of sexual discrimination. We disagree. Plaintiff identifies three claims of discrimination:

- 1) Not being granted a promotion to Plant Foreman at the River Rouge Power plant in 2000;
- 2) Only being placed on restricted duty for one year in 1995 after asbestos exposure when male workers with similar exposure were placed on lifetime restricted duty; and
- 3) Having unequal shower facilities in 1998 while working at the Conner Creek plant.

With respect to the failure to be promoted, plaintiff applied for the position and received a letter that she would not be considered for the position because she did not meet the required qualification of five years' experience as a Master Maintenance Journeyman or Maintenance Journeyman in a recognized maintenance trade. She alleges that she did, in fact, have the requisite work experience. In any event, this event occurred over one year after this case was filed and is not part of plaintiff's complaint. Thus, even assuming that there is merit to plaintiff's position, it simply is not part of this lawsuit.

As for item two, plaintiff alleges that after she was diagnosed with asbestos exposure in 1995, she was only placed on a one-year restriction to avoid work around asbestos, after which she was again assigned jobs involving asbestos exposure to the detriment of her health. She further alleges that white male workers with similar exposure were given lifetime restrictions to asbestos exposure in order to avoid further health problems. Plaintiff, however, provides no factual support for this allegation beyond her self-serving affidavit that such is the case. She provides no documentation identifying those male workers who allegedly received favorable treatment, establishing that their exposure was similar to plaintiff's exposure, or that their health

condition at the time of receiving the lifetime restriction from asbestos-related work was similar to plaintiff's health condition when she was placed only on a one-year asbestos work restriction. For that matter, plaintiff provides no medical documentation that her health condition in 1995 was such that she should have been placed on a lifetime restriction to asbestos exposure. Simply put, plaintiff's bare allegation, albeit under oath, without more is insufficient to create a dispute on this issue.

Plaintiff's third allegation, inadequate shower facilities at the Conner Creek plant in 1998, is also without merit. First, plaintiff only worked at the Conner Creek plant for two weekends in 1998 while taking voluntary overtime. According to her deposition, during the first weekend she used a shower in the contractor abatement room and during the second weekend, she used a trailer brought in for use by the women employees to shower. Further, plaintiff testified that a trailer was available for the male employees to shower both weekends.⁴ Plaintiff testified that she had no information regarding whether the trailer provided to the men was materially different than the trailer provided to the women. Rather, plaintiff testified that the trailer provided to the women was inadequate (plaintiff had no complaints regarding the conditions in the contractor abatement room).

In order to establish her claim, plaintiff must show that the adverse employment action was "materially adverse," such as a termination, demotion, lesser job title, material loss of benefits, etc. *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 363; 597 NW2d 250 (1999), quoting *Kocsis v Multi-Care Mgt, Inc*, 97 F3d 876, 886 (CA 6, 1996). First, plaintiff cannot show that the women's trailer shower was any different than the men's trailer shower. That is, as far as plaintiff is aware, the conditions in the men's trailer may have been equally poor as in the women's trailer. In which case, the "employment action" of having plaintiff use the women's trailer shower was not materially adverse. For that matter, even if the conditions between the men's shower facilities and the women's facilities were materially different, it only affected plaintiff for two weekends. We cannot say that being subjected to inferior shower facilities for two weekends constitutes a materially adverse employment action. Accordingly, we are not persuaded that plaintiff has established a factual support for this claim.

Plaintiff next argues that the trial court erred by dismissing her claim of a hostile work environment due to sexual harassment. Plaintiff cites the following incidents as creating a hostile work environment:

1) An alleged "death threat" by her supervisor in 1999 when plaintiff needed medical attention for an injured finger;⁵

⁴ Although not entirely clear from the record before us, it appears that the shower trailers were brought in response to a determination by the United States Equal Employment Opportunity Commission regarding a formal complaint by another employee that the shower facilities at the Conner Creek and River Rouge facilities were not equal for men and women. The timing of the arrival of the trailers would correspond to the July 16, 1998, EEOC determination.

⁵ We should note that we do not necessarily agree with plaintiff's characterization of this comment as a "death threat." Plaintiff described this incident as the supervisor saying to her that he should give her a gun and a couple of bullets because Dr. Kevorkian is in jail. While this
(continued...)

- 2) An incident in which a co-worker used obscene language;
- 3) Plaintiff's work assignments following her diagnosis regarding asbestos exposure;
- 4) Being required to produce a doctor's slip for every absence;

As discussed above, the conduct in a claim of a hostile work environment based upon sexual harassment must be sexual in nature. *Haynie, supra* at 12. With the possible exception of item two, none of the incidents cited by plaintiff are sexual in nature. As for item 2, this incident occurred the day before plaintiff's deposition. It involved a co-worker, Carlos Garcia, who launched into a vulgar verbal tirade in the employee break room. The tirade was not directed at plaintiff, though plaintiff overheard it. Plaintiff described the incident as Garcia using "the F word" several times, saying something in Spanish, which he then translated as meaning "that he would take his dick out and ram it up his ass," and then repeated the comment in Spanish. Plaintiff complained to a supervisor, Garcia was spoken to, and the supervisor offered to set up a meeting with her and Garcia. Plaintiff told the supervisor that a meeting was not necessary. Plaintiff further testified that she was satisfied with the manner in which the incident was handled, provided that it did not happen again.

While Garcia's comments were sexual in nature, plaintiff admits that the comments were not directed at her. Thus, plaintiff is unable to show that the comments were made because of her sex, an essential element of her claim. *Id.* at 8; *Radtko, supra* at 382. That is, plaintiff cannot establish that Garcia would not have made the comments he did had a woman not been present. Furthermore, with respect to the element of respondeat superior, plaintiff testified that she was satisfied with how the supervisor handled the incident; accordingly, there would be no basis for imposing liability upon defendant. *Radtko, supra* at 396 (employer may avoid liability by taking prompt and appropriate remedial action).

For these reasons, we conclude that the trial court properly granted summary disposition on the hostile work environment claim.

Plaintiff next argues that the trial court prematurely granted summary disposition before the close of discovery. However, of the various claims outlined above, only one could potentially benefit from further factual development: the claim regarding plaintiff's work restrictions following the asbestos exposure diagnosis. Plaintiff, however, fails to demonstrate what discovery would have occurred in the remaining time that would have further enhanced the factual development of this issue. She merely makes the vague allegation that further discovery would yield a fair chance at establishing factual support regarding her work assignments to areas where she would continue to be exposed to asbestos and coal dust. She does not even make a showing what that evidence might be or what its source would be. In short, plaintiff makes no showing other than she might be lucky in her fishing expedition to uncover sufficient evidence to

(...continued)

might be characterized as a crude comment suggesting that plaintiff was better off dead and should just kill herself, it does not suggest that the supervisor was seriously intending to do harm to plaintiff himself.

avoid summary disposition. Accordingly, the trial court did not err in granting summary disposition before the close of discovery. *Neumann, supra*.

Plaintiff's final argument is that the trial court erred in granting summary disposition on her retaliation claim. We disagree. Plaintiff argues that the so-called "death threat" mentioned above *may have been* made in response to plaintiff filing the instant lawsuit. Plaintiff alleges that summary disposition should not have occurred until after she could have deposed the supervisor who made the comment to determine if this lawsuit was the motivating factor for the comment. We disagree. First, as discussed above, we are not convinced that plaintiff's characterization of the comment as a "death threat" is accurate. While crude and insensitive, the comment does not suggest that the supervisor was threatening violence on plaintiff. Furthermore, it does not constitute an adverse employment action by defendant, an essential element of a retaliation claim. *Meyer, supra* at 568-569. The memorandum that plaintiff prepared two days after the incident indicated that not only did the supervisor making the comment apologize after the making the comment, he indicated that he was only joking and would refrain from doing so in the future. Further, that memorandum indicated that plaintiff's complaint to another supervisor was taken seriously and the issue was promptly dealt with. Moreover, plaintiff in her deposition stated that she does not believe that she was retaliated against for raising her claims of discrimination and harassment. Finally, we note that plaintiff's complaint did not allege a claim of retaliation, thus it is not actually part of this lawsuit.

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Bill Schuette