STATE OF MICHIGAN

COURT OF APPEALS

LINDA COLEMAN,

Plaintiff-Appellant,

v

STATE OF MICHIGAN,

Defendant-Appellee.

FOR PUBLICATION
August 27, 1999

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

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

KELLY, J. (dissenting)

I respectfully dissent.

I disagree with the majority's conclusion that defendant's motion for summary disposition was properly granted. I believe plaintiff has alleged facts sufficient to present a prima facie case of hostile work environment sexual harassment. I would reverse the order of the trial court and remand for trial.

As to the second element of her claim, that but for the fact of plaintiff's sex she would not have been subjected to the harassment, *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993), I believe plaintiff has adequately alleged facts to support this element. The facts of this case clearly show a supervisor, Thomas Phillips, to have had a "crush" on a female employee, plaintiff. The majority opinion details the frequency of Phillips' monitoring sessions and notes that we are to accept plaintiff's allegations as true under MCR 2.116(C)(10). These monitoring sessions took place after years of Phillips having plaintiff report to his office for so-called work related meetings that allegedly turned to a discussion of plaintiff's personal life.

The majority finds that the conduct of monitoring plaintiff's attire is not gender-related because such activity could have been directed at a male. The long history of sexual innuendo Phillips exhibited towards plaintiff bolsters plaintiff's claim that she was being singled out because of her gender. At the very least, a question of fact has been presented. Further, I disagree with the majority's analogy that an inspection for provocative clothing could be just as necessary for a man as a woman in a prison setting. The assumption that male-on-male sexual assault is so prevalent in a prison as to justify this type of

inspection for male employees is an invasion of the fact finder's province.[1] The assumption that plaintiff is trying to evoke a "blame the victim" attitude on the part of Phillips is more of the same.

Next, I disagree with the majority's conclusion that Phillips' and Sprang's conduct was not of a sexual nature. In *Koester v City of Novi*, 458 Mich 1, 14-15; 580 NW2d 835 (1998), our Supreme Court clarified that sexual harassment need not involve sexual overtures or attraction; rather, the claim need only be supported by evidence that members of one sex are exposed to disadvantageous terms and conditions of employment that members of the opposite sex are not. While the majority has rejected plaintiff's assertion that she was disciplined on account of her gender, I believe the record indicates a history of Phillips' attraction for plaintiff and his subsequent inappropriate, or at least questionable, conduct of repeatedly critiquing plaintiff's attire.

Finally, the majority concludes that a reasonable person would not have found Phillips' ogling hostile, intimidating, or offensive given the unique circumstances of prison employment. I disagree. Plaintiff testified that the constant scrutiny she was subject to caused her great stress and required her to take a medical leave of absence. A reasonable person could find being called to one's supervisor's office two or three times a day to discuss one's personal life as intimidating, hostile or offensive. Further, having one's movements monitored while at work and having one's attire scrutinized by modeling for a supervisor could be considered intimidating or offensive to a reasonable person. Read in a light most favorable to plaintiff, I conclude that a sufficient factual controversy exists to warrant a reversal of the trial court's order granting defendant summary disposition.[2]

I would reverse.

/s/ Michael J. Kelly

[1] While male-on-male sexual assaults may be a common occurrence in this country, an appellate court should not take judicial notice of such prevalence where the record is silent on the subject.

[2] This Court is liberal in finding a genuine issue of material fact, *Marlo Beauty Supply Inc v Farmers Ins*, 227 Mich App 639; 561 NW2d 882 (1997).