

STATE OF MICHIGAN
COURT OF APPEALS

SHERRY L. BAKER,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS, LT. SCOTT
NOBLES, SGT. JAMES STACKHOUSE, CAPT.
BRADFORD BRYANT, and BRIAN MILLER,

Defendants-Appellees.

UNPUBLISHED

June 11, 1999

No. 204211

Wayne Circuit Court

LC No. 95-532464 NZ

Before: Kelly, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand.

Plaintiff worked as a corrections specialist for defendant Michigan Department of Corrections (DOC). Defendants Nobles, Stackhouse and Bryant were DOC employees who held supervisory positions over plaintiff. Defendant Miller was a coworker of plaintiff. Plaintiff alleged claims of sexual harassment, retaliation for assertion of a sexual harassment claim and sex discrimination with respect to a variety of incidents that allegedly occurred during her employment with the DOC. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), finding that plaintiff had failed to demonstrate a genuine issue of material fact regarding her claims.

Plaintiff's first argument on appeal is that the trial court erred in dismissing her hostile work environment sexual harassment claim. We agree. A motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Such a motion tests the factual basis of a plaintiff's allegations. This Court must view the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the nonmoving party. *Id.* This Court must then decide "whether a genuine issue regarding any material fact exists to warrant a trial." *Id.*

A plaintiff must satisfy the following elements in order to establish a prima facie case of hostile work environment sexual harassment:

- (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. [*Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993) (citations and footnotes omitted).]

We believe that plaintiff established a genuine issue of fact with respect to each of these elements. Because the parties primarily focus their arguments on the fourth element of a hostile work environment claim, we will address this element in detail. The fourth element of a hostile work environment claim requires a showing 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.” *Radke, supra* at 382. Whether a hostile work environment was created “shall be determined by whether a reasonable person, in the totality of the 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. Consequently, in order to survive a motion for summary disposition, a plaintiff must establish the existence of a genuine issue regarding whether a reasonable person would find that, in the totality of the circumstances, the conduct in question was sufficiently severe or pervasive to create a hostile work environment. *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996).

In this case, plaintiff presented deposition testimony that, on several occasions, she was subjected to verbal sexual harassment as well as a single incident of physical sexual harassment. Although our Supreme Court in *Radke, supra* at 395, held that “a single incident, unless extreme, will not create an offensive, hostile, or intimidating work environment,” application of this principle to this case is misplaced. Plaintiff has not alleged a single incident of sexual harassment. Rather, plaintiff has alleged a single incident of *physical* sexual harassment and also claims that she was subjected to repeated instances of verbal sexual harassment. The question presented, then, is whether a reasonable person would find that, in the totality of the circumstances, the conduct in question – here, verbal sexual harassment and an incident of physical sexual harassment – was sufficiently severe or pervasive to create an intimidating, hostile, or offensive employment environment. *Quinto, supra; Radke, supra* at 394.

In viewing the evidence in the light most favorable to plaintiff and drawing all legitimate inferences from the evidence in plaintiff's favor, we believe that a reasonable person could conclude that the harassment endured by plaintiff was sufficiently severe or pervasive to create an intimidating, hostile, or offensive employment environment.

Plaintiff's next argument on appeal is that the trial court erred in dismissing plaintiff's retaliation claim. We agree. Under MCL 37.2701(a); MSA 3.548(701)(a), a person shall not

[r]etaliat[e] or discriminate against a person because the person has opposed a violation of [the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*], or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

To establish a prima facie case of retaliation, plaintiff must satisfy the following elements:

(1) that [she] 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).]

By viewing the evidence in a light most favorable to plaintiff, we are not convinced that there is no genuine issue of material fact as to plaintiff's claim of retaliation. The facts show that plaintiff was engaged in a protected activity when she reported the conduct of defendants to the warden. The fact that plaintiff did not file a formal complaint against defendants has no bearing on this Court's decision. As we noted in *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 396; 493 NW2d 441 (1992):

Regardless of the vagueness of the charge or the lack of formal invocation of the protection of the act, if an employer's decision to terminate or otherwise adversely effect an employee is the result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs.

Since plaintiff made her situation known to the warden of the corrections facility, it cannot be said that defendants did not know of her charges.

Next, it must be shown that defendants took employment action adverse to plaintiff. In helping us clarify this requirement, we look to the federal district court for the northern district of Illinois which stated:

In order to state a claim for retaliation, the adverse action imposed on the employee must be material. A materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. Such a materially adverse change could include a termination of employment, a demotion evidenced by a decrease in wage or salary, a less

distinguishable title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *Adverse actions can come in many shapes and sizes . . . the law deliberately does not take a 'laundry list' approach to retaliation, because . . . its forms are as varied as the human imagination will permit.* [*Kipnis v Baram*, 949 F Supp 618, 624 (ND Ill, 1996) (citations omitted) (emphasis added).]

Plaintiff claimed that after she made an initial sexual harassment complaint, she received undesirable job assignments and was humiliated in front of prisoners. The evidence supporting her claim of retaliation is primarily testimonial in nature. Therefore, we are unable to state with reasonable certainty that no genuine issue of material fact exists.

The final element for plaintiff to establish is that there is a causal nexus between the protected activity and the adverse employment action. The mere fact that an adverse employment action occurred subsequent to a plaintiff's complaint is insufficient to establish a causal connection. See *Polk v Yellow Freight System, Inc*, 801 F2d 190, 197 (CA 6, 1986). While causation cannot alone be established by defendant Noble's statement that he was upset that plaintiff spoke to the warden about a charge of sexual harassment, *Feick v Monroe Co*, 229 Mich App 335, 344; 582 NW2d 207 (1998), plaintiff has established that several instances of highly questionable conduct on the part of defendants occurred after she voiced her complaint to the warden. The denials by defendants, while expected and anticipated, cannot satisfy the proof necessary to grant defendants' motion for summary disposition. These inconsistencies, by and in themselves, create a genuine issue of material fact that must be left for the trier of fact to sort out.

Plaintiff's next argument on appeal is that the trial court erred in dismissing her sex discrimination claim based on a disparate treatment theory. We disagree.

In order to establish a prima facie case of sex discrimination under the disparate-treatment theory, a plaintiff must show that she was a member of a class deserving of protection under the statute, and that, for the same conduct, she was treated differently than a man. It is the plaintiff's burden to establish a prima facie case of sex discrimination with evidence that is legally admissible and sufficient. [*Schellenberg v Rochester Elks*, 228 Mich App 20, 33; 577 NW2d 163 (1998).]

The essence of such a claim is that similarly situated people have been treated differently because of their sex. *Id.* at 34.

Here, plaintiff has failed to adduce evidence that she was treated differently than a similarly situated man in any of the incidents of which she complains. With respect to an incident in the chow hall in which plaintiff was repeatedly told to stop and then start seating prisoners, plaintiff testified that two male officers were never told to stop seating prisoners. Plaintiff has failed to adduce evidence to establish that the male officers were similarly situated to her in regard to training or job assignment. Moreover, the male officers were not treated differently because plaintiff has not shown that an instruction to stop and then start seating prisoners was adverse to her employment.

Plaintiff also relies upon the testimony of Officer Anthony Ave that, while plaintiff was told to return confiscated items to prisoners, other officers were not so instructed. Plaintiff has adduced no evidence that these other officers were similarly situated men. The other officers may have been differently situated than plaintiff with respect to experience, knowledge, judgment, or conduct. Moreover, plaintiff was not treated differently in any meaningful sense from the other officers since the instruction to return confiscated items did not adversely affect plaintiff's employment. Plaintiff's assertion that her authority with the prisoners was undermined is purely speculative.

With respect to the remaining incidents, plaintiff has made no effort to specifically identify a similarly situated man who was treated differently. We thus conclude that plaintiff's sex discrimination claim was properly dismissed because there is no evidence that plaintiff was treated differently than a similarly situated man.

Finally, plaintiff contends that summary disposition was improper because further discovery was needed. Plaintiff failed to raise this issue below in response to defendants' motion for summary disposition, but rather, raised the issue only in her motion for reconsideration. We therefore limit our review of this issue to deciding whether the trial court abused its discretion in denying plaintiff's motion for reconsideration. See *Charbeneau v Wayne Co Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). Plaintiff has not demonstrated a palpable error by which the court and the parties were misled. MCR 2.119(F)(3); *Charbeneau, supra*, 158 Mich App 733. Plaintiff could have raised the discovery argument in response to defendants' motion for summary disposition, but she failed to do so. *Id.* In any event, plaintiff has not shown that there is a fair chance that further discovery would have resulted in the factual support for her claims. *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 329-330; 539 NW2d 774 (1995). The trial court thus did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ William B. Murphy