

STATE OF MICHIGAN
COURT OF APPEALS

BETTY BOYD,

Plaintiff-Appellant/Cross-Appellee,

And

DOROTHY BURRELL, EVELYN GLANTON
AND LOIS HOLMES,

Plaintiffs,

v

CHARTER COUNTY OF WAYNE, and
MELVIN TURNER,

Defendant-Appellees/Cross-
Appellants,

and

BUTLER BENSON,

Defendant-Appellee.

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

In this sexual harassment suit, plaintiff appeals as of right from the trial court's order granting defendants' motion for a directed verdict, and defendants cross-appeal the trial court's denials of their motion for summary disposition. We reverse the trial court's decisions regarding defendants' motion for summary disposition.

I. Facts and Proceedings

On May 8, 1998, plaintiff Betty Boyd, the personnel director in the Wayne County Sheriff's Department, filed a complaint against defendant Wayne County and one of her

supervisors, defendant Melvin Turner,¹ the undersheriff. The only count of the complaint that is relevant on appeal is Count III, in which plaintiff alleged that in September 1995, defendant asked her if she would date him and, because she refused, he influenced other people to deny her request to be classified to a higher paying job classification.²

Plaintiff's claims stem from a conversation she had with defendant in September 1995, at the end of a workday. According to plaintiff, as the two discussed issues concerning employee honesty, defendant mentioned that he had two girlfriends, but that each woman knew that defendant was also dating another woman. Plaintiff testified that defendant told her, "I [defendant] wanted to date someone else. Then she wanted to break it off. And at that time I wasn't going to let someone tell me what to do in my life. I date who I want. Like you." Plaintiff testified that the conversation turned to whether plaintiff would date defendant. Plaintiff told defendant, "Undersheriff, I would not date you."³ After this exchange, plaintiff discussed with defendant her opinion that her work responsibilities had increased and that she deserved a corresponding increase in compensation. According to plaintiff, defendant told her that the budget could not accommodate a salary increase for her.

In February 1996, plaintiff initiated a request for reclassification.⁴ On March 18, 1996, the sheriff signed plaintiff's reclassification request, as required by the collective bargaining agreement. Thereafter, Roberta Palmer, an executive in the classifications unit of Wayne County's personnel department, performed a "desk audit" to review plaintiff's job duties as part of evaluating plaintiff's request. In August 1996, Palmer sent plaintiff a letter denying her request for reclassification, stating that "there was an insufficient basis to approve a reclassification" and notifying plaintiff that she could pursue an appeal to the personnel department. Plaintiff appealed Palmer's denial of her reclassification request to a board of review composed of individuals selected by county personnel. The panel denied her appeal on November 20, 1996.

In April 1997, plaintiff met with Barbara Godre, director of the county's personnel department, and requested a transfer to a different department because she felt she had accomplished all she could accomplish in the sheriff's department. At that time, Godre did not know of a vacant position suitable for plaintiff. Plaintiff again spoke to Godre in September

¹ Throughout this opinion, the term "defendant," when used in the singular, refers to Melvin Turner.

² The complaint also asserted plaintiffs' claims for race discrimination and sex discrimination (disparate treatment), as well as claims for breach of contract and retaliation on behalf of plaintiff Dorothy Burrell. The trial court granted defendants' motion for summary disposition pertaining to these claims, which plaintiffs have not appealed.

³ Defendant does not recall the conversation plaintiff described, but testified that on one occasion, plaintiff mentioned that defendant "was a person she wouldn't want to date." When he asked her why, plaintiff responded that he was not the type of person she would want to date because he worked too much.

⁴ Reclassification is a process through which a county employee can request that the county's personnel department reclassify her job position to a higher paying job category.

1997 after defendant criticized a report plaintiff presented at a staff meeting and embarrassed her. Plaintiff told Godre that she was having difficulties working with defendant that stemmed from an issue that was not work-related. Plaintiff did not tell Godre that defendant had sexually harassed her or asked her to date him.

In May 1999, defendants moved for summary disposition pursuant to MCR 2.116(C)(10), claiming that the single ambiguous remark that plaintiff claims defendant made in September 1995 (“I date who I want. Like you.”) did not provide a sufficient basis for plaintiff’s quid pro quo harassment or hostile environment harassment claims. Defendants also argued, concerning plaintiff’s quid pro quo harassment claim, that the evidence did not show that defendant was responsible for the denial of plaintiff’s request for reclassification. In response, plaintiff claimed that defendant’s statement was sufficient to support her claims and that Eric Smith, chief of operations and legal counsel to the sheriff, told her that defendant stopped her reclassification.

The trial court first heard defendants’ motion for summary disposition on August 5, 1999. The trial court stated that, viewing the evidence in a light most favorable to plaintiff, defendant’s comment raised a question of fact concerning whether plaintiff had been sexually harassed. Additionally, the trial court stated that Smith’s statement that defendant had stopped her reclassification raised a question of fact regarding whether a causal connection existed between the alleged harassment and the denial of plaintiff’s request for reclassification. The trial court did not address plaintiff’s hostile environment claim.⁵

Later, defendants renewed their motion for summary disposition, claiming that defendant’s comment did not constitute “communication of a sexual nature,” as required by MCL 37.2103(i). The trial court, however, stated that whether a statement is sexual in nature depends on the circumstances in which it is made. Accordingly, the trial court again denied defendants’ motion.⁶

Trial began on August 15, 2000. Prior to voir dire, defendants argued that plaintiff had not properly pleaded hostile environment harassment, even though her complaint used the term “hostile environment.” The trial court agreed, and the trial proceeded on plaintiff’s quid pro quo harassment claim. At the close of plaintiff’s proofs, the trial court granted defendants’ motion for a directed verdict. This appeal followed.

II. Standard of Review

⁵ On October 29, 1999, the court heard defendants’ motion to exclude the testimony of certain witnesses. One of the issues raised by defendant at that hearing was whether plaintiff should be allowed to testify regarding what Eric Smith said to her because the statement was hearsay. The court dismissed defendants’ motion without addressing the merits of the motion, stating that defendants could re-file the motion and be more specific with their request.

⁶ The same day, the trial court heard defendants’ new motion in limine to exclude the hearsay statement of Eric Smith. The court ruled that plaintiff could testify to what Smith told her because he was an agent of the county.

This court reviews de novo the trial court's grant or denial of a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion filed under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's claim. *Id.* at 163. The party opposing a motion under MCR 2.116(C)(10) must present evidence of specific facts demonstrating that genuine issues of material fact exist. *Id.* "Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible." *Id.*, citing MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

The application of a statutory provision is also a question of law that is reviewed de novo. *Veenstra, supra* at 159.

III. Analysis

On cross-appeal, defendants first argue that the trial court erred by denying their motion for summary disposition because plaintiff did not present sufficient evidence to permit her quid pro quo harassment claim to proceed. We agree. "Discrimination because of a person's sex includes sexual harassment of the person." *Corley v Detroit Bd of Ed*, 246 Mich App 15, 19; 632 NW2d 147 (2001), citing *Chambers v Tretco*, 463 Mich 297, 309; 614 NW2d 910 (2000). To prevail on a claim of quid pro quo harassment, a plaintiff must demonstrate:

"(1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute, and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment." [*Chambers, supra* at 310-311, quoting *Champion v Nationwide Security, Inc*, 450 Mich 702, 708; 545 NW2d 596 (1996).]

Assuming without deciding that plaintiff has shown that she was subjected to an "unwelcome sexual advance" or a "request for sexual favors," defendants correctly argue that the trial court erred by denying their motion for summary disposition on plaintiff's quid pro quo claim because plaintiff did not produce admissible evidence showing a causal connection between defendant and the denial of her reclassification request. "To show quid pro quo harassment, it is not enough to demonstrate harassment and a tangible employment action—there must be a causal relationship between the two." *Chambers, supra* at 32 n 8. Here, plaintiff claimed that Eric Smith told her that defendant stopped her reclassification. Plaintiff testified at deposition that "Eric said to me, he said, 'Betty, the Undersheriff stopped your reclass.'"⁷ The trial court permitted plaintiff to proceed to trial on the basis of this testimony. The trial court erred, however, because the testimony constitutes inadmissible hearsay.

Plaintiff argued in the trial court that her testimony regarding Smith's statement was admissible as an admission of a party opponent. MRE 801(d)(2) states that a statement is not

⁷ Defendants opposed plaintiff's testimony with an affidavit by Smith stating that he never made the statement plaintiff attributed to him.

hearsay if “[t]he statement is offered against a party and is . . . (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.” Here, plaintiff did not demonstrate, and the trial court did not find, that Smith’s statement concerned a matter within the scope of his agency or employment. Smith was employed as legal counsel to the sheriff. The extent of his involvement in plaintiff’s request for reclassification was a) organizing a meeting with plaintiff and her supervisors, including the sheriff, regarding her initial request; and b) supporting her at her appeal hearing. Smith was not involved in Palmer’s consideration of plaintiff’s request or the review board’s evaluation of her appeal. Because plaintiff failed to provide a sufficient foundation for Smith’s statement, the trial court erred by denying defendants’ motion for summary disposition. See *Bachman v Swan Harbour Assoc*, 252 Mich App 400, 440; 653 NW2d 415 (2002).

For the first time on appeal, plaintiff also argues that Commanders Booth and James, other employees of the sheriff’s department, also told her that defendant caused the denial of her reclassification request. Because plaintiff did not present this argument in the trial court, it has not been properly preserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Additionally, the testimony plaintiff cites does not establish a genuine issue of material fact. Plaintiff testified that after she told these commanders what defendant said to her about dating, Commander James stated, “Well, you should have gave him a little bit,” and Commander Booth stated that plaintiff did not have defendant’s support “because you’re not riding his treadmill.” These statements cannot be construed as evidence that defendant adversely affected plaintiff’s request for reclassification.

Finally, defendants claim in their cross-appeal that they were entitled to summary disposition on plaintiff’s claim of hostile environment harassment. This issue has not been properly preserved because the trial court did not rule on this issue during the hearing on defendants’ motion for summary disposition. *Fast Air, Inc, supra* at 549. Moreover, immediately prior to trial the trial court in fact dismissed this claim as defendants requested.⁸ Nevertheless, because a motion for summary disposition concerns a matter of law and the facts necessary to the resolution of this issue have been presented to this Court, *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002), we will address the issue. We conclude that defendants were entitled to summary disposition on plaintiff’s claim of hostile environment harassment.

A claim of hostile environment sexual harassment requires proof that:

(1) the employee belonged to a protected group;

⁸ Plaintiff did not appeal the merits of the trial court’s ruling dismissing the claim prior to trial, but instead argues on appeal that the trial court abused its discretion by reversing the ruling of a predecessor judge on this question. As we note, however, the previous judge did not rule on the issue. Because we find that summary disposition should have been granted on the claim, however, we do not address here whether the trial court abused its discretion by dismissing the claim as it did on the eve of trial. See *Star-Batt, Inc v City of Rochester Hills*, 251 Mich App 502, 512; 650 NW2d 442 (2002).

- (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. [*Chambers, supra* at 311, quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

To demonstrate respondeat superior liability, the plaintiff must “prove that the employer failed to take prompt and adequate action *upon notice of the creation of a hostile work environment.*” *Chambers, supra* at 312 (emphasis added). Here, plaintiff has failed to show that she provided notice to the county of the alleged sexual harassment. Plaintiff asserts that by telling Barbara Godre that her difficulties with defendant had a source “other than business,” she provided the required notice. We disagree. Plaintiff explicitly testified that she never told Godre that defendant had asked her to date him, that he had sexually harassed her, or that he had discriminated against her because she refused to date him. Plaintiff’s assumption that Godre knew what plaintiff meant is not evidence that raises a genuine issue of material fact.

Moreover, the singular comment plaintiff attributes to defendant is insufficiently severe to create a hostile environment. See *Radtke, supra* at 385, 395. Similarly, plaintiff has not demonstrated that the alleged “ridicule” defendant inflicted nearly two years after the alleged request for a date was “discrimination *because of sex,*” as required by MCL 37.2103(i) (emphasis added). The testimony showed that both men and women experienced difficulties working with defendant. Accordingly, summary disposition on this claim is appropriate.

Because we conclude that the trial court should have granted defendants’ motion for summary disposition, we do not need to address plaintiff’s claims of error pertaining to the trial in this matter.

Reversed. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra