

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE L. SHEPHERD,

Plaintiff-Appellant,

V

GENERAL MOTORS CORPORATION, DALE
ERDMAN, DAN GRIESHABER and ANN
HOBBS,

Defendant-Appellees,

and

TERRY RADCLIFF, JOEL VASQUEZ,
RICHARD MERKEL, LARRY CLEMONS and
SUE MINCE,

Defendants.

UNPUBLISHED

July 26, 2005

No. 260171

Oakland Circuit Court

LC No. 03-047560-CD

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants on plaintiff's claims of employment discrimination and hostile work environment. We affirm.

I

Defendant General Motors Corporation hired plaintiff, who is African American, as a data preparation operator in December 1978. Plaintiff was employed in various clerk positions until 1997, when she became an associate coordinator. On December 13, 2002, plaintiff then fifty-nine years old, filed this action under the Elliot-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.*, alleging age and race discrimination and sex discrimination based on a hostile work environment.¹ Plaintiff alleged that General Motor supervisors and employees engaged in

¹ Plaintiff also alleged counts of intentional infliction of emotional distress and negligence, which were dismissed by the trial court and are not at issue on appeal.

a plan and pattern of harassment designed to force plaintiff to retire. Her claim was based on allegations of improper comments about her race, age, and sexual orientation by coworkers; improper touching by female coworkers; that coworkers sprayed a foul odor on plaintiff; unidentified persons tampered with her work and office environment. She further alleged that General Motors installed a hidden camera in her office, emitted foul odors into her office through the vent, and permitted its employees to contrive the scheme to eliminate older employees through intimidation and unlawful employment tactics.

Plaintiff further subsequently averred that on March 30, 2004, General Motors informed her that as of April 1, 2004, she was displaced from her current position and would be laid off effective October 1, 2004 unless she found another position. According to General Motors, plaintiff's workgroup upgraded its computers, which resulted in the elimination of some tasks performed by clerks such as plaintiff. Because part of plaintiff's job was data entry concerning the assignment of new tool numbers, which would be automatically entered by the new computer system, sixty percent of plaintiff's job would be eliminated. However, three other clerks in plaintiff's group also had their duties diminished or eliminated because of improved computerization. Consequently, she and three coworkers were offered a special retirement package, which all accepted except plaintiff.²

In May 2004, defendant moved for summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(7) (statute of limitations) and C(10). Following a hearing on the motion, the trial court granted summary disposition of all claims and dismissed plaintiff's case.

II

We first address plaintiff's argument that the trial court erred in ruling that the continuing violations doctrine was inapplicable to her claims. We find no error. This Court reviews de novo whether a party's claims are time barred. *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 436; 684 NW2d 864 (2004).

Plaintiff filed her complaint on December 13, 2002. In support of her action, she relied on conduct that allegedly began in 1995.³ The trial court concluded that evidence predating December 13, 1999, would be barred.

An action under the CRA must be brought within three years after the cause of action accrued. MCL 600.5805(10). The continuing violations doctrine permitted recovery for incidents that occurred outside the applicable limitations period, if an individual asserts a series of allegedly discriminatory acts or statements that are so sufficiently related that they constitute a pattern of harassment or discrimination and at least one of the acts alleged occurred within the limitations period. *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 538-539; 398 NW2d 368 (1986), overruled *Garg v Macomb Co Comm Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005); see also *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343-345; 483 NW2d 407 (1992). Factors in evaluating whether timely and untimely incidents result in a

² The record does not indicate plaintiff's current employment status with defendant.

³ Plaintiff cites nine instances of conduct that occurred outside the limitations period. The trial court referenced five.

continuing violation include whether the same type of discrimination is alleged, the frequency of the incidents, and whether the incidents demonstrate the “degree of permanence which should trigger an employee’s awareness of and duty to assert his or her rights” *Sumner, supra* at 538.

After plaintiff filed her appeal, our Supreme Court overruled its prior recognition of the continuing violations doctrine. *Garg, supra* at 283-284. Noting the absence of any language or “provision in Michigan law that even implicitly endorses the ‘continuing violations’ doctrine,” the Court ruled that the “‘continuing violations’ doctrine is contrary to Michigan law.” *Id.* at 283. The Court specifically overruled *Sumner* and held that “a person must file a claim under the Civil Rights Act within three years of the date his or her cause of action accrues, as required by §5805(10).” *Id.* at 283-284. “An employee is not permitted to bring a lawsuit for employment acts that accrue beyond this period, because the Legislature has determined that such claims should not be permitted.” *Id.* at 284.

Even if this Court were to evaluate plaintiff’s claim in accordance with the continuing violations doctrine, it could not be sustained. The sporadic, infrequent and disjointed nature of the comments and conduct, and the fact that they originated from different individuals, indicates a disconnectedness that does not favor the application of the continuing violations doctrine. In addition, plaintiff reported that she construed the incidents as harassing and discriminatory when they occurred. Hence, the alleged incidents that occurred outside the identified limitations period were sufficient, by themselves, to trigger plaintiff’s awareness of a potential cause of action or her ability to pursue a legal remedy. Given this awareness, plaintiff could not merely sit idly by, declining to exercise her rights, and then later seek recovery for the previous incidents by simply asserting that they have some form or manner of connection to incidents occurring later and within the limitations period. Accordingly, the trial court correctly ruled that any acts alleged by plaintiff to have occurred outside the three-year limitations period may not be considered.

III

Plaintiff asserts that the trial court erred in granting summary disposition in favor of defendants on her claims of employment discrimination. A trial court’s decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

A

Plaintiff alleged age and race discrimination in violation of the ELCRA. Section 202 of the ELCRA provides in relevant part:

(1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Discrimination claims under § 202 may be presented as disparate treatment or disparate impact claims. *Wilcoxon v Minnesota Mining & Mfg. Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). Further, disparate treatment claims may be proved by either direct or indirect evidence. *Id.* at 359. Direct evidence is defined as “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003) (citations omitted). In a direct evidence case a plaintiff may prove unlawful discrimination the same as in any other civil case. *Id.* at 132. However, where a plaintiff relies on indirect (or circumstantial) evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski, supra* at 133.

Under *McDonnell Douglas*, a plaintiff must establish a prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination. *Sniecinski, supra* at 134. Once a plaintiff has establish a prima facie case, the burden shifts to the employer to state a legitimate nondiscriminatory reason for the adverse employment action. If an employer states a legitimate reason for its actions, the burden again shifts to plaintiff to show that the employer’s stated reason is merely a pretext for discrimination. *Id.*

The purpose of the *McDonnell Douglas* prima facie test is to eliminate the most common nondiscriminatory reasons for the employer’s action and to force the employer to articulate a nondiscriminatory reason for the action. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). Once the employer produces evidence of a nondiscriminatory reason, the presumption of discrimination evaporates. *Id.* The employee must then proceed without the benefit of the earlier presumptions. *Id.* The employee has the opportunity to come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable trier of fact to conclude that the discrimination was the employer’s true motive in making the adverse employment decision. *Id.* at 696.

B

In presenting her age and race discrimination claim, plaintiff relied on a disparate treatment theory and argued her claim under the *McDonnell Douglas* analysis.⁴ The trial court found that plaintiff failed to adequately support these claims. We agree and find no error in the grant of summary disposition in favor of defendants.

To establish a prima facie case under the *McDonnell Douglas* analysis, plaintiff was required to show that she: (1) is a member of a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and that (4) others, similarly situated and

⁴ Although plaintiff at times conflates the legal rules and analysis for various theories of discrimination, the trial court found that plaintiff chose to prove her claim through the burden-shifting method. Plaintiff apparently does not dispute that conclusion and we proceed accordingly.

outside the protected class, were unaffected by the employer's adverse conduct.⁵ *Town, supra* at 695; *Wilcoxon, supra* at 361.

The trial court found that plaintiff submitted no supporting evidence that similarly situated employees outside the protected class were unaffected by the employer's adverse conduct. We agree.

Although plaintiff acknowledges that three of her coworkers who were similarly situated were also displaced, she asserts that she "is the only employee displaced and doing coffee detail." She states that other non-African-Americans who were allegedly impacted by technology upgrades did not receive significantly diminished responsibilities.

Plaintiff failed to demonstrate that other employees who are non-members of her protected class were treated differently. The individuals relied upon by plaintiff for comparison to her situation were faced with changes or reductions in work assignments, but elected to accept proffered retirement packages, which plaintiff declined. Plaintiff failed to present evidence that, had these individuals refused to accept a retirement package, their fate would have been different from plaintiff's with regard to the need to actively seek an alternative position with General Motors. Further, with regard to other employees, as defendants note, plaintiff attempts to compare herself to employees who are not similarly situated in that their positions or classifications are substantially higher or encompass professional employment grades.

Moreover, we agree with defendants that plaintiff failed to demonstrate that she had suffered an adverse employment action. An adverse employment action for the purpose of proving unlawful discrimination:

(1) must be materially adverse in that it is more than "mere inconvenience or an alteration of job responsibilities," and (2) must have an objective basis for demonstrating that the change is adverse, rather than the mere subjective impressions of the plaintiff. [*Meyer v City of Center Line*, 242 Mich App 560, 569; 619 NW2d 182 (2000), citing *Wilcoxon, supra* at 364.]

At the time of plaintiff's complaint she had not been discharged, laid off, or subjected to any change in benefits, pay or status. Plaintiff was later informed that, based on anticipated changes in her job responsibilities, she would need to investigate other positions within General Motors.

The work assigned to plaintiff to compensate for the change in job duties does not appear to be functionally or substantively different from her prior responsibilities. The duties remain clerical in nature and while plaintiff is required to perform part of her new duties in another physical area or building, the location is acknowledged by plaintiff to be mere minutes walking distance from her usual job situs. As such, plaintiff has failed to demonstrate that her job changes were materially adverse. *Id.* at 365-366.

⁵ The elements of a prima facie case are adapted to the factual context at issue. *Sniecinski, supra* at 134 n 7.

Finally, regardless of the evidentiary method used to establish a claim, i.e., direct or indirect evidence, “a plaintiff must establish a causal link between the discriminatory animus and the adverse employment decision.” *Sniecinski, supra* at 134-135. Here, plaintiff failed to do so.

Plaintiff comes forward with no allegations, within the applicable limitations period, that her race was ever mentioned in any of the purportedly discriminatory comments to which she was subjected. Moreover, the vast majority of these comments were made by co-workers and were not reported by her to management or supervisory personnel. Many of the comments alleged by plaintiff were sporadic, with months or even a year, between the occurrence of the comments. Plaintiff fails to demonstrate that any of the alleged comments were made in conjunction with the alteration of her job responsibilities. Likewise, much of the other conduct alleged by plaintiff, including the assertion that odors were being vented into her office or sprayed upon her person, the purported installation of video cameras in her office and the alleged sabotage of her work, have no obvious relationship to the types of discrimination claimed. Although plaintiff asserts that criticisms of her work or errors in her work imply that her age was the impetus for the comments, plaintiff acknowledged that no references to her age, race or sex were made by individuals in a position to impact her employment. Plaintiff failed to establish that defendants’ alleged actions were causally related to any adverse employment action. *Id.* at 136.

IV

Plaintiff also argues that the trial court erred in granting summary disposition in favor of defendants on plaintiff’s hostile work environment claim. We disagree.

To establish a prima facie hostile work environment claim, a plaintiff must demonstrate:

(1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee’s employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Downey v Charlevoix Co Bd of Co Rd Comm’rs*, 227 Mich App 621, 629; 576 NW2d 712 (1998); see also *Elezovic v Ford Motor Co*, 472 Mich 408, 412 n 4; 697 NW2d 851 (2005).

“[W]hether a hostile work environment was created by the unwelcome conduct ‘shall be determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff’s employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment.’” *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996) (citation omitted).

Accordingly, to survive summary disposition, a plaintiff must present documentary evidence demonstrating the existence of a genuine issue regarding whether a reasonable person would find, under the totality of the circumstances, that the comments or conduct alleged were sufficiently severe or pervasive to create a hostile work environment. *Id.* at 369. Plaintiff's asserted proofs relied upon to establish her hostile work environment claim are insufficient to maintain a cause of action.

Plaintiff has failed to demonstrate that, but for the fact of her sex, she would not have been the object of harassment. *Radtke v Everett*, 442 Mich 368, 383; 501 NW2d 155 (1993). The majority of comments alleged by plaintiff are actually gender-neutral and have only been subjectively interpreted by plaintiff to imply a sexual connotation. While some of the comments reported by plaintiff could be objectively described as being offensive or derogatory, plaintiff submits no evidence that her sex as a female precipitated or caused the remarks. Because the requisite connection between sex and the behavior and comments alleged is lacking, plaintiff has failed to meet the threshold requirement to establish her claim of sexual harassment. *Corley v Detroit Bd of Ed*, 470 Mich 274, 279; 681 NW2d 342 (2004).

In addition, the element of respondeat superior requires a showing that an employer had notice of the alleged conduct constituting harassment and failed to take corrective action. *Elezovic, supra* at slip op p 22; *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001). Courts are to apply an objective standard to determine whether an employer was provided adequate notice. *Id.* “[N]otice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.” *Elezovic, supra* (citation omitted).

Plaintiff readily acknowledges that she did not report to supervisory or management personnel the alleged incidents of touching and verbal comments. The matters reported by plaintiff involved the alleged venting of odors and the purported sabotage of her work. These incidents have no sexual connotation and, thus, are inadequate to establish the sexual content necessary to place defendants on notice for a hostile work environment claim. Accordingly, plaintiff has failed to establish that defendants had notice of the alleged sexual harassment.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot