STATE OF MICHIGAN

COURT OF APPEALS

DENISE WALKER,

Plaintiff-Appellant,

v

CITY OF DETROIT and BERNARD REED,

Defendants-Appellees.

UNPUBLISHED
September 28, 1999

No. 207220
Wayne Circuit Court
LC No. 96-644710 NO

Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition to defendants on her claim for sexual harassment employment discrimination. We affirm.

Plaintiff is a police officer employed by defendant City of Detroit. In 1988, plaintiff was transferred to the seventh precinct, where defendant Bernard Reed was a sergeant and plaintiff's immediate supervisor. The two developed a personal intimate relationship, which plaintiff terminated in April 1992. Plaintiff alleged that in the spring of 1993 through 1994, defendant Reed sexually harassed her, which included inappropriate touching, threats that she would be put on street patrol, threats that she would be disciplined for insubordination and rudeness, presentation of her in a bad light to the precinct's commander and others, and attempts to reestablish their relationship. In November 1994, a lieutenant in the precinct observed Reed touching plaintiff in an inappropriate manner at work, conducted an investigation, and recommended that he be disciplined. The next month Reed was promoted and transferred to another precinct. In March 1996, defendant's EEO coordinator found that Reed had violated the police department's policy on sexual harassment and recommended that he be disciplined. Reed was ultimately found guilty by the police trial board of "mistreatment of any person or prisoner" and "willful disobedience of rules or orders" and suspended for two days without pay.

Plaintiff filed a complaint under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, for sexual harassment. Both defendants moved for summary disposition. The trial court did not indicate under which subrule it granted summary disposition. However, because it appears that the court looked beyond the pleadings in making its determination and did not appear to consider whether plaintiff had alleged facts warranting the application of an

exception to governmental immunity, this Court will construe the motions as having been granted under MCR 2.116(C)(10). *Swan v Wedgwood Christian Youth and Family Services, Inc*, 230 Mich App 190, 194; 583 NW2d 719 (1998); *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

This Court reviews a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 138; 565 NW2d 383 (1997). Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Quinto v Cross and Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996); *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

MCL 37.2103(i); MSA 3.548(103)(i) provides:

> 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, public accommodations or public services, education, or housing.
>
> (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, public accommodations or public services, education, or housing.
>
> (iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

The first two subsections set forth two theories under which a party may make out a claim for what has been labeled "quid pro quo" harassment. *Champion v Nationwide Security, Inc*, 450 Mich 702, 708; 545 NW2d 596 (1996). The third subsection sets forth what is most often referred to as "hostile work environment" sexual harassment. *Radtke v Everett*, 442 Mich 368, 381; 501 NW2d 155 (1993).

Plaintiff alleges the second type of quid pro quo sexual harassment. To succeed on such a claim, a party must establish: "(1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute, and (2) that her employer or the employer's agent used her

submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment." *Champion, supra* at 708-709.

The meaning of the phrase "decisions affecting such individual's employment" as used in the ELCRA has not been defined by Michigan courts. In *Burlington Industries, Inc v Ellerth*, 524 US 742; 118 S Ct 2257, 2268-2269; 141 L Ed 2d 633, 652-653 (1998),[1] the United States Supreme Court described a "tangible employment action" under Title VII:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. . . .
>
> * * *
>
> A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. . . .
>
> * * *
>
> Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . .

Plaintiff concedes that she was not subject to a tangible employment action as defined by the Supreme Court. She argues, however, that Michigan courts have not required a plaintiff alleging quid pro quo sexual harassment under the ELCRA to demonstrate a tangible job detriment. Plaintiff's reliance for this argument on *Champion, supra*, is misplaced. In *Champion*, the Supreme Court found that the supervisor's decision to rape the plaintiff constituted the requisite decision affecting employment for purposes of MCL 37.2103(i)(ii); MSA 3.548(103)(i)(ii), and that the plaintiff was constructively discharged by the supervisor's act of rape. *Id.* at 711. Thus, the *Champion* plaintiff did suffer a tangible job detriment, constructive discharge.

To succeed on a quid pro quo sexual harassment claim under the ELCRA, a plaintiff must establish that the employer or the employer's agent used submission or rejection to unwelcome sexual conduct or communication as the basis for a decision affecting the plaintiff's employment. This definition requires a detrimental employment action, and plaintiff has not demonstrated that she suffered any tangible employment action. Plaintiff was not removed from her position as the precinct commander's clerk, there was no change in her working conditions or benefits, and no evidence was presented that the department failed to promote her because of Reed's actions. Therefore, the trial court did not err in finding that plaintiff could not succeed on a quid pro quo sexual harassment claim.

To state a prima facie case of hostile work environment sexual harassment, a plaintiff must establish five 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. [*Radtke, supra* at 382-383.]

Plaintiff established the first element merely by being defendant's employee. "[A]ll employees are inherently members of a protected class in hostile work environment cases because all persons may be discriminated against on the basis of sex." *Id.* at 383. To meet the second element of the prima facie case, a plaintiff "need only show that 'but for the fact of her sex, she would not have been the object of harassment.'" *Id.*, quoting *Henson v Dundee*, 682 F2d 897, 904 (CA 11, 1982). Plaintiff alleged that defendant Reed inappropriately rubbed her arm, ear, and neck and positioned his body in close proximity to hers while on the job. She further alleged that Reed told her at work that he loved her and would always have a special place in his heart for her and threatened her with discipline for insubordination and rudeness when she rejected his advances. Accepting plaintiff's allegations as true, defendant Reed's conduct towards her was "inferentially sexually motivated," because he would not have displayed this conduct towards a male employee. *Id.* at 384. Plaintiff has sufficiently established that she was subjected to communication or conduct on the basis of her sex.

Plaintiff further alleges that the conduct and communication was unwelcome. In the context of a sexual harassment claim, conduct is unwelcome where "'the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive.'" *Id.*, quoting *Burns v McGregor Electronic Industries, Inc*, 955 F2d 559, 565 (CA 8, 1992), rev'd 989 F2d 959 (CA 8 1993), quoting *Hall v Gus Const Co, Inc*, 842 F2d 1010, 1014 (CA 8, 1988). Plaintiff presented the deposition testimony of another officer, which established that plaintiff complained to her on five to ten occasions in 1993 and 1994 about Reed's conduct at work. This was a sufficient showing that Reed's conduct was unwelcome.

The next element that plaintiff must meet to establish a prima facie case of hostile work environment sexual harassment is that the unwelcome conduct or communication was intended to or in fact did substantially interfere with her employment or created an intimidating, hostile, or offensive work environment. *Id.* at 385. Whether the unwelcome sexual conduct or communication created a hostile work environment "shall be determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or

having the purpose or effect of creating an intimidating, hostile, or offensive employment environment. MCL 37.2103(h); MSA 3.548(103)(h)." *Radtke, supra* at 394. A plaintiff must also usually prove that "(1) the employer failed to rectify a problem after adequate notice, and (2) a continuous or periodic problem existed or a repetition of an episode was likely to occur." *Id.* at 395. In order to be actionable, the sexual harassment must be severe or pervasive. *Chambers v Trettco*, 232 Mich App 560, 563; 591 NW2d 413 (1998).

Plaintiff correctly argues that she did not have to prove a tangible job loss in order to state a claim for hostile work environment sexual harassment. However, she has not shown that Reed's conduct was so severe or pervasive that a reasonable person "would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Radtke* at 394. Plaintiff presented depositions of co-workers and superiors to establish that she appeared uncomfortable when Reed was around and established that Reed told others that she was immature and needed more street experience. However, plaintiff never complained to any authority figure in the police department about Reed's conduct. She did not speak to the commander for whom she clerked. She did not even tell her father, a sergeant in the department, about the problems that she was having. She acknowledged the problem only after the new administrative lieutenant observed Reed touch plaintiff on the ear and neck during a meeting on November 8, 1994. Although we find that a reasonable person would find Reed's conduct offensive, we do not view it as sufficiently severe or pervasive to create a hostile work environment, especially given that plaintiff was not willing to complain to anyone in the department.

Further, plaintiff cannot establish the final element of a hostile work environment claim, respondeat superior. An employer can avoid liability for a hostile work environment claim "'if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment.'" *Radtke, supra* at 396, quoting *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991). To show that the employer bears responsibility for harassment ordinarily requires showing either that a recurring problem existed or a repetition of an offending incident was likely and the employer did not rectify the problem upon adequate notice. *Id.* at 382. Here, the police department did not have notice of the alleged harassment until Lieutenant Logan observed Reed's inappropriate touching of plaintiff on November 8, 1994. The department was not placed on notice by an earlier allegation against Reed, which was dismissed. Although defendant's timeliness in taking action is not impressive, nonetheless plaintiff was protected from any further workplace misconduct by Reed shortly after the observed incident. Thus, once defendant had notice of Reed's conduct towards plaintiff it took steps to ensure that no repetition of the offending incident was likely. *Radtke, supra* at 382.

Because we find that the trial court properly granted summary disposition to defendants on plaintiff's claim, we need not address her remaining issue.

Affirmed.

/s/ Jeffrey G. Collins
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

[1] Defendant Reed argues in his supplemental brief against reliance on federal cases that interpret Title VII. While such cases are not binding on this Court, "Michigan courts regard federal precedent in questions analogous to those present under the Michigan civil rights statutes as highly persuasive." *Schellenberg v Rochester, Michigan Lodge No 2225 of the Benevolent and Protective Order of Elks of the USA*, 228 Mich App 20, 47; 577 NW2d 163 (1998), quoting *Collister v Sunshine Food Stores, Inc*, 166 Mich App 272, 274-275; 419 NW2d 781 (1988).