STATE OF MICHIGAN

COURT OF APPEALS

SANDRA STEWART,

Plaintiff-Appellant,

v

WHITE LAKE TOWNSHIP, RICHARD RAYBURN, JAMES THOMPSON and TERRY LILLEY,

Defendants-Appellees.

UNPUBLISHED
June 9, 1998

No. 202660
Oakland Circuit Court
LC No. 96-517954 NO

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

Plaintiff sued defendants, alleging sex discrimination, sexual harassment, and defamation arising out of plaintiff's employment as an on-call firefighter for defendant White Lake Township. The trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) and (10), and plaintiff appeals as of right. We affirm.

We review a trial court's order granting or denying summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(7), alleging that a claim is barred by governmental immunity, requires that a court review the pleadings and all documentary evidence submitted in the light most favorable to the nonmoving party. *Brown v Genesee Co Bd of Comm'rs*, 222 Mich App 363, 364; 564 NW2d 125 (1997). To survive such a motion, the party must allege facts which justify an exception to governmental immunity. *Id*. at 365.

A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact, except with regard to the amount of damages. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380; 563 NW2d 23 (1997). Giving the benefit of reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.; Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 85-86; 514 NW2d 185 (1994).

Plaintiff asserts that summary disposition was not properly granted under either of the aforementioned subsections of MCR 2.116.

First, plaintiff argues that she provided sufficient evidence to establish a prima facie case of sexual harassment due to a hostile work environment. She claims that defendants' accusations of misconduct, her suspensions, and the continuing recitation of the false allegations by fellow firefighters, all of which eventually forced her to resign, constituted sexual harassment. We disagree.

The Civil Rights Act (ELCRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., prohibits two forms of sexual harassment: hostile work environment sexual harassment and "quid pro quo sexual harassment." *Champion v Nation Wide Security, Inc*, 450 Mich 702, 708; 545 NW2d 596 (1996); *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993). To establish a claim for hostile work environment sexual harassment, a plaintiff-employee must prove: (1) that the employee belonged to a protected group; (2) that the employee was subjected to communication or conduct on the basis of sex; (3) that the employee was subjected to unwelcome sexual conduct or communication; (4) that the unwelcome sexual conduct or communication was intended to or did in fact substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Radtke, supra* at 382-383. One element of a sexual harassment claim is the requirement that the harassment complained of be based on the complainant's gender. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 341; 497 NW2d 585 (1993); *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich App 309, 313; 385 NW2d 778 (1986).

Sexual harassment means "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature." MCL 37.2103(i); MSA 3.548(103)(i). "To interpret the words 'or other conduct of a sexual nature' to mean any conduct or communication based on gender is inconsistent with the examples given in the statute--sexual advances, sexual favors." *Koester v of Novi*, 213 Mich App 653,669-670; 540 NW2d 765 (1995). Furthermore, an employer may avoid liability for sexual harassment if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991).

In the instant case, plaintiff failed to show that she was subjected to unwelcome verbal communication or conduct of a sexual nature. Defendant Richard Rayburn, who was the fire chief, did not make obscene comments to plaintiff. Instead, he filed charges against plaintiff for her alleged misconduct at the fireman's banquet. Rayburn received complaints that plaintiff exposed her breasts while at the banquet and that she was dancing inappropriately with fellow firefighters. In addition, Rayburn testified that he saw plaintiff lift her dress up at the banquet. A fellow firefighter testified that he saw plaintiff dance on a chair, lean over, and press her breasts together. Even plaintiff admitted that she danced on a chair and created cleavage for the purpose of a picture, but she denied that she exposed any part of her anatomy. Because Rayburn was informed that plaintiff engaged in misconduct at the fireman's banquet, it was reasonable that he would conduct an investigation and file charges related to the alleged conduct.

Plaintiff also asserts that she was deeply bothered by the "firehouse talk" of her fellow firefighters. According to plaintiff, male firefighters teased her about "mounting males" and about the sexual charges against her. However, plaintiff admitted that she did not report this teasing to Rayburn or anyone else at the fire department or township. Because there was no evidence that Rayburn, Thompson, and Lilley had any notice of the "firehouse talk" directed at plaintiff, defendants cannot be liable to plaintiff under respondeat superior.

Finally, plaintiff failed to allege that Thompson or Lilley made any comments of a sexual nature to plaintiff. Instead, plaintiff asserts that the men harassed her because she was a woman. The sexual harassment statute cannot be interpreted to prohibit any conduct or communication based on gender. Such an interpretation is inconsistent with the examples given in the statute--sexual advances, sexual favors.

Next, plaintiff asserts that she produced sufficient evidence of sex discrimination based upon disparate treatment. We disagree.

A prima facie case of discrimination can be made by proving either intentional discrimination or disparate treatment. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994); *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 538; 470 NW2d 678 (1991). To establish a prima facie case of sex discrimination under the disparate-treatment theory, a plaintiff must show that she was a member of a protected class and for the same or similar conduct or performance, she was treated differently than a man. *Coleman-Nichols*, *supra* at 651. After a plaintiff has presented a prima facie case of sex discrimination, the employer defendant must provide a legitimate, nondiscriminatory reason for its actions. The plaintiff then bears the burden of showing that the proffered reason was merely a pretext for discrimination. *Id*. Plaintiff must show that sex was a motivating factor behind the adverse employment decision, not that sex was the sole reason. *Reisman*, *supra* at 539.

According to plaintiff, she was treated differently than similarly situated males who engaged in the same or similar conduct. Plaintiff asserts that several male firefighters exposed their chests at the banquet and were accused of rowdy conduct at the restaurant; however, the male firefighters were not charged with misconduct for exposure and the charges for the rowdy conduct at the restaurant were dropped. There is no evidence on the record that anyone brought the men's misconduct to Rayburn's attention. Rayburn could not reprimand people for conduct of which he is not aware. With regard to the charges of misconduct at the Rams Horn Restaurant, Rayburn conducted an investigation and raised charges against males involved with wrongdoing. Charges against the men were dropped, as were some of the charges against plaintiff. Because Rayburn had evidence that plaintiff threw food at the restaurant and did not have any evidence that male firefighters engaged in the same activity, plaintiff was not treated differently for the same or similar conduct.

Plaintiff claims that she was treated differently than male employees who brought children on fire calls. According to plaintiff, she was suspended for bringing children on a run, while male firefighters brought children on calls and were never disciplined. However, plaintiff was suspended for insubordination for threatening and yelling at her supervisor, defendant James Thompson, about

lawsuits. Furthermore, plaintiff testified that other women brought children on calls without suffering any negative consequences. Therefore, plaintiff failed to establish that sex was the motivating factor behind Thompson's decision not to allow plaintiff to sign for the run or his decision to suspend plaintiff.

With regard to plaintiff's various instances of alleged disparate treatment, she failed to provide evidence that Thompson never sent male firefighters back to the station from the site of a run and that he never ordered men to direct traffic. Plaintiff admitted that other male firefighters were present at the scene when Thompson refused to exit his truck. According to plaintiff, Thompson refused to check on her runs, claiming to be too busy, but completed the same request for a male firefighter moments later. However, checking into a matter for a subordinate is not a term, condition, or privilege of the job. Furthermore, it was not an adverse employment decision.

Next, plaintiff contends that governmental immunity did not bar her defamation cause of action or her claims arising under the ELCRA. Because we find that plaintiff was unable to maintain a cause of action arising under the ELCRA, we will address governmental immunity and its relation to plaintiff's defamation claim.

Governmental agencies are immune from tort liability in all cases wherein the governmental agency is involved in the exercise or discharge of a governmental function. MCL 691.1407(1); MSA 3.996(107)(1). A governmental function is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. MCL 691.1401(f); MSA 3.996(101)(a), (d). The maintenance of a fire department is a governmental function. *Powell v Village of Fenton*, 240 Mich 94, 96; 214 NW 968 (1927). Furthermore, the highest elected or appointed executive officials of all levels of government are absolutely immune from tort liability. MCL 691.1407(5); MSA 3.996(107)(5).

Michigan courts have extended absolute immunity to include governmental officials while acting within their respective executive authority. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143-144; 560 NW2d 50 (1997). A government official's motive need not be considered when determining whether an official was acting within the scope of his "executive authority." *Id.* Absolute immunity has been extended to include: a county prosecutor, *Bischoff v Calhoun Co Prosecutor*, 173 Mich App 802, 806; 434 NW2d 249 (1988), the Detroit Police Department's chief of police, *Meadows v Detroit*, 164 Mich App 418; 418 NW2d 100 (1987), the director and deputy director of the Department of Corrections, *Chivas v Koehler*, 182 Mich App 467, 471; 453 NW2d 264 (1990), and the state superintendent of public instruction, *Berlin v Superintendent of Public Instruction*, 181 Mich App 154, 161-162; 448 NW2d 764 (1989). Lower level officers and employees of a governmental agency are granted a qualified immunity under MCL 691.1407(2); MSA 3.996(107)(2).

White Lake Township is a governmental agency expressly authorized to operate and maintain a fire department. Because the maintenance of a fire department is a governmental function, the township is immune from liability for plaintiff's defamation claim. MCL 691.1407(1); MSA 3.996(107)(1). Lilley, the township supervisor, was the highest elected or appointed executive official and, therefore,

enjoyed absolute immunity from tort liability pursuant to MCL 691.1407(5); MSA 3.996(107)(5). As the fire chief, Rayburn was the highest executive officer of the fire department. Based upon the extension of absolute immunity in prior case law, Rayburn was entitled to absolute immunity from tort liability. With regard to Thompson, plaintiff failed to allege that Thompson made any false or defamatory statements concerning plaintiff. Therefore, the trial court was not required to determine if Thompson was entitled to qualified immunity from tort liability pursuant to MCL 691.1407(2); MSA 3.996(107)(2).

Next, plaintiff argues that the trial court should have denied defendants' motion for summary disposition because discovery was incomplete. "Summary disposition is premature if discovery of a disputed issue is incomplete. Summary disposition is appropriate, however, if there is no fair chance that further discovery will result in factual support for the nonmoving party." *Vargo v Sauer*, 215 Mich App 389, 401; 547 NW2d 40 (1996). Furthermore, a disputed issue must remain before the court. *Id*.; *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). A trial court may grant summary disposition prior to the expiration of a discovery deadline if further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Crawford v State*, 208 Mich App 117, 122-123; 527 NW2d 30 (1994); *Neumann v State Farm Mutual Automobile Ins Co*, 180 Mich App 479, 485; 447 NW2d 786 (1989).

In the instant case, plaintiff had over nine months of discovery and failed to uncover factual support for her claims. Previously, plaintiff initiated two federal court actions in which extensive discovery had taken place regarding the same incidences against defendants. Because plaintiff has failed to articulate what factual issues she believes additional discovery may uncover, the trial court did not err in granting summary disposition in favor of defendants prior to the discovery cut-off date.

Finally, plaintiff asserts that she should be allowed to amend her complaint to correct any deficiencies. The grant or denial of leave to amend is within the trial court's discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). When deciding a motion for summary disposition, a court must give the parties an opportunity to amend unless the amendment would be futile. *Weymers, supra* at 658; MCR 2.116(I)(5). Because plaintiff failed to offer a specified proposed amendment for the court to consider, we find that the trial court did not abuse its discretion in denying her request to amend her complaint.

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ Martin M. Doctoroff