STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE ZADRZYNSKI,

Plaintiff-Appellant,

v

GOLF SERVICES, L.L.C., a/k/a THE WYNDGATE, a/k/a WYNDGATE COUNTRY CLUB, a/k/a WYNDGATE GOLF & COUNTRY CLUB, and a/k/a GATE HOUSE GRILL,

Defendant-Appellee.

UNPUBLISHED
December 9, 2010

No. 287151
Oakland Circuit Court
LC No. 2007-085763-NO

Before: GLEICHER, P.J., AND O'CONNELL AND WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) with respect to plaintiff's claims for hostile work environment, sexual harassment and unlawful retaliation under the Michigan Civil Rights Act ("CRA"), MCL 37.2101 *et seq*. We reverse.

Plaintiff was employed as a server at defendant golf and country club. She filed this action alleging that: 1) she was subjected to sexual harassment when her immediate supervisor, Gilberto Barragan, made offensive comments in her presence about the club's female members' body parts, in particular their breasts, buttocks, and legs, and 2) she was a victim of unlawful retaliation when Barragan did not rehire her for the 2007 season. Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition of her sexual harassment and retaliation claims.

I. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision whether to grant summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A motion under this subrule tests the factual sufficiency of the complaint. *Id.* at 278. The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion must then show by

evidentiary materials that a genuine issue of disputed fact exists. *Id*. We consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party, *Corley,* 470 Mich at 278, and all reasonable inferences are to be drawn in favor of the nonmovant, *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

II. HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT CLAIM

Plaintiff alleged that she was sexually harassed and subjected to a hostile work environment by Barragan. To establish a prima facie hostile work environment claim under the CRA, a plaintiff must show: (1) that she belonged to a protected group; (2) that she was subjected to communication or conduct on the basis of sex; (3) that she was subjected to unwelcome sexual conduct or communication; (4) that the unwelcome sexual conduct or communication was intended to or did substantially interfere with her employment or created an intimidating, hostile or offensive work environment; and (5) respondeat superior. *Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000).

There is no dispute that plaintiff was a member of a protected group. Defendant argues that plaintiff failed to satisfy the second element of the claim because Barragan's alleged comments were not based on plaintiff's sex. "[A]n employer cannot be said to have discriminated against an employee 'because of' sex unless, but for the fact of the employee's sex, the employer would not have discriminated against the employee." *Haynie v Dep't of State Police*, 468 Mich 302, 308; 664 NW2d 129 (2003). Only females presented evidence regarding Barragan's comments. No evidence was presented regarding whether Barragan made the comments in the presence of men and a male employee testified that Barragan did not join in when a group of men made similar comments on their smoke breaks. Viewing the evidence in plaintiff's favor, there is at least a question of fact regarding whether Barragan made the comments because plaintiff was female.

Defendant next argues that plaintiff failed to satisfy the third element of the claim because Barragan's alleged comments were not sexual in nature. In *Corley,* 470 Mich at 270, our Supreme Court stated:

> "Sexual" is defined, in part, as "of or pertaining to sex" or "occurring between or involving the sexes: *sexual relations.*" "Nature" is defined as a "native or inherent characteristic." Utilizing these two commonly understood definitions, we conclude that actionable sexual harassment requires conduct or communication that inherently pertains to sex. [Emphasis in original.]

Although some of Barragan's alleged comments could merely be described as gender-based, *Haynie,* 468 Mich at 312, comments such as "I wouldn't mind going home with her," presented a question of fact regarding whether Barragan made implied references to sexual activity that inherently pertained to sex. See *Robinson,* 277 Mich App at 155.

With respect to the fourth element of the claim, plaintiff argues that the trial court erred in finding that Barragan's comments did not substantially interfere with her employment. Plaintiff testified that Barragan's comments were nasty, were an affront to her as a woman, and that she shared her situation with her mother and psychiatrist father, which she asserts showed

that the comments substantially interfered with her employment. We disagree. Plaintiff related no emotional problems as a result of the comments, missed no work, and was fully able to perform her duties. She spoke to her father as a parent, not for the purpose of psychiatric counseling. Simply sharing her situation with her parents does not demonstrate substantial interference. Plaintiff's reasons are more appropriately viewed in terms of whether the comments created a hostile or offensive work environment.

The essence of a hostile work environment action is that one or more supervisors or coworkers created an atmosphere so infused with hostility toward members of one sex that they altered the conditions of employment for them. *Radtke v Everett*, 442 Mich 368, 385; 501 NW2d 155 (1993). In *Radtke*, our Supreme Court relied on the dictionary definitions of "hostile" and "offensive," stating:

> *Webster's Third New International Dictionary* (1961) at 1094, defines "hostile" as "a: of or relating to an enemy . . . c: marked by antagonism or unfriendliness . . . e: . . . not hospitable . . . ."
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> "Offensive" is defined, in pertinent part, as "insulting, affronting." *Webster's, supra* at 1566. "Insult," in turn, is objectively defined: "to treat with insolence, indignity, or contempt . . . affront." *Webster's, supra* at 1173. [*Id*. at 386-387 nn 26 and 28.]

"The Court explained that "the purpose of the [CRA] is to combat serious demeaning and degrading conduct based on sex in the workplace . . . ." *Id*. at 387. Therefore, to survive summary disposition, a plaintiff must present documentary evidence demonstrating the existence of a genuine issue regarding whether a reasonable person would find, under the totality of the circumstances, that alleged comments or conduct were sufficiently severe or pervasive to create a hostile work environment. *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996).

Plaintiff testified at her deposition that Barragan "regularly" made sexually tinged remarks about the appearance and body parts of various female guests at defendant golf and country club. "The comments about how hot they looked and how I wouldn't mind going home with her and I wouldn't mind going to the bar, those would just be like a common thing that you would hear fairly regularly from him." Regarding one guest in particular, plaintiff recalled that Barragan "liked to go out there [the dining room] and stare at her breasts and then he would come in and say things like I wish my wife had those breasts." Yet another female guest

> liked to come to the club to work out in the . . . women's gym, and either before, I think it was usually before she would go down and work out, she would stop at the front desk and visit with Mary, the receptionist. And if she was out there visiting, [Barragan] would have a reason to be standing at the desk by Mary and he would stare at her breasts and then he would make comments about how he thought they were lovely and whether they were real or fake.

A coworker's affidavit attests that Barragan appeared "obsessed about the breasts of certain female members, as on a regular basis, he made crude and offensive sexual comments in my presence . . . ."

While "the sporadic use of abusive language, gender-related jokes, and occasional teasing" should not be actionable, *Faragher v City of Boca Raton*, 524 US 775, 788; 118 S Ct 2275; 141 L Ed 2d 662 (1998) (internal quotation omitted), a rational trier of fact could find in this case that Barragan's frequently expressed, objectively offensive, sexually explicit comments created a hostile work environment. Pursuant to the fifth element of the claim, a plaintiff ordinarily must demonstrate that either a recurring problem existed or a repetition of an offending incident was likely and that the employer failed to rectify the problem on adequate notice. *Radtke*, 442 Mich at 382. Notice of sexual harassment sufficient to impute liability to the employer exists where, "by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of the substantial probability that sexual harassment was occurring." *Chambers*, 463 Mich at 319. Here, the parties dispute whether plaintiff's complaints to Deanna Rumball, who identified herself as the dining room supervisor, were sufficient to alert management of the alleged harassment. *Sheridan*, 247 Mich App at 623 (Actual notice typically involves an employee complaining to an employer's higher management staff about the occurrence of harassment). In any event, a question of fact existed regarding whether defendant had constructive notice of the alleged harassment in light of the pervasiveness of Barragan's alleged comments and evidence that defendant's club manager, Joseph Tignanelli, suggested that employees who made complaints should be prepared to look for other employment.

Because plaintiff minimally established questions of fact regarding the elements of a hostile work environment claim, the trial court erred in granting summary disposition on this ground.

II. RETALIATION CLAIM

Plaintiff alleged that, after she asked Barragan to stop making the offensive statements, she was subjected to retaliatory treatment when she was dismissed from her job. To establish a prima facie claim of retaliation, a plaintiff must show that the plaintiff engaged in a protected activity, the activity was known to the defendant, the defendant took an employment action adverse to the plaintiff, and there was a causal connection between the protected activity and the adverse employment action. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005). Termination is considered an adverse employment action. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003).

Again, the record demonstrates that plaintiff complained about Barragan's comments to Rumball. Nevertheless, she also objected directly to Barragan on more than one occasion. *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611, 622-623; 637 NW2d 536 (2001). Barragan was the supervisor who made the decision, with Tignanelli's approval, not to rehire plaintiff based on other grounds including attendance and inappropriate behavior. Where a supervisor employs a neutral mechanism or party to accomplish a discriminatory purpose, the mechanism or party can no longer be considered neutral and the discriminatory animus of the supervisor may be imputed to those who actually made the decision to terminate. *Rasheed v*

Chrysler Corp, 445 Mich 109, 136-137; 517 NW2d 19 (1994). Therefore, we conclude that a question of fact exists regarding whether Barragan's knowledge of the protected activity and his discriminatory animus can be imputed to defendant.

A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and the adverse action, if the evidence would enable a reasonable factfinder to infer that an action had a discriminatory or retaliatory basis. *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004). However, a plaintiff must show more than mere coincidence in time between the protected activity and the adverse employment action. *Garg*, 472 Mich at 286.

The record supports the claim that Barragan's comments and plaintiffs corresponding objections were made on a regular basis, from mid-summer 2006 and until defendant closed for the season in late December 2006 or early January 2007. The decision not to rehire plaintiff occurred shortly thereafter on February 7, 2007. *Garg*, 472 Mich at 286. Even though defendant asserted non-discriminatory reasons for its decision not to rehire plaintiff, there was sufficient evidence to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action. *Hazle v Ford Motor Co*, 464 Mich 456, 462-466; 628 NW2d 515 (2001). Not only did defendant decide not to rehire plaintiff at this time, it also informed Rumball, who had similarly objected to Barragan's comments, that she would not return. In addition, at her deposition, plaintiff asserted that defendant further retaliated against her by laying her off for three weeks in October and denying her preferences with respect to private parties. Viewing these facts in a light most favorable to plaintiff, we conclude that a question of fact exists regarding whether plaintiff established a causal connection.

We reverse the trial court's order granting defendant's motion for summary disposition of plaintiff's hostile work environment, sexual harassment and retaliation claims. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder