

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

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COLONEL EARL ROBINSON,

Plaintiff-Appellant,

v

HIGHLAND PARK PUBLIC SCHOOL  
DISTRICT, d/b/a HIGHLAND PARK PUBLIC  
SCHOOLS,

Defendant-Appellee.

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UNPUBLISHED

October 26, 2006

No. 268984

Wayne Circuit Court

LC No. 04-414573-NZ

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition and dismissing plaintiff's claims for sexual harassment and retaliation under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, and the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* We affirm.

I. Material Facts and Proceedings

Plaintiff is a retired Lieutenant Colonel of the United States Air Force. From August 2003 until April 2004, he was employed by defendant Highland Park School District as the senior aerospace instructor of an Air Force Junior Reserve Officer Training Corps (AFJROTC) program. In February 2004, plaintiff was told by one of his students that the student was subject to a "gay encounter" while at a school conference sponsored by Derrick Lopez, the principal of the school where plaintiff was employed. Plaintiff subsequently reported the matter to the school board and began investigating the matter himself. Plaintiff alleges that he was confronted by Lopez, who ordered him to stop spreading rumors and to stop his investigation. Other disagreements also arose (or had previously arisen) between plaintiff, Lopez, and plaintiff's junior officer, Master Sergeant Ronald Denard.

Plaintiff complained to Colonel Samuel Barr, who was in charge of the AFJROTC program, and to Jo Alice Talley, the Branch Chief of the AFJROTC Instructor Management office in Alabama. The Air Force was responsible for providing plaintiff's credentials and monitoring his performance, and for paying part of his salary. According to plaintiff, Lopez and the superintendent of schools also complained about plaintiff to Colonel Barr or Talley. Talley subsequently met with plaintiff, Lopez, Denard, and other school personnel. Before Talley

completed her report, defendant transferred plaintiff to another school. Defendant asserted that plaintiff was transferred because he refused to be in the same room as Denard. In March 2004, Colonel Barr decertified plaintiff as an AFJROTC instructor for insubordination. Because plaintiff did not possess a Michigan teaching certification, he was no longer qualified to teach after he lost his Air Force certification and, consequently, was discharged from his position with defendant.

Plaintiff thereafter brought this action, alleging claims for sexual harassment and retaliation under the Civil Rights Act and the Whistleblowers' Protection Act. The trial court granted defendant's motion for summary disposition and dismissed each of plaintiff's claims.

## II. Analysis

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Defendant moved for summary disposition under both MCR 2.116(C)(8) and (C)(10). The trial court did not indicate under which subrule it granted the motion, but because it relied on documentary evidence in making its decision, it is apparent that the motion was granted under MCR 2.116(C)(10). In reviewing a motion under MCR 2.116(C)(10), a court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith, supra*.

### A. Sexual Harassment

The CRA provides protection from discrimination because of sex, including sexual harassment. MCL 37.2103(i); *Diamond v Witherspoon*, 265 Mich App 673, 683; 696 NW2d 770 (2005).

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, public accommodations or public services, education or housing.

(ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education or housing.

(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.

As a threshold matter, to establish an actionable sexual harassment claim, plaintiff was required to show that he was subjected to “unwelcome sexual advances,” “requests for sexual favors,” or “conduct or communication of a sexual nature.” *Corley v Detroit Board of Education*, 470 Mich 274, 279; 681 NW2d 342 (2004) (citations omitted). There was no evidence that plaintiff was subject to any such conduct or communication. Indeed, plaintiff acknowledged that he was not the subject of any unwelcome conduct or communication of a sexual nature, and instead admitted that his allegations related solely to possible sexual misconduct toward a student. On these undisputed facts, plaintiff failed to establish a prima facie case of sexual harassment and the trial court properly dismissed this claim.

### B. Retaliation

Both the CRA, MCL 37.2701(a), and the WPA, MCL 15.362, prohibit retaliation against an employee for engaging in protected conduct.

To establish a prima facie case under the WPA, a plaintiff must show that he “was engaged in protected activity as defined by the Whistleblowers’ Protection Act, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge.” *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997). “An employee is engaged in protected activity under the Whistleblowers’ Protection Act who has reported, or is about to report, a suspected violation of law to a public body.” *Id.*

Similarly,

to establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he 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*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

If the plaintiff is able to establish a prima facie case, the burden shifts to the defendant to articulate a legitimate reason for the adverse employment decision. *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 497; 705 NW2d 689 (2005). “If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff must have an opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge.” *Id.*

Assuming, for purposes of this appeal, that plaintiff’s report to the school system could be considered protected activity,<sup>1</sup> we conclude dismissal of these retaliation claims was proper

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<sup>1</sup> And of this we are uncertain, but not for the same reasons as the trial court. See n. 2, *infra*. In  
(continued...)

because defendant presented unrebutted legitimate reasons explaining why plaintiff was transferred to another school and then discharged. Specifically, defendant asserted that plaintiff was transferred to a different school because he refused to work in the same room as Ronald Denard, his junior officer, against whom plaintiff had filed a police report and sought a protective order. Further, plaintiff was discharged because he did not possess a Michigan teaching certificate and, after the Air Force revoked his AFJROTC certification, he was no longer qualified to continue his employment with defendant. Plaintiff failed to present any evidence showing that these reasons were either untrue or a pretext for the adverse employment actions. Moreover, although there was evidence that defendant complained about plaintiff to the Air Force, it is undisputed that plaintiff also brought the matter to the attention of his Air Force superiors, prompting their investigation that ultimately led to his decertification. Therefore, the trial court properly dismissed plaintiff's claims of unlawful retaliation.<sup>2</sup>

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood

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(...continued)

this case, plaintiff asserts that he was engaged in protected activity because he was required by law to report information concerning possible sexual abuse of a student, but plaintiff does not explain what violation of the law he was reporting. Moreover, plaintiff expressly states on appeal that he was not accusing Lopez of any misconduct, so who he was "blowing the whistle" on is very unclear.

<sup>2</sup> We do agree, however, with plaintiff's argument that the trial court engaged in impermissible fact finding when dismissing the retaliation claims. In dismissing the claims, the trial court ruled that plaintiff's allegations of "sexual abuse" were untrue, and therefore not entitled to protection. Whether or not the violation was ultimately untrue is irrelevant, however, since the WPA protects reports of "suspected" violations of the law, not only "correct" or "true" violations. *Shallal, supra*. Additionally, the trial court concluded that the program sponsor for the weekend trip was "an extremely reputable organization," but that factually undocumented assertion had no relevance to the legal issues presented by this case. Nevertheless, we have affirmed the trial court's dismissal for having reached the right result. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).