

STATE OF MICHIGAN
COURT OF APPEALS

ANNA LAFAIVE,

Plaintiff-Appellant,

v

SGS AUTOMOTIVE, f/k/a INTERMODAL
TRANSPORTATION SERVICES,

Defendant-Appellee.

UNPUBLISHED

May 9, 2006

No. 259215

Oakland Circuit Court

LC No. 2003-050882-NZ

Before: Schuette, P.J. and Bandstra and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition of plaintiff's claims of sexual harassment and hostile work environment, disparate treatment, and retaliation. We affirm.

Plaintiff filed an action against her former employer under the Michigan Elliot-Larsen Civil Rights Act ("CRA"), MCL 37.2101 *et. seq.* Plaintiff alleged that she had been sexually harassed and subjected to a hostile work environment by a co-worker, and that after she complained to management about the situation, she was subjected to retaliatory treatment and dismissed from her job.

Plaintiff worked for defendant from April 5, 2000 until October 18, 2000. Plaintiff alleged that during July of 2000 she was sexually harassed by co-worker¹ Bruce Zang.² In her

¹ In her deposition, plaintiff refers to Zang as a supervisor and a co-worker; other documents indicate he was an employee of higher seniority and position, but not an immediate supervisor of plaintiff.

² Similar claims of harassment by Zang from the same time period at this same facility were brought to the attention of defendant's management by a female co-worker of plaintiff. In addition, defendant's management was apparently aware of similar problems involving Zang at another facility; in a confidential memo dated July 18, 2000, manager Dave Pashkot listed four female employees who had reportedly felt "uncomfortable" because Zang asked them out on dates. Pashkot described the behavior as "stalking" with respect to one of the women. Pashkot

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deposition, plaintiff described various specific instances of harassment, including sexually explicit letters Zang had written to her, an occasion when he showed her an x-rated movie playing on his work computer, several instances of unwelcome and inappropriate touching, and one occasion when he exposed himself to her. Plaintiff alleged that she verbally informed her immediate supervisor, Lorie Collins,³ of these instances of Zang's harassing behavior, and that Collins failed to respond appropriately.⁴ On July 31, 2000, plaintiff in writing informed Bob Scheuering, a higher ranking member of management, about the harassment, and included copies of the sexually explicit letters. Zang was terminated the same day.

On October 18, 2000, plaintiff's employment was terminated for the stated reason of excessive absenteeism. On August 14, 2000, plaintiff had received a written warning about her attendance, dependability, and work quality. A report based on plaintiff's work attendance file prepared by Ed Vechiola, defendant's Midwest Regional Manager, indicates plaintiff was late, absent, or left early on 23 occasions between April 18, 2000 and September 26, 2000. On October 6, 2000, plaintiff had received a final warning, advising that her excessive absences and tardiness would "no longer be tolerated." Plaintiff missed 4 ½ days of work and was late on another day during the two weeks following that final warning, and was then dismissed.

Plaintiff filed suit, alleging her dismissal was retaliation for having complained about the hostile work environment and sexual harassment. Defendant moved for summary disposition under MCR 2.116(C)(10), asserting that plaintiff was terminated for absenteeism only, and that her allegations of sexual harassment were not a factor. The trial court granted defendant's motion for summary disposition, finding that plaintiff could not sustain her hostile work environment claim because the evidence did not support a finding that defendant failed to adequately investigate and take prompt and appropriate remedial action upon notice of the alleged hostile work environment. The trial court also determined that plaintiff could not establish a case of retaliation under the CRA because she failed to offer any link between her dismissal and the report of sexual harassment. The court noted that the evidence showed that plaintiff missed all or part of 38 days of work during her six-month period of employment.

We review de novo the trial court's decision regarding summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). MCR 2.116(C)(10) allows summary disposition only where there is no genuine issue as to any material fact; on review of the motion,

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also stated that Zang "is a very productive employee . . . but is very high maintenance due to his inability to keep his mouth shut." On June 28, 2000, Pashkot had sent a memo to Zang stating "[I]t has been brought to my attention that you discussed some personal things with some of our employees that has been construed as 'out of line'."

³ It is unclear from the record what level of supervisory authority Collins had over plaintiff or any other employees in this workplace.

⁴ Plaintiff alleged, for example, that Collins actually witnessed the x-rated video incident, and said something like "That's Bruce" when plaintiff complained, and when plaintiff reported that Zang had exposed himself to her, Collins demanded that she continue to work the rest of the day with Zang. Plaintiff did not comply with this demand.

we must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, here plaintiff. *Id.* at 120.

Plaintiff argues that defendant had notice of Zang's harassing behavior well before his termination, and did not take prompt remedial action. Plaintiff bases this claim on her verbal complaints to her immediate supervisor about Zang's behavior and on several memos written between members of defendant's management team regarding Zang's harassment of other female employees.⁵ Plaintiff asserts a hostile work environment claim may therefore be sustained. We disagree. To establish a prima facie case of hostile work environment, a plaintiff must establish that she belonged to a protected group; that she was subjected to communication or conduct on the basis of sex; that she was subjected to unwelcome sexual conduct or communication; that the conduct or communication was intended to or in fact did substantially interfere with her employment or create an intimidating, hostile, or offensive work environment; and respondeat superior. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).

Plaintiff's claim plainly succeeds on all but the last required element. Plaintiff's co-worker, Zang, was offensive and his behavior hostile, but the very day plaintiff complained in writing of his behavior toward her, Zang was terminated. An employer may avoid liability "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Radtke, supra*, p 396 (citation omitted). To succeed on the respondeat superior element of the claim, a plaintiff must show that she complained to "higher management," meaning she informed "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611, 622; 637 NW2d 536 (2001).

In this case, plaintiff alleged that she verbally complained to Collins, her immediate supervisor, about Zang's conduct on several occasions, but there was no evidence that Collins had the level of "higher management" authority here required. Plaintiff was hired by Dave Pashkot, was warned about her attendance and performance issues by Bob Scheuering, received her final warning from Ed Vechiola, and was terminated after Scheuering, Vechiola, and Ed Roach consulted with each other. Roach was plaintiff's supervisor, and Scheuering was Roach's manager, and plaintiff was aware that these supervisors were in positions of authority with respect to employment issues. Indeed, when plaintiff wrote a letter in September 2000 attempting to rectify her employment situation with respect to her poor attendance record, she sent it to Vechiola and copied Scheuering and Roach; Collins did not receive a copy and was not mentioned in the letter. It is an undisputed fact that on the day that plaintiff complained about Zang to Scheuering, Zang was terminated. We find that although plaintiff was undeniably harassed by Zang, plaintiff cannot establish a hostile work environment claim because her employer took prompt action to remedy the situation as soon as it was brought to the attention of higher management. No question of material fact remains and summary disposition was therefore properly granted.

⁵ See footnote 2.

Plaintiff also argues that summary disposition was improperly granted on her retaliation claim. A plaintiff must show four elements to establish a prima facie claim of retaliation: (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. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005). If plaintiff establishes a prima facie case of discriminatory action, defendant then bears the burden of producing evidence of a “legitimate, nondiscriminatory reason for its employment decision.” *Hazle v Ford Motor Co.*, 464 Mich 456, 464; 628 NW2d 515 (2001). We find that plaintiff here meets the first three elements of the prima facie claim of retaliation, but fails to demonstrate the final required element, the causal connection between her complaint of sexual harassment and her termination. We further find that even if plaintiff had demonstrated the causal connection, defendant has proffered and supported a legitimate nondiscriminatory reason for terminating plaintiff’s employment.

Plaintiff argues the temporal proximity between her claim of harassment and her dismissal indicates a causal connection. Plaintiff is correct that temporal proximity is a factor, but it establishes a causal connection only “as long as the evidence would enable a reasonable finder of fact to infer that an action had a discriminatory or retaliatory basis.” *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004). Here, defendant asserts the termination was for excessive absenteeism, and the trial court accepted that as a valid rather than pretextual reason, noting that the evidence showed that plaintiff had missed all or part of 38 days of work during her six-month period of employment. Plaintiff was warned in writing twice, indicating both that she was aware of her performance deficiency, and that her employer provided the opportunity to correct the issue.

Plaintiff has not provided any evidence to support that there was a causal link between her complaint of sexual harassment and her termination. Plaintiff asserts that most of her absences were documented after she complained about harassment, but the evidence indicates 27 incidents of partial or wholly missed days before July 31, 2000, when plaintiff first complained of sexual harassment to higher management. Plaintiff asserts that her absences were all approved or excused, but her own deposition testimony does not support this claim. Plaintiff asserts that “a lot” of attendance issues were not documented correctly, and states that these discrepancies are the reason she failed to sign her final warning letter, as required. But plaintiff offers no evidence or documentation indicating how many absences or tardy reports were incorrectly documented, and in the one document she did send to management, a letter responding to the first written warning she received, plaintiff did not mention any discrepancies, but instead only cited reasons for her poor attendance record. Finally, plaintiff claims that no one told her that she was terminated for excessive absenteeism, but the written warnings and plaintiff’s termination paperwork indicate that she was advised that her excessive absences and tardiness were unacceptable.

Plaintiff has not factually demonstrated a causal link between the reporting of sexual harassment, and the adverse employment action, but defendant has demonstrated a valid reason for the termination. The evidence presented would not enable a reasonable trier of fact to infer that plaintiff’s termination had a discriminatory or retaliatory basis. *Rymal, supra*. Because

plaintiff failed to present documentary evidence establishing the existence of a question of material fact, defendant's motion for summary disposition was properly granted.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper