STATE OF MICHIGAN

COURT OF APPEALS

JOANNE SMOYER,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
November 27, 2001

No. 223043
Jackson Circuit Court
LC No. 98-090596-CL

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Plaintiff Joanne Smoyer, a former corrections officer, appeals as of right. She challenges the trial court's order granting summary disposition to defendant Department of Corrections pursuant to MCR 2.116(C)(10) in this action alleging that the Department discriminated against her on the basis of sex, race, and disability, in violation of the Civil Rights Act (CRA)[1] and the Persons with Disabilities Civil Rights Act (PWDCRA).[2] We affirm.

I. Basic Facts And Procedural History

Smoyer, who describes herself as Caucasian in appearance, with green eyes and blond hair, began working for the Department as a corrections officer in February 1989, voluntarily transferring to a different facility in 1992. She worked late shifts at this second prison facility without incident until fall 1996, when the Department assigned her to work an earlier shift. This schedule change required her to work with different supervisors and co-workers. Smoyer considered this new work environment hostile because of several incidents in which, she says, she was exposed to racially discriminatory language targeting her and others, she was subject to sexually harassing remarks and conduct, and she was subject to comments and mocking behavior directed at her disability, which is partial deafness.

In her deposition, Smoyer detailed the racial comments she felt made her work environment hostile, explaining as a preliminary matter that she had learned from her father that

[1] MCL 37.2101 *et seq*.

[2] MCL 37.1101 *et seq*.

her great-great-great grandmother was African. In 1996, Smoyer shared this aspect of her heritage with corrections officer Mary Brown, her co-worker. In early 1997, another co-worker, Sergeant Hendricks told her that she was "nothing but a half breed n----r." Smoyer reportedly told Vicki Lothenhauser, a Department sexual harassment counselor, about Sergeant Hendricks' statement. Whether the Department took any action concerning this incident is unclear. At another time, Smoyer said, she overheard a conversation concerning corrections officer Cabrina Hale, an African-American, in which she heard corrections officer Kulas say to Lieutenant Lammon, "How much f-----g longer do I have to train this stupid bitch. They can't learn." Lieutenant Lammon purportedly responded, "First you have to get them out of the trees before you can train them." According to Smoyer, she heard corrections officer Diane Bartells refer to African Americans as "n-----s" and make derogatory comments about African Americans on more than occasion, even saying "f-----g n-----s, I hate them" while referring to gangs. On another occasion, Smoyer said, she overheard a discussion between corrections officer Phillips and Captain Bobbett. Corrections officer Phillips was relating a conversation he had previously had with a man at an airport in which he asked the man about a motel in the area and the man replied, "Don't go there, it's went downhill since the sand n-----s took it over." When Captain Bobbett spoke about this discussion with Smoyer, he allegedly explained that corrections officer Phillips was merely repeating what he had heard, not what he believed.

Smoyer also outlined a number of comments and incidents that made her perceive her work environment as hostile to her because of her sex. During winter 1996, Sergeant Hendricks often referred to her as "hey girl." She responded by stating "my name is Officer Smoyer." Sergeant Hendricks admitted referring to Smoyer in this way in his deposition testimony. In another instance, Smoyer said, after she wore a red dress to a work Christmas party in 1996, Lieutenant Lammon commented that he had "heard about Jo [Smoyer] in that red dress at the Christmas party." Smoyer described the dress as modest, neither having a "low-cut" neckline nor a short hemline. In early 1997, Sergeant Morris commented to her that he could use a "blow job," which Smoyer related to her friend, corrections officer Brown. Further, when testifying at his deposition, Captain Bobbett admitted that he joked with Smoyer that he was going to leave his family and take her to Hawaii to open a bikini shop.

Smoyer described three specific instances in which the alleged sexual harassment went beyond language to conduct. First, corrections officer Goodwin grabbed her wrist and tried to pull her into his lap. Although Capt. Bobbett was present at the time and saw this happen, he did nothing.

In the second instance, in March 1997, Captain Rudolph, who knew that Smoyer's husband worked with telephone equipment, allegedly lured her into a closet by asking her if she wanted to see the telephone equipment in the closet. Once inside the closet, Captain Rudolph purportedly put his arms around her and pulled her to him. Smoyer stated that she froze in place while he unbuttoned her shirt, told her that her breasts were beautiful, and then attempted to button one of the buttons. Smoyer then grabbed her shirt and ran to the bathroom. She never told anyone at the facility about this incident, but, during a training class on sexual harassment in

1997, corrections officer[3] Biggs put his arm around her and told the others in the class "you guys go ahead, Jo and I are going to go into the closet."

Third, Smoyer stated that, around April 1997, she was leaving her post to take a break when she walked through a group of prison staff, including Sergeant Hendricks, corrections officer Phillips, and corrections officer Goodwin. Smoyer heard corrections officer Goodwin say "tailhook, tailhook."[4] Smoyer then turned and saw corrections officer Goodwin make a motion as if to pinch corrections officer David Straub. When she walked passed these individuals on her way back to her post, either corrections officer Goodwin or Sergeant Hendricks again repeated "tailhook." Although no one actually touched her, Smoyer said that corrections officer Goodwin made gestures or pinching motions toward her.

Smoyer also alleged that she had been subject to remarks that discriminated against her on the basis of her disability, which is partial deafness. Lieutenant Lammon reportedly stated that Smoyer "only hears when she wants to." Similarly, when Smoyer spoke with Captain Bobbett concerning her hearing impairment, Bobbett told her she should consider retiring or getting a different job because, if someone was hurt or killed because she could not hear, she would feel bad the rest of her life. On at least one occasion, other prison staff cupped their ears and pretended not to be able to hear while Smoyer was nearby.

Smoyer asserts that, as a result of these comments and events, she had an emotional breakdown at work. A letter from psychologist John S. Hand, Ph.D., confirms that he diagnosed her as suffering from "an adjustment disorder with mixed emotional features" and placed her on a medical leave of absence in April 1997.

Shortly after she went on this leave, Smoyer filed an extensive written complaint with the Department in which she outlined many of these allegations of racial, sexual, and disability discrimination. The Department staff member appointed to investigate her complaint was corrections officer Biggs, the individual who reportedly made a comment about going into the closet with Smoyer while they were at a sexual harassment training class; however she did not include her allegation about him in her written complaint to the Department.

Corrections officer Biggs was able to substantiate Smoyer's claims that Sergeant Hendricks had referred to her as "hey girl" and a "half-breed" or "n----r." Because this language violated the Department's harassment policies, the Department eventually suspended Sergeant Hendricks for twenty days. Though concluding that Captain Bobbett's remarks to Smoyer

[3] Biggs' title is not exactly clear. By April 1997, he was an Acting Inspector. For the sake of simplicity, we refer to him as corrections officer Biggs.

[4] Smoyer evidently interpreted the remarks as referring to the 1991 scandal in which dozens of individuals, mainly women, were assaulted and sexually molested at a convention of military aviators, defense contractors, and others who belonged to the Tailhook Association. Many of the sexual and physical assaults that occurred at the Tailhook Convention happened in a hotel hallway the victims were forced to pass through, which they referred to as the "Gauntlet." See *The Navy Blues: The clash of values and politics in the post-Tailhook Navy* (visited June 4, 2001) <http://www.pbs.org/wgbh/pages/frontline/shows/navy/>.

regarding her hearing could be interpreted as suspect, corrections officer Biggs was unable to determine whether they violated the Department's disability discrimination policies because his investigation revealed that his remarks, as heard by others and taken in context, could be interpreted as an expression of concern for Smoyer. Corrections officer Biggs' investigation also confirmed that corrections officer Phillips made the inappropriate comment about the conversation he had with an old man at an airport and that Captain Bobbett acted inappropriately by not addressing the comment. Corrections officer Biggs was not able to substantiate any of Smoyer's other allegations at issue in this case, primarily because no one was able to confirm what Smoyer heard, observed, or experienced, or because others had different views of what occurred. It is not clear what actions the Department took concerning the individuals involved in the incidents corrections officer Biggs was able to substantiate.

While Smoyer was on medical leave, she received worker's compensation. When she exhausted her medical leave, the Department placed her on a "waived rights leave of absence" at her request. Smoyer did not return to work at the end of the period allowed for this "waived rights leave of absence." As a result, the Department terminated her employment approximately two years after she went on medical leave.

After Smoyer filed this action, the trial court granted the Department's motion for summary disposition on Smoyer's sex discrimination claim. It reasoned that Smoyer had failed to create a question of fact concerning whether the Department was liable under a respondeat superior theory because she failed to notify the Department of many of the incidents and, when she did notify the Department, it took prompt and appropriate action. The trial court granted summary disposition of Smoyer's race discrimination claim on the grounds that she was not in the protected class for those claims and failed to show disparate treatment or discharge because of race. The trial court granted summary disposition of Smoyer's disability discrimination claim, explaining that she had failed to show that she was discharged on the basis of her disability and never asked for an accommodation to perform her job. Though the trial court indicated that it was summarily disposing of each of these claims under MCR 2.116(C)(8) and (10), that it looked to the evidence in the record indicates that it actually granted the motion only under MCR 2.116(C)(10).

II. Standard Of Review

Whether the trial court properly granted summary disposition is a question appellate courts review de novo.[5]

III. Legal Standard For Summary Disposition

"A motion for summary disposition under MCR 2.116(C)(10) . . . tests the factual support of a claim . . . ."[6] MCR 2.116(G)(5) requires the reviewing court to consider "affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or

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[5] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201(1998).

[6] *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

submitted by the parties . . . ." The court reviews this documentary evidence in the "'light most favorable to the nonmoving party.'"[7] However,

> an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.[8]

In other words, summary disposition is appropriate "'if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact,[9] and the moving party is entitled to judgment as a matter of law.'"[10]

IV. Hostile Environment: Sexual And Racial Harassment

Michigan law provides a cause of action for an employee whose work environment is or was hostile with regard to a characteristic or status protected under the CRA, including race and sex.[11] In order for Smoyer to survive the motion for summary disposition on her sexual harassment and racial harassment claims under the CRA, she had to demonstrate that a question of fact existed[12] concerning each of the five elements that apply equally to her sexual harassment and racial harassment claims.[13] Because our review is de novo, we are free to address the element of Smoyer's prima facie case on each of these claims that we believe to be dispositive, specifically the fifth element: respondeat superior.[14]

As a doctrine, respondeat superior allows an injured party to hold an employer vicariously liable for its employees' acts.[15] "The [CRA] expressly addresses an employer's vicarious

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[7] See *id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

[8] MCR 2.116(G)(4).

[9] See *Richardson v Michigan Humane Society*, 221 Mich App 526, 527-528; 561 NW2d 873 (1997).

[10] *Smith*, *supra* at 454-455, quoting *Quinto*, *supra*.

[11] See MCL 37.2202(1).

[12] See *Richardson*, *supra* at 527-528.

[13] *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993) (defining elements of a hostile work environment cause of action in sexual harassment context, including respondeat superior); see also *Quinto*, *supra* at 368-369; 547 NW2d 314 (1996) (applying the elements delineated in *Radtke* to hostile environment claims generally under the CRA).

[14] *Radtke*, *supra* at 383.

[15] See *Sanders v Clark Oil Refining Corp*, 57 Mich App 687, 690; 226 NW2d 695 (1975).

liability for . . . harassment committed by its employees by defining 'employer' to include both the employer *and* the employer's agents."[16] However,

> [u]nder the Michigan Civil Rights Act, an employer may avoid liability "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment."[17] Such prompt and appropriate remedial action will permit an employer to avoid liability if the plaintiff accuses either a co-worker, or a supervisor of sexual harassment. An employer, of course, must have notice of alleged harassment before being held liable for not implementing action. However, if an employer is accused of sexual harassment, then the respondeat superior inquiry is unnecessary because holding an employer liable for personal actions is not unfair.[18]

Consequently, "a plaintiff must show some *fault* on the part of the employer."[19] In a suit alleging a hostile work environment rather than an adverse employment decision, the plaintiff-employee must demonstrate that the "employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment."[20]

We have no reservation about giving Smoyer the benefit of all reasonable doubts concerning the actual hostility toward race and sex in her work environment and the effect that that hostility had on her ability to perform her job. Not only is her testimony clear on these points, but the Department was able to document a number of her allegations in its internal investigation. Nevertheless, as we intimated at the outset of this section, she failed to create a question of fact concerning respondeat superior. The Department cannot be held liable for failing to investigate and remedy offensive conduct that it did not know was occurring.[21]

With respect to the two incidents Smoyer did report, she did not create a question of fact indicating that the Department failed to conduct an adequate investigation and take appropriate remedial action. Because she does not explain what the Department should have done but failed to do, the evidence on the record suggests that the investigation was adequate and the response appropriate. For instance, Sergeant Hendricks testified during his deposition that an investigation was conducted into his use of "hey girl" when referring to female officers. Sergeant Hendricks explained that he received a questionnaire from corrections officer Biggs asking him about his conduct in both circumstances and, after the investigation, he was disciplined for referring to female officers as "hey girl." In particular, Sergeant Hendricks noted that the warden demanded that he stop calling female officers "girls" and refer to them instead as

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[16] See *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d 910 (2000).

[17] Quoting *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991).

[18] *Radtke*, *supra* at 396-397 (citations and footnotes omitted).

[19] *Chambers*, *supra* at 312.

[20] *Id*. at 313.

[21] See *Radtke*, *supra* at 396-397 ("An employer, of course, must have notice of alleged harassment before being held liable for not implementing action.").

"Officer." This was, in fact, how Smoyer asserted that she wanted to be addressed when she confronted Sergeant Hendricks. Smoyer has not explained why this was an inadequate remedy.

Following the investigation into the "tailhook incident," the Department concluded that Smoyer's allegations of wrongdoing were unsubstantiated because the other individuals alleged to have been present during the incident denied hearing any inappropriate statements or observing any pinching. Clearly, because Smoyer and the other individuals providing information relevant to the investigation had different views on what occurred, the Department was forced to examine their individual credibility in order to decide which people to believe. The Department chose to believe the evidence contradicting Smoyer's claims. Having found no sexual harassment, the Department did not impose any consequences for the participants in the alleged incident.

Smoyer has failed to provide any authority or record evidence that would call into question the adequacy of this investigation or the decision not to institute any reforms because of it. For example, Smoyer fails to explain why the Department was barred from making a factual determination when credibility was at issue; that the Department ignored overwhelming evidence contrary to its conclusion; that the Department purposefully avoided receiving evidence that would have substantiated her claims; or that the investigation process was otherwise flawed in a way that would work against substantiating a meritorious allegation or providing a necessary remedy. Nor does she provide any authority that every report of alleged sexual harassment must lead to disciplinary or other remedial action. The record leaves no controverted question of fact that the Department failed to investigate and take appropriate action with respect to the harassment Smoyer brought to its attention. Thus, the trial did not err when it granted summary disposition of the racial and sexual harassment claims.

V. Disability Harassment

Smoyer contends that she established a prima facie case of hostile work environment on the basis of disability harassment. Section 202 of the PWDCRA creates a cause of action for hostile work environment encompassing harassment on the basis of disability.[22] To establish a prima facie case of hostile work environment, a plaintiff must establish an "intimidating, hostile, or offensive work environment."[23] In order to determine whether a work environment is hostile, courts examine "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."[24]

Smoyer, however, failed to show that the unwelcome comments concerning her hearing loss created this intimidating, hostile, or offensive work environment. The comments allegedly

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[22] See *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 627; 576 NW2d 712 (1998).

[23] *Radtke*, *supra* at 382.

[24] *Quinto*, *supra* at 370, n 9, quoting *Harris v Forklift Systems, Inc*, 510 US 17, 23; 114 S Ct 367; 126 L Ed 2d 295 (1993) (O'Connor, J).

made were Lieutenant Lammon's statement that "she only hears when she wants to" and Captain Bobbett's statement that she should think about getting a different job "because if someone got hurt or killed because I couldn't hear, I would feel bad the rest of my life." Significantly, Smoyer indicated during the investigation into these comments that she did not think Captain Bobbett's statement was meant to offend but was merely a joke between friends. There was no evidence that Smoyer was subjected to these types of comments on a regular basis. Nor is there any evidence that Smoyer was physically threatened by the statements or that they interfered with Smoyer's work performance. Thus, the trial court properly dismissed Smoyer's disability discrimination claim pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Patrick M. Meter