STATE OF MICHIGAN

COURT OF APPEALS

E. DELBERT GRAY,

Plaintiff-Appellee,

v

MICHIGAN MINORITY BUSINESS DEVELOPMENT COUNCIL,

Defendant-Appellant.

UNPUBLISHED
September 18, 2008

No. 276693
Wayne Circuit Court
LC No. 05-529211-CD

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals by leave granted an order denying its motion for summary disposition. We reverse.

This case arises out of the vote of defendant's board against renewing plaintiff's employment contract on the basis that defendant needed to proceed under new leadership in "a new direction." On appeal, defendant argues that plaintiff failed to establish a prima facie case of retaliation. We agree.

The Court reviews de novo an appeal from an order granting summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth documentary evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

The Michigan Elliot-Larsen Civil Rights Act ("CRA"), MCL 37.2701, *et seq.*, provides, in relevant part, that an employer may not retaliate against an employee for opposing a violation of the act or making a charge, filing a complaint, or participating in a proceeding under the act.

MCL 37.2701. "To establish a prima facie case of retaliation, a plaintiff must show (1) that he engaged in a protected activity [i.e., that he opposed a violation of the act or made a charge, filed a complaint, or participated in a proceeding under the act]; (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." *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646, amended 473 Mich 1205 (2005) (citation omitted). The conduct of an employee cannot be opposed to a violation of the CRA unless it refers to some action of the employer that the employee reasonably believes is unlawful. See *EEOC v Crown Zellerbach Corp*, 720 F2d 1008, 1013 (CA 9, 1983) (analyzing § 704(a) of Title VII).

To receive protection, "[a]n employee need not specifically cite the CRA when making a charge under the act. However, the employee must do more than generally assert unfair treatment. The employee's charge must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA." *Barrett v Kirtland Community College*, 245 Mich App 306, 318-319; 628 NW2d 63 (2001) (internal citations omitted).

Plaintiff failed to establish a prima facie case because no evidence was presented that plaintiff was engaged in a protected activity. First, plaintiff's proposal to add Toyota, which plaintiff asserted had "an insensitivity to racial issues," to the board to create additional opportunities for minority business enterprises ("MBEs") was not a protected activity. Indeed, as defendant points out, no provision of the CRA governs defendant's board membership. Thus, the failure to add Toyota to the board was not an unlawful practice. Consequently, plaintiff's proposal to add Toyota to the board did not amount to opposition to a violation of the CRA and failed to raise even the specter of a claim of discrimination on defendant's part. On the contrary, plaintiff admitted that the purpose of the proposal was merely to provide additional opportunities for defendant's MBEs and to "hold Toyota more accountable." Further, no evidence was presented that the proposal in any way impugned a violation of the CRA to defendant. Therefore, the proposal to add Toyota to the board did not constitute a protected activity.[1]

Second, plaintiff's participation in the Exxon-Mobil ("Exxon") case did not amount to participation in a proceeding under the CRA. The Exxon case proceeded in federal court under 42 USC 1981 and 1982 rather than the CRA. Plaintiff contends that because the Exxon complaint alleged violations of "all relevant state claims" in addition to violations of federal law, and because the plaintiffs in that case alleged that the defendant discriminated against them in their attempt to obtain gas stations and distributorships, the CRA was implicated.[2] In context, however, the phrase "all relevant state claims" appears to be a boilerplate, catchall provision given that there was no reference whatsoever in that suit to the CRA. Further, although plaintiff

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[1] Similarly, plaintiff's generic claim that he "fought discrimination," without more, does not impugn a CRA violation to defendant.

[2] Section 2102 of the CRA prohibits discrimination on the basis of race with respect to the opportunity to obtain real estate.

cites *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 14-15; 506 NW2d 231 (1993), in support of the proposition that the CRA applies to cases of discrimination in real estate transactions, the plaintiff in that case filed suit under the CRA. In light of this analysis, we conclude that plaintiff's participation in the Exxon case was not a protected activity.

Even if the Exxon case involved a violation of the CRA, plaintiff's participation did not raise a specter of a claim of unlawful discrimination under the CRA. Plaintiff's participation concerned alleged wrongful practices with respect to Exxon, not defendant. Further, although plaintiff asserted that board member Charles Scales cautioned him against participating in that suit, plaintiff admitted that he received approval to participate in that case from defendant's executive finance committee ("EFC") and the board, which included both the chairman of the board, Tony Brown, and Scales. Thus, plaintiff's participation in the Exxon case is insufficient to create a prima facie case of retaliation.

Third, plaintiff's formal complaint letter protesting sexual harassment did not constitute a protected activity.[3] "In interpreting provisions of the CRA, we are guided by federal court interpretations of the counterpart federal statute." *Barrett*, *supra* at 314, citing *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000) and Title VII of the federal Civil Rights Act of 1964, 42 USC 2000e *et seq*.[4] Under Title VII of the federal Civil Rights Act, the federal counterpart statute to the CRA, sexual harassment is actionable

> only if it is so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment. Workplace conduct is not measured in isolation; instead, whether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances, including 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. [*Clark Co School Dist v Breeden*, 532 US 268, 270; 121 S Ct 1508; 149 L Ed 2d 509 (2001) (internal quotations and citations omitted).]

Although plaintiff alleged that Reynaldo Jensen twice made a lewd comment, Jensen made the comment during a single encounter with plaintiff.[5] Further, while plaintiff claimed he

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[3] We note that defendant claims plaintiff failed to cite the formal complaint letter as an example of a protected activity. This claim is misleading given that plaintiff does not label any allegations in his complaint as "protected activity." Defendant however, correctly points out that plaintiff cites this formal complaint letter as a report of defamation rather than sexual harassment in his complaint.

[4] Title VII prohibits discrimination in employment "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC 2000e-2(a)(1)

[5] Upon seeing new furniture in plaintiff's office, Jensen commented: "Whose dick did you have to suck to get that furniture?"

felt humiliated and complained that Jensen continued to give plaintiff job assignments after plaintiff filed his letter, this did not affect plaintiff's job performance. On the contrary, plaintiff asserts that his job performance was exemplary up to the time the board voted not to renew his contract. Moreover, Jensen apologized for the incident and was not a member of the board when it voted against renewing plaintiff's contract. Finally, plaintiff admits that Jensen made no additional lewd comments to him. Given these facts, it appears that Jensen's comments were isolated and were not sufficiently severe or pervasive to affect plaintiff's conditions of employment or create a hostile working environment. Therefore, plaintiff's formal complaint letter did not address actionable sexual harassment and did not, therefore, constitute a protected activity. Consequently, plaintiff failed to establish a prima facie case of retaliation under the CRA. Therefore, summary disposition was appropriate on this claim.

Defendant next argues that plaintiff abandoned his claim of hostile work environment based on race. We agree. Indeed, while plaintiff alleged this claim in his complaint, plaintiff failed to discuss this claim in responding to defendant's summary disposition motion. Instead, plaintiff argued that Brown's race[6] did not bar plaintiff's claims for discrimination and retaliation. However, plaintiff made no allegation of discrimination in his complaint. If the nonmoving party fails to rebut evidence presented by the moving party that no genuine issue of material fact exists, the trial court must grant summary disposition. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 725-726; 691 NW2d 1 (2005). Additionally, plaintiff failed to address this issue in his brief on appeal, let alone assert error. Therefore, plaintiff has abandoned this issue. *Wayne Co v Hathcock*, 471 Mich 445, 465-466; 684 NW2d 765 (2004). Thus, the trial court erred in denying summary disposition of this allegation.

Finally, defendant argues that the trial court erred in denying summary disposition on plaintiff's claim of hostile work environment sexual harassment. We agree. The CRA recognizes freedom from sexual harassment from an employer as a civil right. MCL 37.2102. Under section 2103(i),

> sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
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> * * *
>
> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . .

Sexual harassment falling into this third subsection is known as hostile work environment sexual harassment. *Chambers*, *supra* at 310. The CRA does not exclude same-gender sexual harassment claims. *Robinson v Ford Motor Co*, 277 Mich App 146, 153; 744 NW2d 363 (2007). To state a prima facie case of hostile work environment sexual harassment, a plaintiff must establish five elements:

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[6] Both plaintiff and Brown are black.

> (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).]

Plaintiff failed to establish a prima facie case of hostile work environment sexual harassment based on Jensen's comment. First, plaintiff failed to show that Jensen made the comment on the basis of sex. On the contrary, with regard to sex, plaintiff admitted that he did not know "what [Jensen] was getting to[,]" and did not know if he was requesting sexual favors. While evidence was presented that Jensen wanted plaintiff removed as president and that Jensen and plaintiff had a bad relationship, no evidence related any of these facts to sex. Although Jensen's comment bore a sexual connotation, this does not prove *per se* that the comment was made because of sex. *Oncale v Sundowner Offshore Services, Inc*, 523 US 75, 81; 118 S Ct 998; 140 L Ed 2d 201 (1998).[7] When this comment is considered in the context of plaintiff's poor relationship with Jensen, the comments appear to be a crass insult rather than a sexual reference. Thus, the comment was not made because of sex.

Second, there is no genuine issue of fact that Jensen's comments substantially interfered with plaintiff's employment or created an intimidating, hostile, or offensive work environment. The alleged sexual harassment creating such an environment must be severe and pervasive to be actionable. *Radtke*, *supra* at 378. The sole foundation of plaintiff's sexual harassment claim is the comment at issue. As noted above, in context, the comment amounted to a crass insult. Further, plaintiff admits that Jensen made no additional lewd comments to him. Thus, the alleged sexual harassment was neither severe nor pervasive. Indeed, it is rare that a single incident of alleged sexual harassment will create a hostile work environment. *Id*. at 394. Moreover, plaintiff asserts that his job performance was exemplary up to the time the board voted not to renew his contract. Thus, it does not appear the comments substantially interfered with plaintiff's employment.

Plaintiff contends that the harassment was severe and pervasive because Jensen previously filed "slanderous charges of sex harassment" against plaintiff while Jensen was part of the field services committee.[8] Notwithstanding the fact that the charges were later found to be baseless, plaintiff fails to explain how this charge relates to the comments at issue. In making this argument, plaintiff is comparing apples to oranges. In other words, to file sexual harassment charges is not the equivalent of sexually harassing an individual. Thus, this argument is meritless.

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[7] This Court has cited *Oncale* for guidance in interpreting the sexual harassment provisions of CRA. *Robinson*, *supra* at 157.

[8] No specific information was presented regarding this complaint. Rather, plaintiff explained that the complaint failed to identify a specific victim.

Third, no genuine issue of material fact exists on the issue of respondeat superior. Under the CRA, "an employer may avoid liability in a hostile environment case if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Chambers*, *supra* at 312 (internal quotation marks and citation omitted). Here, after plaintiff filed his formal complaint letter, plaintiff received a letter of apology from Jensen as Brown had instructed. In addition, Brown removed Jensen from all consideration pertaining to plaintiff's performance following plaintiff's request. Although plaintiff asserts that he continued to receive assignments through Jensen after this incident, he admitted that Jensen merely served as Brown's liaison in this capacity. Thus, Brown's prompt and appropriate remedial action renders plaintiff's claim unsustainable under this element. Therefore, plaintiff failed to establish a prima facie case of hostile work environment sexual harassment, and summary disposition was appropriate on this claim.

Reversed.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot