STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA SHAULL,

Plaintiff-Appellant,

v

MICHIGAN AFFILIATED HEALTH CARE SYSTEM, INC., and CYNTHIA WOOD,

Defendants-Appellees.

UNPUBLISHED
September 22, 1998

No. 202582
Ingham Circuit Court
LC No. 95-080153 CZ

Before: Jansen, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Plaintiff Cynthia Shaull appeals from the trial court's grant of summary disposition in favor of defendants Michigan Affiliated Health Care System, Inc. (MAHSI) and Cynthia Wood in this case involving allegations of same-gender sexual harassment, retaliatory discharge, and breach of an employment contract. We affirm.

I

Plaintiff was hired as a secretary in the Continuing Medical Education (CME) department of MAHSI's predecessor in 1978, and was eventually promoted to the position of CME coordinator. In May 1993, Wood was hired to replace the retiring CME director, for whom plaintiff worked for many years.

Plaintiff alleges that from the beginning of Wood's employment through October 1993, Wood subjected plaintiff to continuous sexual harassment. Specifically, plaintiff stated that Wood would come up behind her and hug her, and that Wood would kiss her on the back of the head and call her "hon." Plaintiff also stated that Wood would sit "like a man," with her ankle crossed over her knee, while wearing a skirt. Plaintiff stated that Wood asked her inappropriate personal questions regarding sexual matters, including specific questions about plaintiff's sexual relationship with her husband. Plaintiff believed that Wood had a crush on her, but when asked, Wood stated that she was not homosexual.

Plaintiff also related an incident that took place during a CME conference. When plaintiff knocked on the door of Wood's hotel room to retrieve some conference materials, Wood answered the door nude. Plaintiff stated that although she stayed in Wood's room for approximately five minutes, Wood did not dress. Shortly after plaintiff left, Wood telephoned another employee and instructed her to "Tell [plaintiff] I'm signing CME certificates in the raw."

In September 1993, plaintiff, along with two other CME employees, met with a human resource consultant to complain about Wood's management style, her perceived lack of competency as CME director, and her general mistreatment of them. Plaintiff told the consultant that Wood was "weird" with her, and "I think she likes me," but did not elaborate or explain what she meant. When later asked why she did not report the alleged sexual harassment at that time, plaintiff replied both that she was embarrassed, and that she hoped to use Wood's affection for her to plaintiff's advantage in securing favorable work assignments.

During an unrelated argument in the fall of 1993, plaintiff confronted Wood and told her that she had "reported" Wood to personnel, and that plaintiff had requested a transfer out of the CME department.[1] Plaintiff stated that no further acts of sexual harassment occurred except for an isolated incident in 1994 when Wood told plaintiff that after watching an X-rated movie, she had a dream that plaintiff was stripping in front of her.

Work relations between Wood and plaintiff continued to deteriorate, with the women exchanging accusations of incompetency and insubordination. Plaintiff spoke with Wood's supervisor and advised her that she would like to work part-time.

In April 1994, plaintiff met with Rick Bryant in human resources, again complaining about Wood. Plaintiff admitted that at that time she knew that her job was in jeopardy because rumors of possible layoffs had been going around the hospital. Plaintiff told Bryant that she was concerned about the reputation of the CME department and that she had little confidence in Wood's management. Plaintiff stated that she was having a difficult time getting used to working with Wood, and that she had heard that perhaps Wood was looking for another job out of town. The next day, Bryant met with both plaintiff and Wood to discuss the problems with their working relationship, and he urged the women to try to get along and put their problems in the past. No references were made at this meeting by either plaintiff or Bryant regarding any allegations of sexual harassment.

On April 7, 1994, MAHSI management sent out a directive to all supervisors to prepare recommendations for organization-wide labor force reductions. As a result of this directive, Wood and her supervisor met to discuss how to restructure the CME department. Wood opposed her supervisor's suggestion that plaintiff's position be reduced to half-time; nevertheless, her supervisor prevailed and instructed Wood to honor plaintiff's request for part-time hours.

On May 6, 1994, plaintiff received a letter from Wood advising that, "per your request, and to support recent cost-cutting at MAHSI," her position would be changed to half-time. Plaintiff complained that she did not want to work part-time in the CME department, and requested a transfer to another department.

On June 1, 1994, plaintiff received a letter from the director of MAHSI's human resources department which formally notified plaintiff that, as a result of an organization-wide reduction in force, her position as CME coordinator was being reduced to half-time. Plaintiff was given the option of accepting the half-time position or signing a separation agreement and release and receiving eight weeks of severance pay. Plaintiff refused the half-time position, and also refused to sign the release agreement.

On June 2, 1994, plaintiff wrote a detailed account of Wood's alleged sexual harassment. On June 4, 1994, she met with Bryant to discuss her accusations further. MAHSI conducted a formal investigation of plaintiff's complaints of sexual harassment, which concluded on June 30, 1994. Wood received a "step one verbal warning" and was placed on probation for ninety days regarding the incident at the hotel.

Plaintiff filed a five count complaint against MAHSI and Wood alleging (I) hostile work environment sexual harassment; (II) retaliatory discharge; (III) intentional infliction of emotional distress; (IV) tortious interference with contractual relations; and (V) breach of contract. Count II was dismissed by stipulation of the parties. Defendants filed a motion for summary disposition regarding the remaining counts, which was granted by the trial court pursuant to MCR 2.116(C)(10). Plaintiff now appeals the trial court's ruling with regard to counts I, II, and V.

II

The trial court properly granted defendant's' motion for summary disposition in Count I, hostile work environment sexual harassment.

The Michigan Civil Rights Act, 37.2101 *et seq.;* MSA 3.548(101) *et seq*., prohibits employment discrimination on the basis of sex "with respect to a term, condition or privilege of employment . . . ." In pursuit of equality in the workplace, the act broadly defines sexual discrimination to include sexual harassment:

> Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
>
> (i) Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment . . . .
>
> (ii) Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment . . . .
>
> (iii) Such 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. [MCL 37.2103(i); MSA 3.548(103)(i).

In the present case, plaintiff alleges she was subjected to hostile work environment harassment. The following five elements are required to establish a prima facie case:

(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 Elliott*, 442 Mich 368, 382; 501 NW2d 155 (1993).][2]

In its opinion in support of its order granting defendants' motion for summary disposition, the trial court determined that plaintiff failed to present evidence raising a question of fact regarding the fourth and fifth elements.

As correctly noted by the trial court, "[t]he mere fact that sexual harassment has occurred will not justify recovery under a 'hostile work environment' claim. Rather, the severity of the harassment becomes an issue." *Langlois v McDonald's Restaurants of Michigan Inc*, 149 Mich App 309, 313; 385 NW2d 778 (1986). We determine whether the alleged conduct reaches the level of actionable sexual harassment using the following standard:

> [A] hostile work environment claim is actionable when the work environment is so tainted that, in the totality of the circumstances[4] , a reasonable person in the plaintiff's position 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 employment environment." [*Radtke, supra*, 442 Mich at 372.]

After a careful review of the record, we find that some of Wood's alleged conduct was distasteful and offensive. However, when viewed in the light most favorable to the plaintiff, we find that as a matter of law the conduct at issue here was not sufficiently severe or pervasive to alter the conditions of plaintiff's employment and create an abusive working environment. *Id*. Accordingly, summary disposition pursuant to MCR 2.116(C)(10) was proper on this count.[3]

III

Plaintiff next challenges the trial court's grant of summary disposition on her claim of unlawful retaliation. We find no error here.

The Michigan Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., prohibits employers from retaliating against an employee because he has opposed a violation of the act, or because he has filed or has participated in a formal charge or investigation concerning a violation. MCL 37.2701(a); MSA 3.548(701)(a). To establish a prima facie case of unlawful retaliation, 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 Inc*, 23 Mich App 432, 436; 566 NW2d 661 (1997) (citations omitted).]

Even if we were to assume that plaintiff established a prima facie case under the act, defendants rebutted this presumption by presenting evidence that MAHSI had suffered severe financial difficulties and had instituted an organization-wide reduction in force directive in response to this economic necessity. See *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906(1998). After a careful review of the entire record in a light most favorable to plaintiff, we conclude that plaintiff failed in her burden to produce sufficient evidence to raise a genuine issue of material fact regarding whether defendants' assertion of economic necessity was a mere pretext to mask a desire to retaliate against plaintiff for raising allegations of sexual harassment. Id. at 174. Accordingly, we affirm the trial court's grant of summary disposition on this count.

IV

Plaintiff argues that the trial court erred in finding that she was an employee at will. We disagree. The language contained in MAHSI's handbook and policies is insufficient, as a matter of law, to overcome the presumption of employment at will. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 164-166; 579 NW2d 906 (1998).

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Peter D. O'Connell

[1] Plaintiff did not say what she had "reported" to the human resources department.

[2] Defendant Wood argues that plaintiff was required to allege that Wood was homosexual. We disagree. Michigan Courts have held that pursuant to the Civil Rights Act, sexual harassment must be "gender-based," that is, but for the fact of the victim's sex, he or she would not have been the object of harassment. *Radtke v Everett*, 442 Mich 368, 383; 501 NW2d 155 (1993). Accordingly, where the alleged harassment is "gender neutral," or equally offensive to both men and women, it is not actionable. *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 341; 497 NW2d 585 (1993). See also *Barbour v Dept of Social Services*, 198 Mich App 183; 497 NW2d 216 (1992) (holding that although harassment based on a person's perceived sexual orientation is not proscribed by the act, specific homosexual advances directed to the plaintiff by his supervisor, which were directly related to plaintiff's status as a male, were actionable).

In addition, we note that a unanimous United States Supreme Court has recently held that sex discrimination consisting of same-gender sexual harassment is actionable under Title VII and that it is not

necessary that the harasser be shown to be homosexual or bisexual. *Oncale v Sundowner Offshore Serv Inc*, ___ US ___; 118 S Ct 998, 1002; 140 L Ed 2d 201 (1998)

[4] When considering the totality of the circumstances, the following factors are relevant:

> [T]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required. [*Harris v Forklift Systems, Inc*, 510 US 17, 23; 114 S Ct 367; 126 L Ed 2d 295 (1993).]

As instructed by the United States Supreme Court in *Oncale*, *supra* at 1003, "Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simply teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

[3] Because of our holding on this issue, we need not address plaintiff's claim regarding the timeliness of plaintiff's notice to MAHSI of Wood's alleged harassment, or her challenge to the adequacy of MAHSI's investigation and the leniency of Wood's discipline.