STATE OF MICHIGAN

COURT OF APPEALS

LINDA COLEMAN,

Plaintiff-Appellant,

v

STATE OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
August 27, 1999

No. 202847
Jackson Circuit Court
LC No. 96-076996

Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM

Plaintiff filed a complaint alleging that her supervisor in the Department of Corrections sexually harassed her. The trial court granted defendant's motion for summary disposition because plaintiff failed to produce any evidence of sexual harassment.[1]

I

FACTS AND PROCEEDINGS

Plaintiff, an employee at the Egeler Correctional Facility in Jackson, alleges that Thomas Phillips, deputy warden and plaintiff's immediate supervisor, sexually harassed her following a prisoner's assault and attempted rape of plaintiff. Plaintiff avers that Phillips created a sexually hostile work environment by (1) having plaintiff come to his office to check the appropriateness of her clothes, and (2) influencing coworkers at the prison to believe she dressed provocatively.

Plaintiff began work as an investigator at the Egeler Correctional Facility in Jackson in1986. In 1987 or 1988, Thomas Phillips became deputy warden and plaintiff's immediate supervisor. Plaintiff alleges that shortly afterward, Phillips confided in her that he found her attractive, but that he could not have a relationship with her because he would not be unfaithful to his wife. On other occasions, Phillips spoke admiringly of plaintiff's appearance, but never again expressed his interest in a relationship with her. Plaintiff does not contend that Phillips touched her or that he asked her for a date or for sexual favors at any time. Indeed, there is no claim that Phillips ever said anything of an overtly sexual nature or that he did anything that can be construed as sexual in nature. Plaintiff also alleges that Phillips

frequently called her to his office to discuss problems with her performance and to sign counseling memoranda. She claims that he would turn the conversation to personal matters, such as her relationship with her boyfriend. Plaintiff avers that it was unnecessary for Phillips to summon her to his office, and that he did so as a pretext to discuss non-work related matters. She also contends that his criticism of her work was unjustified, because she successfully challenged most of the counseling memoranda and reprimands through her union. Though plaintiff says she believes that her refusal to respond to Phillips' "attentions" caused him to resent her, and prompted the alleged harassment, there is no assertion by plaintiff that Phillips ever asked for any emotional or romantic involvement. Further, there is no record evidence to suggest that Phillips expressed any prurient interest regarding plaintiff's sex life.

In April, 1994, a male prisoner armed with a "shank" attacked plaintiff in a female employee's restroom, held her hostage, and attempted to rape her. Prison employees quickly overcame the prisoner, and plaintiff suffered only superficial physical injury. Plaintiff claims that afterwards, she and Phillips had several discussions in which he insinuated that she provoked the assault by dressing alluringly. However, plaintiff admits that Phillips never said so directly. Plaintiff believes that Phillips' actions following the assault promoted the idea throughout the prison that plaintiff had provoked the assault by dressing provocatively, and that this created a hostile workplace environment. On the other hand, Phillips maintains that plaintiff's coworkers—including the guards who intervened to help her during the assault—complained about her clothing, and that he was responsible for responding to these concerns. Indeed, Officer Waldron filed a sexual harassment complaint against plaintiff, alleging that her clothing posed a danger for male employees, because they would have to intervene if a prisoner attacked plaintiff. Plaintiff denies ever wearing inappropriate attire in the prison. Phillips testified that although he never saw plaintiff wearing provocative clothing, he received several complaints to that effect.

Because plaintiff's coworkers complained to Phillips about plaintiff's provocative attire, Phillips instructed them to notify him if plaintiff was wearing an inappropriate outfit. He also instructed a female employee (who later became plaintiff's immediate supervisor) to check plaintiff's clothing on a daily basis. Plaintiff estimates that approximately seven to ten times after the assault[2], Phillips called her to his office to check her attire.[3] Plaintiff emphasizes that he asked her to remove her overcoat and turn around during these checks. Another female employee was present on at least one of these occasions. Phillips never deemed any of plaintiff's outfits to be inappropriate. Plaintiff says that she felt intimidated by this conduct. Although plaintiff has conceded that Phillips, as her immediate supervisor, was the person responsible for looking into complaints about her clothing, she nonetheless speculates that Phillips was actually behind the officers' complaints about her clothing.[4] However, she has no evidence to support this belief.

In May, 1994, plaintiff filed an internal sexual harassment complaint against Phillips, based on the clothing checks.[5] Plaintiff complained that staff members were saying that she dressed provocatively, and that prisoners were saying that she "deserved what [she] got." She stated "I believe that Deputy Phillips started all of this" by instructing an officer to watch her. On July 2, 1994, Warden Jessie Rivers issued a counseling memorandum to Phillips, admonishing him for "poor managerial

conduct" and "spitefulness" toward plaintiff. Rivers agreed to remove the memorandum from Phillips' employment file after six months. Although plaintiff did not make any further complaints against Phillips, she has alleged that he continued to call her to his office six or seven times a day to discuss non-work related matters and plaintiff's personal life. Eventually Phillips became acting warden, a position which had no direct supervisory authority over plaintiff.[6] Plaintiff has not complained about either of the deputy wardens who succeeded Phillips as her direct supervisor.

Plaintiff also blames Phillips for remarks Deputy Warden Charles Sprang made during a sexual harassment training seminar in November, 1995. Plaintiff did not attend this seminar, but she alleges, upon the word of other attendees, that Sprang raised questions about an unnamed employee who wore spiked heels, mini skirts, no slips, and no panties, who provoked a sexual assault by the prisoner. Another attendee advised plaintiff that Sprang described an employee who "wears no panties or bra and struts around the yard." Plaintiff believes that every attendee at the meeting knew that Sprang must have been talking about her. Plaintiff alleged that after she filed a sexual harassment complaint against Sprang, Sprang told her that he had no personal knowledge of inappropriate clothing, and that his remarks were based on information received from Phillips. Sprang has not corroborated this account. However, in a sworn affidavit, Sprang stated that employees complained about plaintiff's workplace attire and conduct, specifically that she wore inappropriately short skirts and see-through clothing, and that she slept in the restroom during work hours. The regional administrator investigated plaintiff's complaint against Sprang, and concluded that Sprang's remarks did not constitute sexual harassment because the purpose of the seminar was to address issues of concern to employees, and because Sprang complied with seminar rules by not using a name.

After taking a disability leave, purportedly due to workplace stress, plaintiff filed this lawsuit in July, 1996. Ultimately, the trial court granted defendant's MCR 2.116(C)(10) summary disposition motion, stating:

> I, frankly, can't really find there was harassment in this case. If there was, I think the Department of Corrections corrected the problem as soon as it was brought to someone else's attention, but I really don't think there was any.

Plaintiff now appeals.

II

LAW AND ANALYSIS

This Court reviews a trial court's summary disposition orders de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions under MCR 2.116(C)(10) test the factual support of the plaintiff's claim. *Id.* The court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.* Both this Court and the trial court must resolve all reasonable inferences in the nonmoving party's favor. *Bertrand v Allan Ford*, 449 Mich 606, 618; 537 NW2d 185 (1995).

The Michigan Elliott-Larsen Civil Rights Act prohibits employment discrimination on the basis of sex, including sexual harassment. MCL 37.2103(h), 37.2202(1)(a); MSA 3.548(103)(h), 3.548(202)(1)(a). The statute recognizes both "quid pro quo" and "hostile environment" sexual harassment. *Champion v Nation Wide Security*, 450 Mich 702, 708; 545 NW2d 596 (1996). Here, plaintiff has proceeded solely on a hostile environment theory.[7] To establish a prima facie case of hostile environment sexual harassment, plaintiff must establish the following elements:

> (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. MCL 37.2103(h), 37.2202(1)(a); MSA 3.548(103)(h), 3.548(202)(1)(a). [*Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993) (footnotes omitted).]

Here, the trial court concluded that plaintiff had failed to establish that harassment had occurred. We agree. Plaintiff has failed to establish proofs on the second, third and fourth elements.

A

To establish the second element, plaintiff must show that "but for the fact of her sex, she would not have been the object of harassment." *Radtke*, *supra* at 383. Plaintiff cannot satisfy this element. Plaintiff's allegations of harassment primarily stem from her speculation that Warden Phillips believed that she incited the prisoner assault by dressing provocatively. The crux of plaintiff's complaint is that Phillips created a hostile environment against her in the prison by somehow indoctrinating prison employees and prisoners to believe that plaintiff "asked for it"—not that Phillips sought a romantic liaison with her. Specifically, she alleges that Phillips' monitoring of her attire and Sprang's inquiries about inappropriate attire at a sexual harassment seminar constituted unwelcome conduct on the basis of sex because a man would not have been treated the same way.

We find no gender-related basis for any of this conduct because it could have been directed at a man or woman. Provocative or otherwise inappropriate dress is not a peculiarly feminine concern, especially in a prison setting, where male-on-male sexual assaults are a well-known hazard. For example, a male guard who wore tight pants and a half-unbuttoned shirt would pose the same concerns for prison officials as an immodestly dressed female employee. Plaintiff has thus failed to establish the second element of a hostile environment claim. Furthermore, plaintiff lacks evidentiary support for these allegations. She has not demonstrated, through deposition testimony, affidavits, or otherwise, that any

prison employee or prisoner came to believe, by Phillips' instigation, that plaintiff induced the assault by dressing provocatively. This is merely plaintiff's own surmise.

Plaintiff's argument appears to be based on the assumption that Phillips' concern with provocative clothing necessarily reveals a "blame the victim" attitude and exposes him as a misogynist. We disagree. Plaintiff has failed to produce any evidence to support her conjecture that Phillips held such an attitude. Furthermore, Phillips' concern is warranted, given the prison environment. Plaintiff did not work in a ordinary workplace among law-abiding people who can be counted on to exercise self-control. She worked in a prison, among convicted criminals. Hence, it is understandable that Phillips was concerned that appropriate attire and decorous behavior—by men and women—was not simply a matter of professionalism, but security. This is not the sort of "blame the victim" mentality that has been roundly discredited in sexual assault cases, but rather a common-sense realization that prison employees must exercise the utmost caution for their own safety and the safety of their coworkers. As we stated in *McCallum v Department of Corrections*, 197 Mich App 589, 599, 601; 496 NW2d 361 (1992), "[b]y its very nature a prison is a hostile workplace", to be contrasted from an ordinary workplace where "normally law-abiding citizens [are] employed under nonhostile conditions and in a nonhostile environment." Given the volatile nature of the prison setting, Phillips' heightened concern over proper attire, and specifically plaintiff's clothing, was prudent, particularly after a sexual assault. Plaintiff's surmise that this was motivated by sexism is conjecture and speculation, not proof.[8]

B

Plaintiff also has failed to establish that Phillips' or Sprang's alleged conduct was of a *sexual nature*, as required by the third element. Our Supreme Court recently elaborated upon this element in *Koester v City of Novi*, 458 Mich 1; 580 NW2d 835 (1998).[9] The Court stated that "[a] trier of fact may find sexual harassment when "the harasser is motivated by general hostility to the presence of women in the workplace." *Id.*, 15 (quoting *Oncale v Sundowner Offshore Services, Inc*, 523 US 75; 118 S Ct 998, 1002; 140 L Ed 2d 201 (1998)). The Court noted that under the *Oncale* decision, "'harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.'" *Koester*, 15 (quoting *Oncale*, 118 S Ct 1002.) Applying these standards, the Court concluded that harassing conduct related to the plaintiff's pregnancy was "sexual" in nature, as it would not have occurred but for the plaintiff's gender. *Koester*, 16-18.

In contrast, plaintiff here has not shown that the alleged conduct was in any way motivated by hostility toward women, or otherwise related to discrimination on the basis of sex. In *Koester*, the alleged harassment was based on pregnancy, a condition unique to women. Furthermore, the defendant's harassing conduct in *Koester* was inextricably connected to employment discrimination on the basis of sex. For example, the plaintiff's police captain suspended her for refusing a short-notice overtime request when she was unable to find a babysitter, although another male officer had requested, and had been denied, an overtime assignment for the same shift. *Id.*, 17.

Here, however, plaintiff has not shown that the alleged conduct was motivated by a general hostility toward women. Although plaintiff produced evidence that defendant disciplined her by giving her reprimands, she has not shown that this was related to her sex.[10] We have already rejected

plaintiff's argument that Phillips' concern over attire evinced misogyny. Her proofs on the third element thus fail, and defendant was entitled to summary disposition.

C

Finally, we conclude that plaintiff has failed to show that any of Phillips' conduct created an intimidating, hostile, or offensive work environment. Our Supreme Court held in *Radtke, supra* "that an objective reasonableness standard is mandated by the plain meaning" of Elliott-Larsen. *Id.,* 386. "[T]he inquiries in a hostile work environment action inherently involve an examination of the reasonableness of the alleged perpetrator's conduct: 'hostile,' 'intimidating,' and 'offensive' are terms primarily determined by objective factors." *Id.*, 386-387 (footnotes omitted). The *Radtke* Court further held:

> a reasonableness inquiry is necessary to fulfill the purpose of the act. As noted, the purpose of the act is to combat *serious demeaning and degrading conduct* based on sex in the workplace, and to allow women the opportunity to fairly compete in the marketplace. The reasonableness inquiry (i.e., objectively examining the totality of the circumstances) in a hostile work environment action, is simply a method of objectively determining whether a hostile work environment existed. 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.*, 387.]

The United States Supreme Court has further elaborated on the fourth element of hostile environment claims, holding that while a plaintiff need not demonstrate psychological harm from the alleged conduct, she must show that "the environment would reasonably be perceived, and is perceived, as hostile or abusive." *Harris v Forklift Systems, Inc*, 510 US 17, 22; 114 S Ct 367; 126 L Ed 2d 295 (1993). The Court determines whether the environment was sufficiently "hostile" or "abusive" "by looking at all the circumstances . . . [which] may include the 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." *Id.*, 23.

Read together, *Radtke* and *Harris* dictate a two-pronged inquiry for the fourth hostile environment element: first, the plaintiff must show that the alleged conduct can be objectively recognized as hostile, or intimidating, or offensive; second, she must show that the conduct, in its totality, rose to the level of creating a hostile or abusive work environment. We believe plaintiff's claim fails on both grounds. We do not believe that a reasonable person would have found Phillips' conduct hostile, intimidating, or offensive, especially given the unique circumstances of prison employment. Plaintiff's subjective view that the clothing inspections were intimidating is not sufficient to create a question of fact on this matter. Similarly, her subjective perception of the seminar incident does not establish, for summary disposition purposes, that the alleged conduct was hostile or offensive. Finally, plaintiff failed

to produce any evidence to support her claim that Phillips set out to influence prisoners and employees against plaintiff, or that anyone harbored an ill opinion of plaintiff because of Phillips' influence.

Furthermore, were the alleged conduct to be considered offensive, in totality it would not be enough to create a hostile work environment. A review of decisions by this Court and our Supreme Court demonstrates the degree of conduct judged sufficiently severe to constitute a hostile work environment. In *Radtke, supra*, the plaintiff's employer forcibly embraced her and refused to release her. *Id.*, 375-376. In *Chambers v Trettco, Inc*, 232 Mich App 560; 591 NW2d 413 (1998), the plaintiff's manager grabbed her buttocks and breasts, asked her to have oral sex with him in a hotel, and announced his desire to put whipped cream on plaintiff's breasts and between her legs and lick it off. *Id.*, 563. In *Howard v Canteen Corp*, 192 Mich App 427; 581 NW2d 718 (1992), the harasser asked the plaintiff whether she paid her boyfriend for her sexual favors; asked her how she could "keep up with" a younger man; told plaintiff that she should not work out in public, and informed her that the company would never promote women to upper management positions. *Id.*, 433. In *Eide v Kelsey-Hayes Co*, 154 Mich App 142; 397 NW2d 532 (1986), rev'd in part on other grounds 431 Mich 26 (1988), the plaintiff's foreman touched her and asked for sex, and her coworkers displayed a poster-size picture of a nude woman, referred to plaintiff by a pornographic nickname, and attached an obscene drawing to her back without her knowledge. *Id.*, 147-148.

In contrast, several federal cases illustrate how obnoxious, rude, and puerile behavior is not necessarily sufficient to create a hostile environment, even when tangentially related to sex. In *Stoeckel v Environmental Management Systems, Inc*, 882 F Supp 1106 (DC D 1995), the plaintiff alleged that the harasser complimented her on her appearance, informed her of his dating activities, rubbed her neck and shoulders, and postured himself as if to kiss her. *Id.*, 1109. In *Weller v Citation Oil & Gas Corporation*, 84 F3d 191 (CA 5, 1996), the plaintiff's supervisor made statements to the effect that she was possessed by the "Spirit of Jezebel" which tends to corrupt society. *Id.*, 193-194. In *Schweitzer-Reschke v Avnet, Inc*, 874 F Supp 1187, the supervisor inquired about the plaintiff's sex life, recommended that she please vendors by flirting with them and wearing short skirts, and instructed her to pose as a baby in an advertisement. *Id.*, 1193-1195. In *Munday v Waste Management of North America, Inc*, 858 F Supp 1364 (D Md 1994), rev'd in part on other grounds 126 F3d 239 (CA 4, 1997), the plaintiff's dispatcher and coworkers denied her access to the women's bathroom, made comments about her bathroom use, accused her of "'taking food out of the mouths of men'" by working in a man's job, required her to go to the men's changing area and bathroom to get her schedule, and made comments over truck radios that plaintiff was "on the rag" and "under sexual pressure." *Id.*, 1367-1368, 1373-1374. In all of these cases, the court determined that the alleged conduct was not enough to establish sexual harassment.

Accordingly, we conclude that a reasonable person could not have found the alleged conduct sufficiently severe to alter plaintiff's working environment. Clearly, the alleged conduct towards plaintiff is lacking in any measurable degree of intrusiveness or humiliation. The clothing checks which plaintiff found so objectionable fall far short of this level. Similarly, we cannot say that Sprang's inquiry about provocative outfits was sufficient to alter plaintiff's work environment.

Because plaintiff has failed to demonstrate a question of fact with respect to workplace sexual harassment, we need not consider the respondeat superior element of a hostile environment action against her employer.

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra

[1] MCR 2.116(C)(10)

[2] Plaintiff does not specify the dates or the time frame in which these checks occurred.

[3] Defendant contends that Phillips checked plaintiff's clothing only once. Under the MCR 2.116(C)(10) standard, we accept plaintiff's allegation as true.

[4] Officer Waldron, one of the employees who rescued plaintiff during the assault, filed a sexual harassment complaint against plaintiff. Waldron complained that plaintiff's provocative dress created a danger for male employees who would have to defend her against assault. It is not clear what, if any, action was taken on Waldron's complaint.

[5] In this complaint, plaintiff also described the "couch incident". Plaintiff surmises that Phillips encouraged hostility against her by removing a couch from the restroom where the assault occurred. After the assault, Phillips had the maintenance staff remove a couch from the women's restroom where the assault occurred and instructed the staff not to replace it. According to plaintiff's version of events, Phillips removed the couch to give the impression that she had "lain in wait" for the prisoner to attack her. She alleges that at least one of the maintenance workers made a joke to this effect. According to defendant's account, the removal of the couch was unrelated to the assault. Defendant maintains that Phillips ordered the couch removed several months *before* the attack, in 1993, but had to give this order a second time (coincidentally after the assault) because it had been returned. (In her internal sexual harassment complaint, plaintiff admitted that Phillips had the couch removed in late 1993, and that Phillips had rebuked her for spending too much time in the restroom.) Defendant maintains that Phillips wanted the couch removed because plaintiff's coworkers complained that she napped on the couch and "trashed" the women's restroom by leaving cosmetics and other debris littered about. We cannot see any manner in which this incident qualifies as hostile environment sexual harassment.

[6] Plaintiff does not specify when Phillips became acting warden, or when his status was changed to warden. Apparently, he was still serving as warden at the time plaintiff filed this appeal. Plaintiff says that she felt more intimidated after Phillips became acting warden, although Phillips no longer has direct supervisory authority over her. (According to Phillips' affidavit, which plaintiff does not contradict, he no longer was plaintiff's immediate supervisor after May, 1994.) Nonetheless, plaintiff maintains that Phillips continued to call her to his office after she made the internal complaint.

[7] Plaintiff has not sought relief on a quid pro quo theory. Although plaintiff alleges that Phillips was attracted to her, she has never claimed her employment, or the conditions of her employment, were made conditional on her response to Phillips' statements. MCL 37.2103(i)(i), (ii); MSA 3.548(103)(i)(i), (ii); *Champion, supra* at 708-709.

[8] Further, it would be conjecture and speculation for a factfinder to conclude that Phillips was motivated by an attraction he had expressed toward plaintiff some six or seven years earlier, rather than security concerns.

[9] While we are constrained to follow the Supreme Court's decision *Koester*, we believe that the majority's opinion is inconsistent with the plain language of Elliott-Larsen. Elliott-Larsen provides that sex discrimination "*includes* sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication *of a sexual nature . . .*" MCL 37.2103(h)(i); MSA 3.548(103)(h)(i). This language implies *two* separate elements of sexual harassment: (1) that it be directed against an individual on the basis of sex; *and* (2) that it involve overtures or other conduct *of a sexual nature*. Indeed, the Supreme Court previously recognized these as two distinct elements of a hostile environment claim. *Radtke, supra* at 382-383. The *Koester* majority declared, however, that a plaintiff does not have to show that the conduct was of a "sexual nature" as that term is usually understood and as it was interpreted by this Court's decision in *Koester*. 213 Mich App 653; 564 NW2d 46 (1997). Instead, a plaintiff can satisfy the "sexual nature" element merely by showing that the conduct was directed against an individual on the basis of sex. We believe that this interpretation renders the "sexual nature" element merely redundant of the "on the basis of sex" element. Consequently, this ruling contradicts the statutory language by merging two distinct requirements into one, thereby lowering the evidentiary bar. Justice Weaver's vigorous dissent in *Koester*, joined by Justices Brickley and Taylor, remarked on this discrepancy and observed that the majority's decision contravened the legislative intent to address sexual harassment as "a form of misconduct distinct from sex discrimination." *Id.*, 24 (Weaver, J., concurring in part and dissenting in part).

[10] Plaintiff has, in fact, undermined her own position by stating that other female employees did not receive such treatment.