

STATE OF MICHIGAN
COURT OF APPEALS

DARCY SCHMITT,

Plaintiff-Appellant,

v

CITY OF EAST LANSING,

Defendant-Appellee.

UNPUBLISHED

November 20, 2012

No. 307571

Ingham Circuit Court

LC No. 10-000844-CD

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this action alleging a hostile work environment¹ under the Elliott Larsen Civil Rights Act (CRA), MCL 37.2501 *et seq.*, plaintiff, Darcy Schmitt, appeals as of right the trial court's order granting summary disposition in favor of defendant, City of East Lansing. We affirm.

In 2005, plaintiff began working for defendant as a community-development analyst and was being "groomed" to succeed the planning and zoning administrator, Bob Owen, who was planning to retire. When plaintiff initially started working for defendant, she had a very good relationship with Ronald Springer, a coworker who was competing for the administrator position. However, when plaintiff's promotion was announced in 2006, Springer began acting very rudely to everyone in the department, including his superiors. According to plaintiff, Springer began to exhibit hostile, aggressive, and inappropriate behavior toward her, including sexual comments about her gender, appearance, and breasts. More specifically, over a period of about four years, Springer did the following: told plaintiff "[y]ou're an attractive woman and I can't compete with that"; told plaintiff "I can't compete with breasts"; sent plaintiff flowers on several occasions; had several outbursts of anger toward plaintiff, which included yelling, slamming his hands on tables, and telling her to "shut up"; acted insubordinately toward plaintiff; and, according to plaintiff, sent her fiancé an anonymous note that implied that she was not being faithful to him. As these incidents occurred, plaintiff reported them to defendant. Defendant initially responded to Springer's behavior by speaking to him about the inappropriateness of his actions. When the

¹ In her complaint, plaintiff also alleged claims of gender discrimination in violation of the CRA and negligent infliction of emotional distress. The trial court dismissed these claims, and they are not at issue on appeal.

incidents continued, defendant's responses progressed to written memorandums to Springer regarding his conduct, a warning letter that included a threat of termination, and a request to resign, which Springer did in early 2010.

On appeal, plaintiff contends that the trial court erroneously granted summary disposition in favor of defendant on her hostile-work-environment claim. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint."² *BC Tile & Marble Co v Multi Building Co*, 288 Mich App 576, 582-583; 794 NW2d 76 (2010). All documentary evidence supporting a motion under MCR 2.116(C)(10) must be viewed in a light most favorable to the nonmoving party. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009). When reviewing a motion pursuant to MCR 2.116(C)(10), summary disposition may be granted if the evidence establishes that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in a light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

MCL 37.2202(1) provides in part:

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. [MCL 37.2202(1)(a).]

MCL 37.2103(i)(iii) states:

² Defendant moved the trial court for summary disposition under MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of material fact), but the trial court did not differentiate the claims or specify the rule it was applying when it granted the motion. Summary disposition of the hostile-work-environment claim could not have been on the basis of MCR 2.116(C)(7). See *Mack v Detroit*, 467 Mich 186, 195 n 9; 649 NW2d 47 (2002) (governmental immunity is not a defense to an action under the CRA). Furthermore, because "the trial court considered material outside the pleadings, this Court will construe the motion as having been granted pursuant to MCR 2.116(C)(10)." *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:

* * *

(iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

Subsection (iii) is known as hostile work environment sexual harassment. *Haynie v State*, 468 Mich 302, 307, n 7; 664 NW2d 129 (2003).

To establish a prima facie case of hostile work environment on the basis of sexual harassment, an employee must demonstrate 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. [*Id.* at 307-308 (citations omitted).]

In this case, plaintiff established the first element because she is a member of a protected class; "[i]n fact, all employees are inherently members of a protected class in hostile work environment cases because all persons may be discriminated against on the basis of sex." *Radtke v Everett*, 442 Mich 368, 383; 501 NW2d 155 (1993).

Plaintiff has also established the second element: subjection to communication or conduct on the basis of sex. To establish the second element, plaintiff must show that, "but for the fact of her sex, she would not have been the object of harassment." *Id.* (quotation omitted). It is enough to show that she was subjected to "hostile and offense comments about her gender." See *Haynie*, 468 Mich at 309. Here, plaintiff testified that Springer made comments to her about being an attractive woman and her breasts. But for the fact that plaintiff is a woman, she would not have been the object of these statements; thus, plaintiff established the second element. See *id.*; *Radtke*, 442 Mich at 383.

To establish the third element, plaintiff must show that she was subjected to “unwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct or communication of a sexual nature” *Haynie*, 468 Mich at 313, quoting MCL 37.2103(i). “The threshold for determining that conduct is unwelcome is that the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive.” *Radtke*, 442 Mich at 384 (quotations and citations omitted). As previously discussed, Springer told plaintiff that he could not compete with her attractiveness and breasts. This verbal conduct was sexual in nature. And it was unwelcome. Plaintiff did not solicit or incite it. Indeed, she testified that it made her uncomfortable and that it was inappropriate, so she reported it to her superiors. Thus, plaintiff established the third element.³

For the fourth element, plaintiff must show that Springer’s conduct created a hostile work environment. “The essence of a hostile work environment action is that one or more supervisors or co-workers create an atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment for them.” *Id.* at 385 (quotations and citations omitted). To determine whether a hostile work environment exists, courts use an objective reasonableness standard. *Id.* at 398. The test is “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.” *Id.* at 394.

Further, our Supreme Court has stated that the CRA “imposes liability *whenever* sexual harassment creates a hostile work environment.” *Id.* at 394-395 (emphasis in original). The Court implied that the number of incidents or remarks is irrelevant.⁴ Rather, the inquiry is whether the incident(s) created a hostile work environment. However,

³ Plaintiff asserts that, included in Springer’s sexual conduct toward her, is a comment that Springer made about her breasts to another person while at a coworker’s home. Plaintiff, however, testified that the comment was not demeaning and did not bother her. Therefore, we do not consider this comment by Springer to be an unwelcome sexual communication. See *Radtke*, 442 Mich at 384.

⁴ We note that the cases the trial court relied on regarding “stray remarks,” which were presented by defendant, do not address stray remarks made in the context of hostile work environment sexual harassment. Rather, they address gender discrimination claims in other contexts. See *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124; 666 NW2d 186 (2003); *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289; 624 NW2d 212 (2001).

[b]ecause a single incident, unless extreme, will not create an offensive, hostile, or intimidating work environment, a plaintiff usually must prove that (1) the employer failed to rectify a problem after adequate notice, and (2) a continuous or periodic problem existed or a repetition of an episode was likely to occur. [*Id.* at 395 (internal citation omitted).]

Viewing the totality of the circumstances of this case in a light most favorable to plaintiff, there is no genuine issue of material fact that a reasonable person would not have perceived the conduct at issue as substantially interfering with plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive work environment. It is clear that Springer exhibited hostility toward plaintiff because plaintiff received a promotion over him. However, a significant majority of the hostility was not in the form of unwelcome sexual conduct. Although Springer made a few comments that were sexual in nature, most of his behavior toward plaintiff was not sexual but, rather, inappropriate exhibitions of anger and insubordination. To prevail on a hostile-work-environment claim, plaintiff must show that "*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." *Haynie*, 468 Mich at 308; see also MCL 37.2103(i)(iii). The CRA targets conduct or communication of a sexual nature, not conduct or communication conveying nothing more than personal animosity. See *Corley v Detroit Bd of Ed*, 470 Mich 274, 280; 681 NW2d 342 (2004). There is no indication that Springer continuously exhibited *sexual conduct* toward plaintiff that created a hostile work environment. A reasonable person would not have perceived the unwelcome sexual conduct in this case—one statement to plaintiff regarding her attractiveness and another statement to plaintiff regarding her breasts—as a substantial interference with employment or conduct that creates an intimidating, hostile, or offense work environment. There was no evidence that the few sexual comments made by Springer created an environment infused with hostility toward women that altered the work environment; indeed, there was testimony that, despite Springer's behavior, plaintiff was able to maintain good work performance with only some attendance issues in 2011, after Springer left the city.⁵ Thus, plaintiff has not met the fourth element.

Even if plaintiff could establish that Springer's comments created a hostile work environment, she has not established respondeat superior. To hold an employer liable for an employee's sexual harassment, a plaintiff must show that "the employer had reasonable notice of the harassment and failed to take appropriate corrective action." *Elezovic v Ford Motor Co*, 472

⁵ Plaintiff asserts that the trial court erred by considering whether she had physical manifestations of stress caused by Springer's conduct. There is no requirement that plaintiff prove she suffered physical manifestations of stress from sexual harassment. See *Haynie*, 468 Mich at 307-308. However, it was not improper to consider whether plaintiff had physical manifestations in determining whether she was subjected to a hostile work environment. See *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 631; 576 NW2d 712 (1998) (considering health problems allegedly attributable to a work environment when determining whether a hostile work environment existed).

Mich 408, 426; 697 NW2d 851 (2005). There is no genuine issue of material fact that defendant took appropriate corrective action given the notice that it had of Springer's conduct. There was evidence that when plaintiff informed defendant of Springer's behavior, both her superiors and human resources were receptive and would address the behavior. Specifically, Springer was spoken to regarding his conduct, provided written memorandums addressing the conduct, and given a warning letter that included a threat of termination. Indeed, Springer's behavior improved for a while. Plaintiff testified that Springer did not make one sexual comment for two years and that, in 2008, things with Springer "seemed to be on the upswing" and she did not want anyone fired. Plaintiff even welcomed Springer into her home on more than one occasion. When Springer started to act inappropriately again in the fall and winter of 2009, he was given a memorandum regarding his conduct and ultimately asked to resign, which he did in early 2010. Most importantly, plaintiff admitted that defendant's responses to Springer's actions were appropriate.

Plaintiff argues that the trial court erred by not considering whether defendant followed its policy on sexual harassment. We reject this argument. "Under Michigan law, an employer may enhance its employment relationship with its employees through express policies and practices. However, not every written employment policy has the force of a binding contract." *Sheridan v Forest Hills Pub Sch*, 247 Mich App 611, 625; 637 NW2d 536 (2001) (citations omitted). Our Supreme Court has stated that "a 'policy' is commonly understood to be a flexible framework for operational guidance . . ." *In re Certified Question*, 432 Mich 438, 456; 443 NW2d 112 (1989). "Here, we are not asked to determine whether defendant's sexual harassment policy bound defendant to provide greater protection than is provided under the CRA, and we do not specifically decide the matter." *Sheridan*, 247 Mich App at 625. Moreover, even if defendant discouraged plaintiff from making written complaints of Springer's conduct as is encouraged by defendant's sexual harassment policy, plaintiff has not provided this Court with any legal authority for the proposition that a failure to follow such "operational guidance" establishes—or is even relevant to—respondeat superior. Plaintiff may not merely leave it to this Court to discover the legal basis for her position. See *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 106; 776 NW2d 114 (2009). Furthermore, plaintiff testified that she was encouraged to document Springer's rude behavior. And, as previously discussed, most of Springer's conduct was not sexual in nature, defendant responded to plaintiff's complaints, and Springer's behavior improved.

Plaintiff also argues that the trial court prematurely granted summary disposition because discovery was incomplete. Specifically, plaintiff asserts that she was not able to review a report prepared by defendant's expert who performed a psychological examination of plaintiff. To establish that discovery was incomplete, plaintiff must show that "further discovery stands a fair chance of uncovering factual support for [her] position." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 292. "In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence. The party opposing summary disposition must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions." *Id.* at 292-293. In the instant case, plaintiff has not met her burden of showing a fair chance that the report would have uncovered factual support for her position. See *id.* at 292. In fact, plaintiff fails to identify a disputed issue; she merely asserts that it is unknown what may have been

discovered if she had been given an opportunity to review the report. See *id.* at 292-293. Plaintiff's argument, therefore, lacks merit.

Accordingly, we conclude that the trial court did not err when it granted summary disposition under MCR 2.116(C)(10) in favor of defendant.

Affirmed.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly