STATE OF MICHIGAN

COURT OF APPEALS

ROSANNA L. MIRELES,

Plaintiff-Appellant,

v

GKN SINTER METALS, INC., and
GKN SINTER METALS – OWOSSO, INC.,

Defendants-Appellees.

UNPUBLISHED
July 1, 2004

No. 247059
Shiawassee Circuit Court
LC No. 00-005802-CZ

Before: Fitzgerald, P.J. and Bandstra and Schuette, JJ.

PER CURIAM.

In this retaliatory discharge case, plaintiff, Rosanna Mireles, appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

I. FACTS

Plaintiff claims that on September 15, 1999, she was fired from her employment at defendants' business due to her earlier complaint regarding Larry Lucious, a supervisor who plaintiff claimed sexually harassed her in the workplace. Plaintiff alleges retaliatory discharge in contravention of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.* (CRA).[1]

[1] Plaintiff's complaint is not explicitly clear regarding what cause or causes of action plaintiff intended to bring. Defendants' motion for summary disposition addressed both a CRA claim for sexual harassment and a CRA claim for retaliatory discharge. Plaintiff's response to defendants' motion for summary disposition states, "This is an excellent claim for retaliatory discharge. . . " and does not make mention of a sexual harassment claim. During the argument on the motion for summary disposition, both sides' arguments and the court's ruling brought forth some elements of sexual harassment, but it was not specifically stated that there was a claim for sexual harassment. Although Lucious' comments are very objectionable, in plaintiff's brief on appeal, plaintiff only discussed a retaliatory discharge claim. Thus we conclude that plaintiff only brought forth one claim, which was for retaliatory discharge, and therefore, we will only address the issue in accordance with the standard for retaliatory discharge.

Defendants hired plaintiff on September 9, 1997, as a press and oven operator. In January 1999, Lucious became plaintiff's supervisor. In May 1999, plaintiff went to production manager Tom Vogl and complained about verbal harassment by Lucious. Lucious had asked plaintiff if she received her job by performing oral sex on Vogl. Lucious would play with plaintiff's hair. Lucious also began playfully poking plaintiff in the sides and plaintiff told him to stop. Lucious would hover behind plaintiff as she worked. Lucious would also follow plaintiff to the bathroom and wait for her to come out. He also made inappropriate comments to other employees indicating that he believed plaintiff was looking at him lustfully. After plaintiff complained about Lucious to Vogl, Vogl had a discussion with Raj Renadeer, the general manager, after which Vogl, Renadeer, and plaintiff met to discuss the situation.

There were several meetings regarding this complaint. Renadeer stated that following one meeting with Lucious, Vogl, and plaintiff, he spoke with Lucious regarding his behavior. Following this meeting, Renadeer told plaintiff that if she had any further complaints to speak to him. There were no further complaints from plaintiff to Renadeer regarding sexual harassment from Lucious.

The company had started an employee committee to rewrite the absenteeism regulations, which was later disbanded. The committee had plaintiff sign a document on August 7, 1999, stating she had excess absenteeism and that if she had any more incidents of absenteeism in the 45 days following the notice, she would be terminated. On August 14, 1999, plaintiff was tardy because she overslept. On August 22, 1999, the excessive absenteeism document was modified to define "absent" to include being late and leaving early. The committee and management also allowed plaintiff's request to have September 11, 1999 off of work provided that she make up the hours. On September 15, 1999, plaintiff called into work and stated that she could not show up because she did not have a babysitter.

Plaintiff was terminated from her job for excessive absenteeism. Lucious had no role in the decision to terminate plaintiff. Vogl stated that he made the decision to terminate plaintiff without consulting anyone first. Vogl stated that he used the guidelines and rules set up for excessive absenteeism to make the decision.

On December 1, 2000, plaintiff filed her complaint. On September 17, 2002, defendants field a motion for summary disposition, stating that there was no sexual harassment by Lucious, that there was no interference with plaintiff's employment, that there was no pervasive conduct by Lucious, and that defendants took prompt remedial action. Plaintiff submitted a response brief stating that she had presented a prima facie case for retaliatory discharge. On October 25, 2002, defendants responded by stating that there was no causal connection between plaintiff's sexual harassment complaint against Lucious and her termination from the company. Defendants stated that plaintiff was terminated purely based upon her absenteeism.

The trial court heard the motion on February 14, 2003. After hearing arguments, the court found that in establishing a claim for retaliatory discharge, there was no nexus between her complaints, which established the protected activity and the termination from her employment. Plaintiff was placed on a probationary term by a group of her peers for her excessive absenteeism, and she violated the terms of her probation three times. Her termination was not related to her complaint about sexual harassment. The court found that there were no issues of

material fact in this case and entered an order granting summary disposition to defendants on February 14, 2003.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School District*, 255 Mich App 60, 67; 661 NW2d 586 (2003). In deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). 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. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000). Review is limited solely to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

III. ANALYSIS

Plaintiff argues that the trial court erred in granting summary disposition by failing to consider all of the evidence in the record in the light most favorable to the plaintiff and making factual determinations that should have been submitted to a jury. We disagree.

Plaintiff claims that she was discharged in retaliation for filing a sexual harassment complaint against her supervisor. There is no direct indication that her filing the charge against her supervisor was a factor in the determination to terminate plaintiff's employment.

The CRA, MCL 37.2202(1), provides, in relevant part:

> An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

The retaliation provision of the CRA, MCL 37.2701(a), states:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a change, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

This Court has interpreted the retaliation provision to require that a plaintiff prove a prima face case by showing:

> (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 Cmty College*, 245 Mich App 306, 315-316; 628 NW2d 63 (2001), citing *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000), citing *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

To establish the causation element, the plaintiff must show not just a causal link between her participation in activity protected by the CRA and her employer's adverse employment action, but that it was a "significant factor." *Barrett, supra*at 315 ; *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 929 (CA 6, 1999); *Polk v Yellow Freight System, Inc*, 801 F2d 190, 199 (CA 6, 1986).

In the present case, plaintiff's conduct of filing complaints with her employer in May 1999, regarding sexual harassment from her supervisor was "protected activity" for purposes of a retaliation claim. *Barrett, supra* at 315; see also MCL 37.2701(a) (prohibiting retaliation "because the person has . . . filed a complaint . . . under this act.") The complaints became known to defendants. Subsequently, plaintiff's employment with defendants was terminated. Thus, plaintiff presented sufficient evidence to satisfy the first three elements of her retaliation claim. For plaintiff to prevail on her retaliation claim, she must also establish causation.

The record is void of any connection between plaintiff's firing and her sexual harassment claims against her supervisor. The undisputed evidence shows that plaintiff was on probation for her attendance and that she violated that probation and was, therefore, terminated.

Plaintiff argues that the employee committee that placed her on probation was just formed to oust her from her employment. However, the committee placed two other employees on probation also. Larry Lucious, plaintiff's supervisor, was not on the committee, and did not have any role in plaintiff's termination. In one year, plaintiff was absent from her employment 44 days and tardy five times. The committee was not formed to terminate her employment, nor was their focus on her unexpected.

Given the violation of probation by plaintiff and her poor attendance record, plaintiff's sexual harassment complaints against her supervisor cannot be said to have been a "significant factor" in defendants' decision to discharge plaintiff. See *Jacklyn, supra* at 929; *Polk, supra*at 199. Consequently, without making any factual determinations that should be submitted to a jury, the trial court did not err in finding that her complaints cannot form the basis of a retaliation claim. *Meyer, supra* at 568-569 n 8.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette