STATE OF MICHIGAN

COURT OF APPEALS

STACI A. FOUNTAIN, Plaintiff-Appellant,	UNPUBLISHED May 17, 2016
v	No. 325699 Chippewa Circuit Court
DEPARTMENT OF CORRECTIONS, GERALD CASEY, and EDWARD O'DELL, Defendants-Appellees.	LC No. 11-011558-CD

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

PER CURIAM.

In this retaliation and sex discrimination case brought under the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, plaintiff appeals the trial court's order that granted summary disposition in favor of defendants. For the reasons provided below, we affirm.

I. FACTS & PROCEDURAL HISTORY

Defendant Michigan Department of Corrections (MDOC) hired plaintiff in January 2001 as a corrections officer at its Straits Correctional Facility. During the initial probationary period of her employment, plaintiff made numerous complaints of sexual harassment to defendant Gerald Casey, then her immediate supervisor, to which Casey allegedly responded on more than one occasion, "This is why females should not work here."

Once plaintiff completed her probationary period, she requested, and was assigned, the midnight shift under the supervision of a female captain, Bonnie Barnes. For the remainder of her tenure, plaintiff allegedly continued to experience various forms of workplace harassment, including, in part, at least three disciplinary investigations, all of which were ultimately found to be baseless. Plaintiff's employment, however, was terminated in January 2009 after an investigation into allegations that she had engaged in regular communication with a parolee, Raymond Middaugh, in violation of Work Rule 50.

The events which led to plaintiff's discharge occurred in November 2008 when a fellow corrections officer, Kay Thompson, reported that plaintiff had given Thompson's cell phone number to Middaugh so that Middaugh could contact plaintiff on Thompson's phone. After receiving Thompson's report, the facility's warden, Gregory McQuiggen, authorized an

investigation and assigned it to defendant Casey, who was then an internal investigator at the facility.

Defendant Casey's investigation revealed that plaintiff and Middaugh had been in regular phone contact during October and the beginning of November 2008. Plaintiff, in fact, admitted during the investigation that she and Middaugh had called each other daily in October, but "not as much in November." According to plaintiff, she and Middaugh were life-long friends and she had spoken to Middaugh regarding her sister's alcohol problem. The investigation showed that plaintiff and Middaugh's cell phones had connected for over 900 minutes during the time frame at issue and that some calls were made while plaintiff was at work. Defendant Casey concluded that plaintiff "may" have violated multiple department rules, including Work Rule 50, which deals with overfamiliarity or unauthorized contact with offenders. Under Work Rule 50, an employee is prohibited from "engaging in overfamiliarity with an offender," which includes parolees, and such a violation is "grounds for dismissal."[1]

Defendant Casey's investigation was forwarded to McQuiggen for review. McQuiggen found that sufficient evidence existed to support the allegations. Because wardens are not authorized to issue discipline, or even make a recommendation, for violations of Work Rule 50,

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[1] Work Rule 50 of the then-applicable Employee Handbook provided in pertinent part:

> Employees are prohibited from engaging in overfamiliarity with an offender, or a family member or listed visitor of an offender.
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> It is inappropriate for employees to have a personal relationship with an offender, the offender's family, or visitors. . . . Employees should avoid any appearance of impropriety with offenders, offender's family members or their listed visitors.
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> * * *
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> Offender contact exception requests must be renewed whenever a change in the offender's status occurs. . . .
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> * * *
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> Any employee may have contact with their immediate family which is defined as spouse, parent(s), children or step-children, brother(s), sister(s), parent(s)-in-law, grandparent(s), grandchild(ren) and any person(s) whose financial or physical care the employee is principally responsible [for]. . . . [T]he employee is required to verbally notify the employee's Warden . . . when the employee's immediate family member is an offender.
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> * * *
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> Any violation of this rule will be grounds for dismissal.

McQuiggen sent the investigation packet to Kathy Warner, the discipline coordinator for the Department of Corrections, who was located in Lansing. Based on her review of the investigation packet, Warner determined that plaintiff's employment should be terminated. According to Warner, plaintiff had engaged in dischargeable conduct when she engaged in excessive contact with a parolee and failed to report it.

Subsequently, plaintiff filed the instant lawsuit, which alleged, in part, that defendants engaged in various acts of sexual harassment, gender discrimination, and retaliation in violation of the ELCRA. After extensive discovery, defendants moved for summary disposition under MCR 2.116(C)(10) and argued that (1) there was no evidence, direct or circumstantial, to show that plaintiff's gender motivated her termination and (2) plaintiff had failed to establish a prima facie case of retaliation. The trial court granted defendants' motion and found in relevant part that plaintiff failed to make a prima facie showing of either retaliation or sex discrimination.[2]

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The motion is appropriately granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

III. ANALYSIS

On appeal, plaintiff claims that she presented a prima facie case of retaliation and sex discrimination based on both direct and circumstantial evidence. According to plaintiff, genuine issues of material fact prohibited the grant of summary disposition. We disagree.

A. APPLICABLE LAW

MCL 37.2202(1)(a) prohibits employment discrimination on the basis of, *inter alia*, an employee's sex. To establish a prima facie case of discrimination, 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 adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 134; 666 NW2d 186 (2003).

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[2] The trial court also granted defendants' motion with respect to plaintiff's claims of sexual harassment, but those claims are not at issue in this appeal.

MCL 37.2701(1)(a) prohibits retaliation against a person because that person "has opposed a violation of [the ELCRA], or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under [the ELCRA]." A prima facie case of retaliation may not be established merely by mistreatment, but by a showing that (1) "[the plaintiff] engaged in a protected activity;" (2) "this was known by the defendant;" (3) "the defendant took an employment action adverse to the plaintiff;" and (4) "there was a causal connection between the protected activity and the adverse employment action." *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

A plaintiff may meet her prima facie burden through either direct or circumstantial evidence. Under the latter, if the plaintiff successfully establishes a prima facie case of retaliation or sex discrimination, the burden then shifts to the defendant to provide a legitimate, non-discriminatory purpose for the adverse employment action. See *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000). If the employer articulates such a reason, then the burden shifts to the plaintiff to establish that the proffered reason is pretextual. *Id*.

Comparatively, to establish a violation of the ELCRA with direct evidence "the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). "Direct evidence," in the context of an ELCRA claim, is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id*. (citations and quotations omitted); see also *Danville v Regional Lab Corp*, 292 F3d 1246, 1249 (CA 10, 2002) ("Direct evidence demonstrates on its face that the employment decision was reached for discriminatory reasons.").

B. DECISION-MAKER KATHY WARNER

The parties do not dispute that Warner was the decision-maker who ultimately terminated plaintiff's employment. Under the ELCRA, only the decisions of those in "higher management," or those who are decision-makers in the employer's "chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee," may be imputed to the employer. *Sheridan v Forest Hills Pub Sch*, 247 Mich App 611, 621-622; 637 NW2d 536 (2001). Therefore, it was incumbent upon plaintiff to proffer evidence that Warner acted based on a discriminatory and retaliatory motive when she terminated plaintiff's employment.

1. DIRECT EVIDENCE OF SEX DISCRIMINATION AND RETALIATION

Plaintiff did not present any direct evidence from which a reasonable trier of fact could conclude that Warner's decision was in any way motivated by either discrimination or retaliation. Indeed, plaintiff points to none. Thus, plaintiff must rely on circumstantial evidence to prove her claims.

2. CIRCUMSTANTIAL EVIDENCE OF RETALIATION

The record also reflects that plaintiff failed to make a prima facie case of retaliation based on circumstantial evidence with respect to Warner. While Warner had some knowledge of

plaintiff's protected activity—Warner admitted that she knew plaintiff had complained of sexual harassment based on her review of a disciplinary packet filed at the same time as the Work Rule 50 violation—there is no evidence that Warner's decision to terminate plaintiff's employment was causally connected to Warner's knowledge of that activity. Absent any such evidence, plaintiff has not made a prima facie showing that Warner fired plaintiff for any reason other than plaintiff's excessive contact with Middaugh and her failure to report that activity in violation of Work Rule 50.[3] Simply put, there is no evidence that Warner's decision was causally related to her knowledge of plaintiff's protected activity. Accordingly, there is no genuine issue of material fact with respect to the retaliation claim as to Warner.

3. CIRCUMSTANTIAL EVIDENCE OF SEX DISCRIMINATION

The parties only dispute the fourth element of plaintiff's burden—that her termination occurred under circumstances giving rise to an inference of unlawful discrimination. A plaintiff can establish this element by showing that the defendant treated a similarly situated person not in the protected class differently than her. *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). Thus, plaintiff has to show that she was treated differently from a male corrections officer who engaged in the same or similar conduct, i.e., the officer had extensive phone contact with a parolee but was not terminated.

While plaintiff asserts that she presented evidence that Warner did not terminate similarly situated employees for violations of Work Rule 50, the record belies this assertion. In fact, six

[3] We note that plaintiff does not argue that an inference of retaliation can be drawn from Warner's more lenient treatment of two other female officers who violated Work Rule 50—one for receiving a foot rub from a prisoner and another for carrying on a romantic relationship with a parolee. Even if she had, we would find no basis for such an inference. Plaintiff had to show that her participation in the protected activity was a "significant factor" in her termination, not just that there was a causal link between the two. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). Warner only became aware of plaintiff's complaints through a passing reference to them in a memorandum included in a disciplinary packet, which was received and reviewed at the same time as the Work Rule 50 disciplinary packet. The content of that memorandum was simply that plaintiff had "indicated to [the] investigator these issues [of sexual harassment] have been reported to Lansing . . . [and that] the EEO and MCO were aware of some of the issues." Compare *Debano-Griffin v Lake Co*, 493 Mich 167, 178 n 3; 828 NW2d 634 (2013) (where an inference of retaliation existed because the decision-maker was the recipient of the actual complaints and was affected by the complaints). Moreover, around the time of plaintiff's termination, defendant MDOC had ended or was ending its historical practice of "last chance" agreements that the two other female employees were able to utilize. The fact that two other people were treated differently under a prior historical practice would not, under the present circumstances, create a reasonable inference that Warner viewed plaintiff's complaints as a matter of consequence. In other words, it cannot be said, given Warner's more lenient treatment of other employees, that Warner terminated plaintiff *because* of the protected activity.

other employees, four of which were men, were discharged for violating this very same rule. Moreover, the two other male employees who were investigated for a Work Rule 50 violation, but were not terminated, cannot be said to be similarly situated to plaintiff. One employee was suspended when it was only found that he, on a single occasion, "may" have delivered to a prisoner a part to complete a clock he was building.[4] The other individual who was not terminated for a Work Rule 50 violation had unknowing contact with a parolee over Facebook. The parolee "friended" the officer, who indicated that the parolee's name was changed and that he did not recognize the parolee from the Facebook picture; once the officer realized the individual was a parolee, he discontinued the contact. Plainly, the isolated conduct at issue with these two employees is not the "same" conduct or even "similar" to the conduct that plaintiff engaged in. Plaintiff engaged in extensive telephone contact with Middaugh over a nearly two-month period, during which she admittedly spoke to him almost daily.

Plaintiff additionally asserts that her termination was "unfair" given that the discipline Warner meted out for Work Rule 50 violations was inconsistent. Fairness, however, is not part of the analysis and plaintiff cites to no authoritative caselaw indicating otherwise. Further, plaintiff's implicit argument that disparate treatment can be inferred from Warner's inconsistent disciplinary decisions under Work Rule 50, i.e., Warner gave two *female* corrections officers second chances when one received a foot rub from a prisoner and another carried on a romantic relationship with a parolee, misses a critical nuance. That these other female corrections officers were treated more leniently than plaintiff does not establish that plaintiff was subject to disparate treatment because of her gender.

C. "CAT'S PAW" THEORY

Plaintiff's theory of liability, however, is not based primarily on any impermissible bias of Warner. Indeed, aside from her claim of sex discrimination, plaintiff does not largely dispute that Warner herself lacked impermissible bias when she made her decision to terminate plaintiff's employment. Rather, plaintiff's primary theory of liability is predicated on her assertion that defendant Casey was motivated by an impermissible bias and that he influenced Warner's disciplinary decision. This theory of liability, recognized in federal courts and known as the "cat's paw" or "rubber stamp" theory, applies when a supervisor, who lacks impermissible bias, has been influenced by another who was motivated by such bias and makes an adverse employment decision. See *Arendale v Memphis*, 519 F3d 587, 604 n 13 (CA 6, 2008).

[4] The record reflects that this suspension was entered into as part of a settlement. The reason it went to settlement is not clear from the record, but it may be because there could have been some uncertainty with respect to the underlying factual allegations, as indicated by the report's use of the word "may." The use of the word "may" in that instance should not be confused with Casey's use of the word "may" in describing that plaintiff "may" have violated Work Rule 50. That is because, while Casey himself did not make a definitive determination that plaintiff violated the rule, there was no question or dispute regarding whether *the underlying facts* to the purported rule violated occurred, i.e., that plaintiff engaged in extensive contact with a parolee.

According to plaintiff, Michigan courts have recognized the applicability of this doctrine in *Sheridan*, 247 Mich App at 622.[5] However, *Sheridan* did not adopt this theory. *Sheridan* merely clarified that only the actions of those in "higher management" may be imputed to the employer for purposes of the ELCRA. *Id.* at 623-624. In any case, we need not decide whether the theory applies in Michigan because, even if we assume that the doctrine is applicable, for the reasons that follow, plaintiff cannot prevail under such a theory.

1. DIRECT EVIDENCE OF SEX DISCRIMINATION AND RETALIATION

Plaintiff alleges that defendant Casey's remarks, that women do not belong in corrections and that he would get plaintiff fired, are direct evidence of discrimination and retaliation. As already noted, "direct evidence" in the context of an ELCRA claim is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazel*, 464 Mich at 462 (citations and quotations omitted). Under the direct evidence test, a plaintiff must establish a causal connection between the discriminatory or retaliatory motive and the adverse employment action. See *Sniecinski*, 469 Mich at 134-135. As such, "a plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision." *Id*. at 135.

While defendant Casey's remarks certainly reflect a discriminatory animus, plaintiff has failed to proffer any "direct proof" connecting these remarks to the termination of her employment. There is no evidence that defendant Casey made these remarks close in time to plaintiff's termination, such that they were related to the investigation or decision-making process. More importantly, Casey did not initiate the complaint that led to the investigation against plaintiff, did not suggest any course for Warner to follow, and certainly did not make the actual decision itself to terminate plaintiff's employment. In his role as investigator, Casey could only investigate those matters assigned to him by the warden and, in this instance, after completion of his investigation, Casey merely concluded that plaintiff "may" have violated Work Rule 50. Indeed, plaintiff presented no evidence that Casey actually manipulated either the investigatory process, for example by fabricating evidence, or the disciplinary process.

Thus, viewing the evidence in a light most favorable to plaintiff, no direct evidence supports the conclusion that defendant Casey's discriminatory or retaliatory animus caused the termination of plaintiff's employment.[6] As such, even assuming Casey's alleged motives can be

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[5] Plaintiff also relies on several unpublished cases, but those cases are not binding, see MCR 7.215(C)(1), and in any event, there are other unpublished cases that also state that Michigan has not adopted this theory.

[6] We also reject plaintiff's claim that the trial court erred by dismissing her claims against defendant Casey in his individual capacity. Viewing the record in a light most favorable to plaintiff, it cannot be said that plaintiff suffered an adverse employment decision by any act of Casey. Consequently, plaintiff failed to produce any evidence in support of her claim that Casey violated the ELCRA.

imputed to Warner under the cat's paw theory, no impermissible motives for termination were established.

2. CIRCUMSTANTIAL EVIDENCE OF RETALIATION

In support of her retaliation claim based on circumstantial evidence, plaintiff argues that defendant Casey's investigation had a retaliatory motive that should be imputed to Warner under the cat's paw theory. The parties dispute only the second and fourth elements of a retaliation claim—notice of the protected activity and a causal connection between the protected activity and plaintiff's termination.[7] Since Warner had actual notice of plaintiff's protected activity—Warner admitted she knew that plaintiff had made complaints of sexual harassment—our analysis, again assuming without deciding that the cat's paw theory is applicable, focuses on whether a causal connection exists between defendant Casey's knowledge of plaintiff's protected activity and plaintiff's termination.

Here, plaintiff complained of sexual harassment to defendant Casey while she was a probationary employee in 2001, which put him on notice of her protected activity. The origin of the instant investigation that led to plaintiff's termination was a 2008 memorandum from another female corrections officer who reported plaintiff's contact with Middaugh. From there, McQuiggen authorized an investigation and assigned the investigation to defendant Casey, per department protocol. During the investigation, plaintiff admitted her extensive phone contact with Middaugh. As the investigator, it was defendant Casey's duty to discern from the evidence collected what, if any, rule violations occurred, and he determined that plaintiff "may" have violated Work Rule 50.

To show causation in a retaliatory discrimination case, a "[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). The instant investigation occurred seven years after plaintiff made complaints of sexual harassment to defendant Casey. Thus, not even a coincidence in time between plaintiff's complaints and her termination supports plaintiff's claim of retaliation. Further, viewing the evidence most favorably to plaintiff, nothing about the investigatory process indicates that Casey used his position and authority to act on an alleged retaliatory motive. As previously noted, given the neutrality with which the investigation was conducted, no logical connection can be made between defendant Casey's discriminatory comments—including that women should not belong in corrections and that plaintiff would be fired after Barnes retired—and the investigation. As

[7] We disagree with plaintiff to the extent that she suggests that she suffered retaliation in the form of a high volume of investigations against her. Such investigations are not, by definition, adverse employment actions because these investigations were not a form of discipline. See *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 363; 597 NW2d 250 (1999) (stating that an adverse employment action must be *materially* adverse, "such as termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation") (quotation marks and citations omitted).

such, no evidence established that the investigation, and hence plaintiff's termination, was specifically caused by defendant Casey's knowledge of plaintiff's protected activity.

In vigorously asserting otherwise, plaintiff overstates the evidence she relies on. Plaintiff suggests that defendant Casey could initiate investigations for his own purposes, but the evidence she cites in support confirms that Casey could only investigate a matter if the warden assigned it to him. Plaintiff also relies extensively on Barnes' affidavit to support her contention that Casey used the investigation process to retaliate against plaintiff. Barnes, however, was no longer employed by defendant MDOC when the investigation occurred, and her attestation, that she "felt" the investigation against plaintiff was inaccurate and unfair based on her understanding of the MDOC's historical practice of inaccurate investigations, is nothing more than speculation and conjecture. The testimonies of other female corrections officers, who reported similar systemic problems, are similarly conjectural.[8]

D. PROHIBITION AGAINST CREDIBILITY DETERMINATIONS

Plaintiff also generally asserts that the trial court violated the principle that, when deciding a motion for summary disposition under MCR 2.116(C)(10), it is not to assess credibility or make factual determinations. See *Dillard v Schlussel*, 308 Mich App 429, 445; 865 NW2d 648 (2014). However, the alleged credibility disputes plaintiff references are either misstatements of the record (that Warner contradicted herself during her deposition), immaterial (that plaintiff actually spent less than "900 minutes" on the phone with Middaugh), or unsupported by documentary evidence (that plaintiff did not violate Work Rule 50). Simply put, the record does not support plaintiff's assertion. As our preceding analysis demonstrates, the trial court viewed the uncontroverted facts and determined that defendants were entitled to judgment as a matter of law. Plaintiff simply failed to come forward with evidence that demonstrated a genuine issue of material fact that would preclude summary disposition.[9]

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[8] We likewise reject plaintiff's argument that the trial court erred when it failed to consider violation of her "just cause" employment contract as evidence of retaliation. This argument is predicated on plaintiff's belief that she did not violate Work Rule 50 because she allegedly reported in 2005 that she knew Middaugh, who was then incarcerated. However, no reasonable juror could conclude that plaintiff's report in 2005 constituted a report, and approval, of her telephone contact with Middaugh in 2008, when his status had changed to parolee, which required a new report under the Employee Handbook. Thus, even if the violation of an employment contract could be considered evidence of retaliation, no violation of plaintiff's employment contract occurred because plaintiff was fired "for cause." In other words, the trial court did not err by failing to consider evidence that did not exist.

[9] Plaintiff additionally argues that defendants' purported willful destruction of evidence and failure to retain documents creates disputes of material fact, which preclude summary disposition. Plaintiff did not include this issue in her statement of the questions presented in her brief on appeal and, therefore, we deem the issue abandoned. See MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). In any case, the record does not reflect any type of discovery violation.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Jane E. Markey