STATE OF MICHIGAN

COURT OF APPEALS

THOMAS LOWANDE,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee

UNPUBLISHED
September 17, 1999

No. 210164
LC No. 96-085085 CZ

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff, an employee of defendant, claimed that the conduct of his female supervisor, violated the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., by subjecting him to gender discrimination, hostile work environment sexual harassment, and retaliation. Plaintiff appeals only with respect to the gender discrimination and sexual harassment claims. We affirm.

On appeal, this Court reviews de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

Plaintiff first alleges that the trial court improperly considered defendant's summary disposition motion because the motion was not supported by an affidavit. The claim is without merit. Affidavits are not required in support of MCR 2.116(C)(10) motions. *Michigan National Bank-Oakland v Wheeling*, 165 Mich App 738, 742-743; 419 NW2d 746 (1988). Rather, MCR 2.116(G)(3)(b) states only that affidavits, depositions, admissions, or other documentary evidence is required to support the motion. *Id.* In the instant case, defendant supported its motion for summary disposition with the pleadings and plaintiff's deposition. In light of this "other documentary evidence," the absence of a supporting affidavit for defendant's summary disposition motion does not require reversal.

Plaintiff next argues that the trial court erred in dismissing his claims for failure to set forth a prima facie case under *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d

668 (1973), because according to plaintiff, he was not required to establish a prima facie case under *McDonnell Douglas*. We disagree. A plaintiff need not establish a prima facie case under the *McDonnell Douglas* framework if he presents direct evidence of discrimination. *Harrison v Olde Financial Corp*, 225 Mich App 601, 609; 572 NW2d 679 (1997). Examples of direct evidence include derogatory comments about race, *id.* at 610, and statements such as "'If I have to, I will get rid of the older guys – you older guys and replace you with younger ones.'" *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998).

In this case, plaintiff has not cited the specific portions of his deposition testimony and affidavit that he alleges constitute the direct evidence of discriminatory animus. In reviewing plaintiff's affidavit, we note that he avers that his supervisor "specifically told [him] that the reason he wasn't being allowed to go [to an awards banquet] was because he was male. . . ." However, plaintiff's deposition contradicts this assertion and indicates that, in regard to the awards banquet, the supervisor told plaintiff that she wanted to take a female coworker because "this was kind of a girl thing." "Parties may not create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition." *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 234; 477 NW2d 146 (1991), citing *Peterfish v Frantz*, 168 Mich App 43, 54-55; 424 NW2d 25 (1988). Other than the inaccurate allegation regarding the awards banquet, we could find no evidence of any statement or action that constituted the type of direct evidence that has previously been cited as sufficient to take a discrimination case out of the *McDonnell Douglas* framework. In the absence of such direct evidence of discrimination, the trial court did not err in evaluating plaintiff's claim under the *McDonnell Douglas* framework.

Plaintiff alleges, nonetheless, that he established a prima facie case with regard to both his gender discrimination and sexual harassment claims. An employee may establish a prima facie case of gender discrimination by showing either disparate treatment or intentional discrimination. *Hickman v W-S Equipment Co, Inc*, 176 Mich App 17, 20; 438 NW2d 872 (1989), citing *Dixon v W W Granger, Inc*, 168 Mich App 107, 114; 423 NW2d 580 (1987).

Plaintiff alleges that he was subjected to both forms of gender discrimination. His disparate treatment claim is premised on allegations that defendant accorded a female lieutenant preferential treatment with regard to discipline for department violations. Plaintiff also makes similar claims with regard to the department's response to violations by his supervisor.

To establish discrimination by showing disparate treatment, the plaintiff must show "that there are similarly situated individuals who have been treated differently because of their sex." *Schultes v Naylor*, 195 Mich App 640, 645; 491 NW2d 240 (1992), citing *Marsh v Dep't of Civil Service (After Remand)*, 173 Mich App 72, 79; 433 NW2d 820 (1988). In construing the "similarly situated" requirement of a prima facie case of age discrimination under the Age Discrimination in Employment Act of 1967 as amended, 29 USC 623(a), the court in *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344, 352 (CA 6, 1998), explained that "similarly situated" does not require that the plaintiff be identical in every single aspect of employment to the other employees the plaintiff alleges have been more favorably treated. Rather, the plaintiff must simply prove "that all of the relevant aspects of his employment situation were 'nearly identical' to those of [the females'] employment situation." *Id.*,

quoting *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994). Thus, in the context of alleged discriminatory disciplinary action, in order to be deemed "similarly situated,"

> the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. [*Mitchell v Toledo Hospital*, 964 F2d 577, 583 (CA 6, 1992).]

To the extent plaintiff argues that he was treated differently than his female supervisor, the argument fails because she and plaintiff neither had the same supervisor, nor engaged in the same conduct, and therefore were not similarly situated. Likewise, plaintiff and the female lieutenant, although sharing the same supervisor and presumably subject to the same standards, did not engage in the same conduct with differing results. Plaintiff has not shown that any of the conduct for which he claims he was discriminatorily disciplined was the same as the conduct he alleges that the lieutenant engaged in without repercussion. Because plaintiff and the female lieutenant were not similarly situated, plaintiff did not establish a disparate treatment theory of gender discrimination.

Turning to plaintiff's intentional discrimination claim, he argues that defendant intentionally discriminated against him when his supervisor instituted a shift change policy and allegedly did not require the female lieutenant to continue in the rotation after she rotated to plaintiff's morning shift. A prima facie case of intentional discrimination includes evidence of an adverse employment action. See *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360; ___ NW2d ___ (1999). Thus, the dispositive issue here is whether the shift change constituted an adverse employment action.

An adverse employment action includes actions such as "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Kocsis v Multi-Care Management, Inc*, 97 F3d 876, 886 (CA 6, 1996), citing *Crady v Liberty National Bank & Trust Co*, 993 F2d 132, 136 (CA 7, 1993). Two concepts are integral to finding an adverse employment action:

> (1) the action must be materially adverse in that it is more than "mere inconvenience or an alteration of job responsibilities," *Crady, supra* at 136, and (2) there must be some objective basis for demonstrating that the change is adverse because "a plaintiff's 'subjective impressions as to the desirability of one position over another' [are] not controlling," *Kocsis, supra* at 886, quoting *Kelleher v Flawn*, 761 F2d 1079, 1086 (CA 5, 1985). [*Wilcoxon, supra* at 364 (brackets in original; footnote omitted).]

Here, plaintiff neither alleges that the shift change altered his duties or status, nor that it resulted in a decrease in pay. Other than interfering with plaintiff's Knights of Columbus meetings, plaintiff cites no adverse effect resulting from the shift change. Moreover, plaintiff testified that when he was moved to the night shift when the second rotation of the shift change occurred in April 1997, he had no problem with working this shift. We therefore conclude that plaintiff did not suffer an adverse employment

action. As such, plaintiff cannot establish a prima facie case of intentional discrimination, and the trial court did not err by summarily disposing of this claim.

The trial court also properly granted summary disposition to defendant on plaintiff's hostile work environment sexual harassment claim. The elements of a prima facie case of a hostile work environment claim are:

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

Here, plaintiff alleged that his supervisor subjected him to hostile work environment sexual harassment by posting a "Women Working" sign, making inquiries into plaintiff's sex life, and asking plaintiff whether a brassiere pictured in a catalog would enhance her cleavage.

Plaintiff failed to establish his prima facie case on two counts. First, he was required to show that the questions posed to him created a hostile work environment. *Id.* at 380, citing MCL 37.2103(h); MSA 3.548 (103)(h). "The essence of a hostile work environment action is that 'one or more supervisors . . . create an atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment for them.'" *Id.* at 385, quoting *Lipsett v University of Puerto Rico*, 864 F2d 881, 897 (CA 1, 1988). On this basis, this Court has held that a single incident, in which a supervisor made lewd, suggestive comments to an eighteen-year-old female employee and then briefly placed his hand on her breast and grabbed her buttocks, was not sufficient to show a hostile work environment. *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich App 309, 314; 385 NW2d 778 (1986). Similarly, in *Ferguson v E I duPont de Nemours & Co, Inc*, 560 F Supp 1172, 1181-1182 (D Del, 1983), the court concluded in dicta that the plaintiff had not shown conduct pervasive enough to show a hostile work environment although the plaintiff alleged that her supervisor smacked her buttocks once as she was leaving his office, called her into his office for "heart to breast" talks, referred to her as his girlfriend in public, inquired about her sex life, opined on her promiscuity, and made several lewd comments to her. Also, in *Seep v Commercial Motor Freight, Inc*, 575 F Supp 1097 (SD Ohio, 1983), the court found that the plaintiff had not demonstrated a hostile work environment based on her allegations that male employees made suggestive remarks to her, possessed

and displayed pornographic material, and otherwise attempted to embarrass the company's female employees. Based on these cases, we conclude that the supervisor's inquiries regarding plaintiff's sex life and the brassiere and the posting of the "Women Working" sign were not sufficiently severe or pervasive so as to subject plaintiff to a hostile work environment.

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder