

STATE OF MICHIGAN
COURT OF APPEALS

SHEABRA SIMPSON,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
November 6, 2001

No. 220050
Wayne Circuit Court
LC No. 97-702866-NO

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court orders granting defendant summary disposition pursuant to MCR 2.116(C)(10) with regard to plaintiff's claims of race and gender discrimination, racial and sexual harassment, and retaliation, and pursuant to MCR 2.116(C)(7) with respect to those claims falling outside the applicable statute of limitations. We affirm.

Plaintiff first argues that the circuit court erred in granting defendant summary disposition because she presented sufficient evidence to raise a genuine issue of material fact whether defendant discriminated against her in failing to promote her because of her race and gender. We review de novo a trial court's decision on a motion for summary disposition. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). The motion may be granted when, except with regard to amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

An employer is prohibited from discriminating against an individual with respect to employment, compensation, or a term, condition, or privilege of employment because of race or gender. MCL 37.2202(1)(a); *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). To establish a prima facie case of failure to promote based on race or gender, a plaintiff must

present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job

was given to another person under circumstances giving rise to an inference of unlawful discrimination. [*Id.*]

Once the plaintiff presents a prima facie case of discrimination, the burden shifts to the defendant to articulate a non-discriminatory reason for the adverse employment action. *Id.* at 463-464. To prevail, the employee must then present evidence that the employer's explanation was a pretext for discrimination. *Id.* at 465-466.

Here, defendant demonstrated that its decision to not promote plaintiff was based on non-discriminatory reasons; i.e., plaintiff was not as qualified as the individuals who received promotions. A plaintiff can establish that a defendant's articulated legitimate, non-discriminatory reasons are pretexts (1) by showing the reasons had no basis in fact, (2) if they had a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998). In this case, plaintiff has failed to establish that defendant's business decision had no basis in fact. Additionally, plaintiff has failed to present evidence establishing that differences between her qualifications and those of the individuals who were promoted were not the actual factors motivating defendant's decisions. Accordingly, the circuit court did not err in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) on plaintiff's discrimination claims.

Plaintiff next argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) with regard to her claim of racial harassment. Plaintiff contends specifically that defendant's decision to not promote her is evidence of racial harassment. The elements of a prima facie case of racial harassment are: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct – here, failure to promote – on the basis of the protected status; (3) the employee was subject to unwelcome conduct or communication involving the protected status; (4) the unwelcome conduct 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. *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996). Here, plaintiff failed to present evidence sufficient to meet elements two and three because, as discussed above, plaintiff did not present evidence sufficient to establish that defendant's decision to not promote her was related to her race. Accordingly, the circuit court did not err in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) on plaintiff's claim of racial harassment.

Plaintiff next argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) on her claim of sexual harassment. Discrimination in employment because of sex is a violation of a person's civil rights. *Corley v Detroit Bd of Ed*, 246 Mich App 15, 19; 632 NW2d 147 (2001). Discrimination because of a person's sex includes sexual harassment. *Id.* To present a prima facie case of hostile work environment harassment, as alleged here, the employee must show the same five elements as required for a claim of racial discrimination, except that the protected status is gender, rather than race. *Chambers v Tretco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000); *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).

Here, plaintiff has failed to show a prima facie case of sexual harassment sufficient to withstand summary disposition because even presuming plaintiff met elements one through three, she failed to meet elements four and five. Specifically, the brief, sporadic episodes of alleged harassment occurred over a number of years, and under a reasonable person standard, were not sufficient to raise a genuine issue of fact with regard to whether the alleged harassment created a hostile work environment. *Radtke, supra* at 385-394.

Plaintiff next argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) with regard to her claim of retaliation. The Civil Rights Act prohibits an employer from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the act. MCL 37.2701(a); *Feick, supra* at 344. To prove a prima facie case of retaliation, a plaintiff must show the following:

(1) that the plaintiff 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. [*Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001), quoting *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000), citing *DeFlavis v Lord & Taylor, Inc*, 223 Mich App 432, 437; 566 NW2d 661 (1997).]

Here, defendant has shown that plaintiff was less qualified than the candidates chosen for the disputed positions, and plaintiff has failed to establish a causal connection between her filing of complaints and defendant's failure to promote her. Accordingly, the circuit court did not err in granting summary disposition pursuant to MCR 2.116(C)(10) with regard to her claim of retaliation.

Finally, plaintiff argues that the trial court erred in holding that the continuing violations doctrine did not apply to plaintiff's claims of harassment, discrimination, and retaliation that occurred before January 30, 1994. An action for employment discrimination under the Civil Rights Act must be brought within three years after the cause of action accrued. *Briggs v Barden Cablevision of Inkster, Inc*, 166 Mich App 189, 193; 420 NW2d 99 (1987), rev'd on other grounds 430 Mich 869; 422 NW2d 240 (1988), citing MCL 600.5805(8).¹ Plaintiff filed her complaint on January 30, 1997, setting forth discrimination and harassment claims based on acts that took place from 1989 to 1997. Absent some exception to the statute of limitations, then, those claims based on acts occurring before January 30, 1994 are barred.

Here, the only possible applicable exception is the continuing violation doctrine set forth in *Sumner v Goodyear Co*, 427 Mich 505, 524-542; 398 NW2d 368 (1986). However, the continuing violations doctrine is not applicable because there was no "series of events" that were

¹ MCL 600.5805 has since been amended. The cited provision is now found at MCL 600.5805(9). 2000 PA 2.

“sufficiently related so as to constitute a pattern, only one of which occurred within the limitation period.” *Id.* at 528. During the applicable limitations period, plaintiff had no contact with James Taylor, Joyce Wheeler, Julie Woodling, or Dr. Jane Stewart – individuals she claims discriminated against her; therefore, those individuals’ acts cannot evidence a policy or plan of discrimination or harassment. Further, because plaintiff filed numerous internal complaints and grievances regarding discrimination and harassment beginning in 1990, she cannot now claim she was unaware of her rights and the duty to assert them. Therefore, the circuit court did not err in dismissing, pursuant to MCR. 2.116(C)(7), plaintiff’s claims of discrimination and harassment that allegedly occurred before January 30, 1994.

Affirmed.

/s/ Jeffrey G. Collins

/s/ William B. Murphy

/s/ Kathleen Jansen