

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

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STEPHANIE D. PROVOST and BONNIE  
CHRISTIAN,

UNPUBLISHED  
February 20, 2007

Plaintiffs-Appellees,

and

DENISE M. ROBERSON,

Plaintiff/Counter-Defendant,

v

No. 268856  
Washtenaw Circuit Court  
LC No. 02-000937-CL

MICHIGAN DEPARTMENT OF  
CORRECTIONS,

Defendant-Appellant,

and

RONALD BAPTIST,

Defendant/Counter-Plaintiff.

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Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendant Michigan Department of Corrections (MDOC) appeals by leave granted the trial court order denying summary disposition on the issue of its vicarious liability for quid pro quo harassment, hostile environment harassment, and retaliation under the Elliott-Larsen Civil Rights Act (CRA).<sup>1</sup> We hold that the trial court erred in denying the MDOC's motion for summary disposition, and we order that judgment be entered in favor of the MDOC on the above claims.

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<sup>1</sup> MCL 37.2101 *et seq.*

## I. Basic Facts And Procedural History

Plaintiffs Stephanie Provost and Bonnie Christian, past and present female corrections officers at the Huron Valley Men's Correctional Facility, filed this action against the MDOC and Ronald Baptist, a lieutenant for the MDOC before he was terminated for reasons unrelated to this appeal. Provost and Christian allege that they were sexually harassed and retaliated against by Baptist in violation of the CRA. The trial court dismissed all sexual harassment claims against Baptist with prejudice because Provost and Christian failed to establish a genuine issue of material fact that "defendant substantially affected or controlled the term, condition, or privilege of her employment." However, the trial court found that the evidence created a genuine issue of material fact with respect to the MDOC's vicarious liability for quid pro quo harassment, hostile environment harassment, and retaliation under the CRA.<sup>2</sup>

## II. Summary Disposition

### A. Standard Of Review

We review de novo a trial court's resolution of a summary disposition motion under MCR 2.116(C)(10), which tests the factual support of a claim.<sup>3</sup> Under MCR 2.116(C)(10), summary disposition is proper when "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The moving party must first identify that there is no genuine issue of material fact and support that position with documentation.<sup>4</sup> The trial court must review the pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party.<sup>5</sup> However, the nonmovant may not merely promise to offer factual support for his or her claims at trial.<sup>6</sup> If the nonmovant fails to set forth, by documentary evidence, specific facts showing that there is a genuine issue for trial, the moving party is entitled to judgment as a matter of law.<sup>7</sup>

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<sup>2</sup> Assault and battery claims against Baptist were separated from Provost's and Christian's claims against the MDOC by stipulation of the parties, and plaintiff/counter-defendant Denise Roberson settled her claims against the MDOC. Therefore, the claims against Baptist play no role in this appeal, and we address only Provost's and Christian's employment discrimination claims against the MDOC.

<sup>3</sup> *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

<sup>4</sup> MCR 2.116(G)(4).

<sup>5</sup> *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

<sup>6</sup> *Id.* at 456 n 2.

<sup>7</sup> *Id.*

## B. Applicable Legal Provisions

“Through the Civil Rights Act, Michigan law recognizes that, in employment, freedom from discrimination because of sex[, which includes sexual harassment,] is a civil right.”<sup>8</sup> MCL 37.2103(i) provides:

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:

- (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment . . . .
- (ii) Submission to or rejection of the conduct or communication is used as a factor in decisions affecting the individual’s employment . . . .
- (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual’s employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.

Subsections (i) and (ii) describe what is commonly referred to as quid pro quo harassment, while subsection (iii) describes what is commonly referred to as hostile work environment harassment.<sup>9</sup> The CRA provides for employer liability and creates personal liability for individual supervisors who violate the civil rights of fellow employees.<sup>10</sup> The statute subjects an employer to vicarious liability for sexual harassment committed by its employees “by defining ‘employer’ to include both the employer *and* the employer’s agents.”<sup>11</sup> However, in contrast to the federal Civil Rights Act, the rule of vicarious liability under the Michigan CRA depends on the type of sexual harassment alleged.<sup>12</sup> An employer may be held strictly liable for quid pro quo sexual harassment committed by one of its agents.<sup>13</sup> In contrast, a hostile environment sexual harassment claim must be based on some fault on the part of the employer.<sup>14</sup>

In order to establish a prima facie claim of quid pro quo sexual harassment, plaintiffs are required to show that they were subjected to unwelcome sexual advances, requests for sexual favors, or conduct or communication of a sexual nature and that the employer or the employer’s

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<sup>8</sup> *Chambers v Tretco, Inc*, 463 Mich 297, 309; 614 NW2d 910 (2000); see MCL 37.2102; MCL 37.2103(i).

<sup>9</sup> *Chambers, supra* at 310.

<sup>10</sup> *Elezovic v Ford Motor Co*, 472 Mich 408, 411; 697 NW2d 851 (2005).

<sup>11</sup> *Chambers, supra* at 310 (emphasis in original).

<sup>12</sup> *Id.* at 315.

<sup>13</sup> *Id.* at 313.

<sup>14</sup> *Id.* at 312.

agent used the plaintiff's submission to or rejection of the proscribed conduct as a factor in a decision affecting the plaintiff's employment.<sup>15</sup>

To establish a claim of hostile environment harassment, plaintiffs must prove the following elements by a preponderance of the evidence:

- (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.<sup>16</sup>

After a thorough review of the record, we conclude that neither Provost nor Christian alleged facts sufficient to support a prima facie case of sexual harassment under either a quid pro quo theory or a hostile work environment theory.

#### C. Christian's Claims

Christian cannot meet the threshold requirement to establish either type of sexual harassment claim because her allegations against Baptist do not involve unwelcome sexual advances, requests for sexual favors, or conduct or communication of a sexual nature. Rather, the record revealed that Baptist made contact with her breast when he deliberately "bumped" her as they crossed paths. "Conduct or communication of a sexual nature," however, has been interpreted strictly by the Michigan Supreme Court. "[A]ctionable sexual harassment requires conduct or communication that *inherently* pertains to sex."<sup>17</sup> Even abusive conduct or communication does not constitute sexual harassment if it is not sexual in nature.<sup>18</sup>

When viewed in the light most favorable to Christian, her allegation that Baptist deliberately steered himself into her in the hallway on two occasions does not "inherently pertain to sex."<sup>19</sup> We are not persuaded that the physical contact was necessarily sexual simply because Baptist's torso made contact with her breast when he bumped into her side. In fact, Christian

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<sup>15</sup> *Id.* at 310-311.

<sup>16</sup> *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).

<sup>17</sup> *Corley v Detroit Bd of Educ*, 470 Mich 274, 279; 681 NW2d 342 (2004) (emphasis in original); see *Haynie v Dep't of State Police*, 468 Mich 302; 664 NW2d 129 (2003).

<sup>18</sup> *Corley*, *supra* at 279.

<sup>19</sup> *Id.*

does not allege that Baptist touched or groped her breasts or made any comment of a sexual nature during either encounter. Nor does she allege that Baptist tried to physically intimidate her because of her sex. In her written responses to the MDOC's investigation of the first incident with Baptist, Christian claimed that Baptist was attempting to physically intimidate her in reprisal for filing a personnel complaint against him, which complaint was unrelated to sexual harassment. This evidence undermines Christian's claim that Baptist's conduct was sexually motivated. In short, Christian's testimony supported only that Baptist physically assaulted her. As the *Corley* Court noted, "[v]erbal or physical conduct or communication that is not sexual in nature is not sexual harassment."<sup>20</sup> Here, as in *Corley*, Baptist's asserted conduct conveyed nothing more than personal animosity towards Christian. For that reason it is not conduct that is prohibited by MCL 37.2103(i).<sup>21</sup>

Christian failed to allege facts creating a genuine issue of material fact regarding whether she was subjected to conduct or communication of a sexual nature. Therefore, we find that the trial court erred in denying the MDOC's motion for summary disposition on Christian's sexual harassment claims.

#### D. Provost's Claims

##### 1. Quid Pro Quo

Provost's quid pro quo claim, however, presents a closer question. She alleged several incidents in which Baptist made romantic overtures to her. Provost claimed that Baptist invited her to lunch and on a weekend trip to Toronto because he was interested in her romantically. He also communicated to her that he would change her off-site job assignment so that they could work together again because he "missed" her. Alleged romantic overtures are "inferentially sexually motivated" and are sufficient to meet the minimum prima facie showing necessary to establish that the conduct in question was based on sex.<sup>22</sup> Further, the record revealed that the MDOC's investigation substantiated Provost's claim that she rebuked Baptist when he referred to her as his "girlfriend." The investigator concluded that Baptist's behavior was in apparent violation of the MDOC's policy directive on sexual harassment.

Nonetheless, we conclude that the MDOC was entitled to summary disposition on Provost's sexual harassment claims because she failed to establish a tangible, adverse employment action related to the harassment. Although she established a genuine issue of material fact regarding whether Baptist was "in a position to offer tangible job benefits in exchange for sexual favors, or, alternatively, threaten job injury for failure to submit," she failed to prove that he used his position to take a materially adverse employment action against her.<sup>23</sup>

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<sup>20</sup> *Id.* at 280.

<sup>21</sup> *Id.*

<sup>22</sup> *Radtke, supra* at 384.

<sup>23</sup> *Champion v Nation Wide Security, Inc*, 450 Mich 702, 713; 545 NW2d 596 (1996).

Provost claimed that Baptist affected her employment in three ways. First, she claimed that he used his authority on the days that he was responsible for the shift schedule to change her assignment to the least desirable and most dangerous areas of the prison. Second, she alleged that Baptist removed her from the overtime eligibility list for refusing one of these reassignments. Finally, she claimed that her resignation from the MDOC was caused by Baptist's sexual harassment and thus amounted to a constructive discharge. A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable, from an objective standpoint, that the employee is forced into an involuntary resignation.<sup>24</sup> A constructive discharge constitutes tangible employment action where the plaintiff establishes a causal relation between the alleged harassment and his or her resignation.<sup>25</sup>

With respect to employment-related action sufficient to be considered materially adverse, this Court has explained that it must be:

materially adverse in that it [the action] is more than [a] mere inconvenience or an alteration of job responsibilities and that there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one position over another are not controlling.

Although there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. In determining the existence of an adverse employment action, courts must keep in mind the fact that work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.<sup>[26]</sup>

Provost has not established a tangible employment action because occasional rotation to less desirable assignments within her job category is not "an ultimate employment decision."<sup>27</sup> Provost conceded that the reassignments did not affect her income, benefits, or title. Further, Provost did not have a "bid assignment" under her union contract. Therefore, she could be assigned anywhere in the facility on a floating basis. Provost acknowledged that others in her chain of command occasionally shifted her assignment within her job category when they were responsible for the daily shift schedule. Moreover, her subjective impression of the assignments that Baptist gave her is not enough to sustain her claim of an adverse employment action.<sup>28</sup>

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<sup>24</sup> *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151; 483 NW2d 652 (1992).

<sup>25</sup> See *Chambers, supra* at 317.

<sup>26</sup> *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003) (internal quotations and citations omitted).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Provost merely alleged that the yard and kitchen are more dangerous assignments without providing evidence of the types of dangers that might be unique to those assignments. Similarly, Provost admitted that MDOC regulations allowed her to be removed from overtime eligibility as a consequence of refusing to accept a shift assignment change. She provided no evidence to substantiate her belief that the written policy had not been enforced against other officers who refused reassignments.

“Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.”<sup>29</sup> Because Provost has not established that the assignments to the yard and kitchen of the prison were objectively “unbearable or even undesirable,” we find that her proofs do not support the conclusion that she was constructively discharged,<sup>30</sup> or suffered any other adverse employment decision. The fact that Provost did not hold a bid assignment prevents us from finding that reassignments within her job category were so unreasonable that a person in her place would feel compelled to leave her job.<sup>31</sup>

We note that the mere fact that Provost was offended by Baptist’s treatment of her does not elevate his acts to the level of materially adverse employment actions.<sup>32</sup> While the events of which Provost complains may not have made her work place a perfect environment, they certainly did not constitute adverse employment actions.<sup>33</sup> Because there was no genuine issue of material fact regarding whether Provost suffered any adverse employment actions, the trial court should have granted the MDOC’s motion for summary disposition on her quid pro quo sexual harassment claim.

## 2. Hostile Work Environment

We also find that the trial court erred in denying summary disposition of Provost’s hostile work environment claim because there was no genuine issue of material fact with regard to the MDOC’s respondeat superior liability. Respondeat superior liability can be imposed on an employer for an employee’s hostile work environment only if the plaintiff meets his or her burden to prove that the employer had notice of the alleged harassment and failed to act.<sup>34</sup> “[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[;]”<sup>35</sup> hence, actual notice is not required.

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<sup>29</sup> *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

<sup>30</sup> *Wilconox v Minn Mining & MFG Co*, 235 Mich App 347, 363; 597 NW2d 250 (1999).

<sup>31</sup> *Champion*, *supra* at 710.

<sup>32</sup> *Pena*, *supra* at 312.

<sup>33</sup> *Id.* at 315.

<sup>34</sup> *Chambers*, *supra* at 315-316.

<sup>35</sup> *Id.* at 319.

“[T]he test is whether the employer knew or should have known of the harassment.”<sup>36</sup> An employer may nevertheless avoid vicarious liability “if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment.”<sup>37</sup> To determine whether the MDOC took adequate remedial action, we review the totality of the circumstances and assess whether the MDOC’s response to Provost’s complaints “reasonably served to prevent future harassment[.]”<sup>38</sup>

Here, the MDOC does not dispute that it was on notice of Provost’s allegations of sexual harassment. However, the MDOC argues on appeal that Provost did not meet her burden to establish a genuine issue of material fact that its response was inadequate because the record shows that the MDOC promptly investigated each claim. In Provost’s case, Baptist was suspended for ten days as a result of the warden’s finding that he violated various work rules. Furthermore, Provost’s direct supervisors also offered her a position in a part of the prison that was removed from Baptist’s area of control. Provost did not provide any documentary evidence to support her contention that the shift would not have prevented continuing harassment from Baptist. A party may not rely on speculation to establish a genuine issue of material fact.<sup>39</sup>

Provost points to a history of sanctions against Baptist for violating MDOC work rules, several of which are allegedly related to his sexually inappropriate behavior with female co-workers. She alleges that his personnel record demonstrates a recurring problem, which put the MDOC on notice that repetition of an offensive incident was likely.<sup>40</sup> However, with the exception of documents related to a contemporaneous claim of sexual harassment, which resulted in Baptist’s termination, Provost’s exhibits support only unsubstantiated claims of sexual harassment against Baptist. There is no evidence that the MDOC responded inadequately to any complaints. Accordingly, we find that the trial court erred in denying the MDOC’s motion for summary disposition. Provost did not meet her burden to prove that the MDOC’s remedial action was inadequate.

#### E. Provost’s And Christian’s Retaliation Claims

Finally, the MDOC argues that the trial court erred in denying its motion for summary disposition of Provost’s and Christian’s retaliation claims. The CRA also prohibits retaliation against a person for having “opposed a violation of the act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding or hearing under the act.”<sup>41</sup> To establish a prima facie case of retaliation under the CRA, a plaintiff

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<sup>36</sup> *Elezovic, supra* at 426.

<sup>37</sup> *Chambers, supra* at 312, quoting *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991).

<sup>38</sup> *Chambers, supra* at 319.

<sup>39</sup> *Altairi v Alhaj*, 235 Mich App 626, 628-629; 599 NW2d 537 (1999).

<sup>40</sup> *Radtke, supra* at 382, 395.

<sup>41</sup> MCL 37.2701(a).

must prove: (1) that she was engaged in a protected activity; (2) that this was known by defendant; (3) that defendant took an employment action adverse to plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.<sup>42</sup> Because Provost and Christian failed to demonstrate either a violation of the CRA or an adverse employment action resulting from harassment, their retaliation claims must also fail.

### III. Conclusion

Provost and Christian failed to produce objective evidence of a materially adverse employment action or evidence of the MDOC's failure to respond to their claims with appropriate remedial action. Therefore, we conclude that the trial court erred in denying the MDOC's motion for summary disposition with regard to Provost's and Christian's sexual harassment claims. Their retaliation claims must also fail because Provost and Christian have not established a violation of the CRA. Thus, the MDOC is entitled to judgment as a matter of law.

Reversed and remanded for entry of judgment in favor of MDOC. We do not retain jurisdiction.

/s/ William C. Whitbeck  
/s/ Richard A. Bandstra  
/s/ Bill Schuette

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<sup>42</sup> *Pena, supra* at 310-311.