STATE OF MICHIGAN

COURT OF APPEALS

SANDRA L. HOUGHTALING and TROY HOUGHTALING,

Plaintiffs-Appellants,

v

BAY MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED
March 14, 1997

No. 187838

Bay Circuit Court
LC No. 94-003423-CZ

Before: Taylor, P.J., and McDonald and C. J. Sindt,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant summary disposition pursuant to MCR 2.116(C)(10) on the basis of a finding that there was no genuine issue of material fact regarding whether defendant took effective steps to prevent plaintiff, Sandra L. Houghtaling, from being sexually harassed in the work place. We affirm.

Houghtaling, a phlebotomist, alleged that on November 19, 1993, while she was working in defendant's emergency room (ER), a doctor escorted her to an unoccupied utility room where he kissed her once. She became extremely distraught about the incident and informed her supervisors. Defendant responded to this incident by agreeing to not schedule her for ER coverage and by telling the doctor to cease and desist from such conduct. Despite defendant's assurance regarding ER coverage, defendant still scheduled plaintiff for ER duty. However, when she confronted her supervisor with a scheduling conflict issue, her schedule was changed. In addition to her scheduling problems, plaintiff claims to have encountered some difficulties with her co-workers, including: (1) complaints and ridicule for not going into the ER; (2) jokes made over the public address system about her inability to provide ER coverage; (3) a male nurse pulling at her hair when she was in the ER; and (4) someone placing pins in her family portrait. She experienced no further harassment from the doctor.

Plaintiff first argues that the trial court erroneously limited its inquiry to whether plaintiff suffered a second assault and battery, and that the correct inquiry should have been "whether a reasonable

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* Circuit judge, sitting on the Court of Appeals by assignment.

person, in the totality of the circumstances, would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile or offensive work environment." See *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). Plaintiff argues that there is sufficient evidence to support the conclusion that a reasonable person, after being assaulted in the isolated area of the ER by a physician who had the authority to issue orders to the person, would feel that being required to go back to the ER and being subjected to the control of that physician, would constitute an intimidating, hostile, or offensive environment. "[W]hether a hostile work environment exists should be determined by an objective reasonableness standard, not by the subjective perceptions of a plaintiff." *Radtke, supra* at 388. "The alternative would be to accept all plaintiffs' subjective evaluations of conduct, thereby imposing upon employers liability for behavior that, for idiosyncratic reasons, is offensive to an employee." *Id.* at 387.

We conclude on the basis of an objective standard that defendant's scheduling of plaintiff for ER coverage did not create a hostile environment. Each time that plaintiff brought the fact that she had been scheduled for ER to the attention of her supervisor, her schedule was changed. The mere fact that she was erroneously scheduled for ER coverage did not create a hostile environment because defendant responded when notified of the problem. Plaintiff's "coverage" consisted of only one hour per eight-hour shift, and the possibility that she would encounter the doctor on the intermittent occasions when she was scheduled for the ER appears remote. It only occurred once over a three month time period. Moreover, defendant was not required to exempt Houghtaling from ER coverage. The law states that an employer may avoid liability if it investigates the misconduct and takes prompt appropriate remedial measures. *Radtke, supra* at 396; see also *Saxton v American Tel & Tel Co*, 10 F3d 526, 535-536 (CA 7, 1993) (holding that the employer was not liable even though it failed to follow through on its promise that the offending supervisor would take a refresher course on the sexual harassment policy because the employer's actions effectively ended the complained of conduct). Defendant's actions were effective in that the doctor was thwarted from future misconduct, as evidenced by the fact that he did not harass plaintiff again after the initial incident.

We also conclude on the basis of an objective standard that the alleged teasing incurred at the hands of co-workers was insufficient to support a claim for hostile environment. Regarding jokes over the public address system, objectively speaking, we do not conclude that a single incident where a co-worker asked plaintiff to go to the emergency room and then said, "Oops. Forgot you can't go down there," constitutes harassment. Plaintiff conceded that the incident with the male nurse pulling her hair happened because he thought that she had removed a blood pressure cuff from a patient he had been attending. It was not because of her sex. Finally, the alleged damage to her family portrait was neither sexual in nature nor directed at her because of her sex. As noted by the trial court: "the teasing was not sexual harassment. . . . [T]he teasing had to do with [her] refusal to go to ER or perhaps that she was being favored by [defendant] in not being required to go to ER . . . ."

Plaintiff also argues that the doctor's conduct alone was sufficient to constitute a hostile work environment. In *Radtke, supra*, the Court held that "[a] single incident unless extreme, will not create an offensive, hostile, or intimidating environment" but that a single incident may be sufficient" if severe harassment is perpetrated by an employer in a closely knit working environment." *Id*. at 398. In

Radtke, the plaintiff was a veterinary technician who worked for the defendant who was part owner and the operator of Clark Everett Dog and Cat Hospital. *Id.* at 374. The defendant held the plaintiff down and tried to kiss her while they were taking a break from their work. *Id.* at 375. The Court found that the defendant could be liable because, although the conduct itself did not create a hostile environment, "the alleged conduct combined with the reality that the employer was the perpetrator, permits *this* single incident to be sufficient to reach the jury." *Id.* at 395 (emphasis in original). The Court specifically noted that, "because the perpetrator of the alleged conduct was the employer, recourse to the employer was fruitless." *Id.*

In this case, the doctor was not plaintiff's employer. Rather, he was a subcontractor who worked in the ER and who had power to give plaintiff orders with respect to patient care. Unlike the plaintiff in *Radtke,* plaintiff's recourse was not "fruitless." Defendant had a sexual harassment policy in place and remedied her situation. Furthermore, unlike the *Radtke* case, defendant's hospital is not a "closely knit" working environment. Rather, it is an operation of considerable size, employing almost two thousand people. This is evidenced by plaintiff's concession that in the approximately three months she worked for defendant following the occurrence, she only worked in the same room with the doctor once.

Finally, plaintiff argues that defendant did not adequately remedy the alleged hostile work environment. However, the law does not require a defendant to do everything a plaintiff requests. The law only requires "prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Radtke, supra* at 395; *Downer v Detroit,* 191 Mich App 232, 234; 477 NW2d 146 (1991). Here, plaintiff's supervisor prepared a report about the incident on the evening that it occurred, two administrators spoke with her within hours of the alleged incident, the incident was investigated the following day, and it was agreed that she would not be assigned to the ER until further notice. One week later, the doctor was warned that defendant would not tolerate incidents of this nature and was advised that if he did not "cease and desist" immediately, he would lose his right to practice medicine or work at defendant's hospital. These actions were both prompt and appropriate. Courts that have decided the issue whether an employer has taken prompt and appropriate action have "placed great weight on whether the harassment ended after remedial steps were taken." *Foster v Twp of Hillside*, 780 F Supp 1026, 1039 (D NJ, 1992). Here, the doctor never engaged in the alleged misconduct again. We conclude that the remedy was therefore adequate.

Next, plaintiff argues that she should have been allowed to amend her complaint to add the doctor as a defendant. Plaintiff concedes that she failed to serve the doctor within the ninety-one day period as provided under MCR 2.102(D). However, plaintiff contends, the dismissal was without prejudice and did not affect her right to amend her complaint under MCR 2.118(A). In the alternative, plaintiff argues that leave to amend is typically freely given and that failure to allow amendment in this case was grossly unfair and potentially prejudicial to her in that the doctor's deposition would have been helpful to this case. We find plaintiff's argument unpersuasive. "This Court will not reverse the trial court's decision on a motion to amend absent an abuse of discretion that results in injustice." *Taylor v Detroit,* 182 Mich App 583, 586; 452 NW2d 826 (1989). MCR 2.118(A)(1) provides that "[a] party may amend a pleading once as a matter of course within 14 days after being served with a

responsive pleading by an adverse party." However, "[a] summons expires 91 days after the date the complaint is filed." MCR 2.102(D). As the trial court correctly noted:

> The plaintiffs' have attempted to do an end run around the rules which provide for dismissal for non-service by the expedient filing of an amended complaint. By the reasoning of plaintiffs' counsel plaintiffs could extend this matter indefinitely contravening the rules regarding the prompt service of process. The Court is convinced that the plaintiffs cannot avoid the consequences of the rules by this expedient.

Plaintiffs could have extended the summons with a showing of good cause within the ninety-one day period. MCR 2.102(D). However, plaintiff failed to seek such an extension. Furthermore, the trial court's ruling did not prejudice plaintiff. Plaintiff could still have taken the doctor's deposition in this case, and there is no indication that she could not file a separate action against him.

Affirmed.

/s/ Clifford W. Taylor
/s/ Gary R. McDonald
/s/ Conrad J. Sindt