STATE OF MICHIGAN

COURT OF APPEALS

STACIE DAVIS,

Plaintiff-Appellant,

v

HENRY FORD HOSPITAL and
DR. ROBERT C. HAWLEY,

Defendants-Appellees.

UNPUBLISHED
December 28, 1999

No. 204780
Wayne Circuit Court
LC No. 96-633783 CZ

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order of the trial court granting defendants' motion for summary disposition of her race discrimination claim pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff, an African-American woman, was hired as a full-time secretary by defendant Henry Ford Hospital (HFH) in 1994. Plaintiff worked in HFH's Hemopathology Department, providing clerical support primarily for two doctors, including defendant Robert C. Hawley. Following a confrontation with Hawley on February 28, 1996, during which plaintiff was reprimanded by Hawley for being absent from her workstation for approximately thirty minutes, plaintiff quit her job at HFH. Plaintiff then filed an administrative grievance, in which she stated that Hawley had "created a hostile working environment" by yelling and swearing at her and telling her that he did not want her as his secretary any longer.

Plaintiff subsequently initiated suit against HFH and Hawley, alleging that they had violated the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, by subjecting her to a racially hostile work environment.[1] Plaintiff identified three statements allegedly made by Hawley which, she claimed, constituted unwelcome, race-based communications. Plaintiff testified at her deposition as follows regarding these three statements:

> 1. "The first occasion [during which Hawley raised his voice at me] that I can recall is where he thought that I considered him to be a liar. He told me to come into his office and he pointed at me, 'Look, lady, let me tell you something, you know. I'm not a liar,'

you know. I said, 'No, I didn't call you a liar.' He said, 'Look, the way things go around here is I was raised on a farm and the way that we handle—the way that I handle my disputes or whatever is by fighting them out.' I said, 'Well, I was raised in the ghetto and so I can relate.' He said, 'Yeah, it figures, since you're black,' you know."

2. "There was another time where he mentioned—he talked about how this black guy tried to run him off the road and he came in mad about it and talking about it and I didn't say anything, one way or the other, and the next morning he comes in, you know, good morning and he, you know, didn't say anything. He comes back out of his office and he says, 'Yeah. I got something for you people. I'm going to start bringing my gun to work.' "

3. "[After finishing the report on February 28, 1996, I did not hand it to Hawley.] Normally I put it in his box and he came out and said, 'Why didn't you bring it in there to me? Why didn't you bring it to me?' I said, 'Because I'm not your slave.' He said, 'Are you sure?' "

On appeal, plaintiff argues that she has established a material factual dispute regarding whether a hostile work environment claim based on race discrimination exists such that summary disposition was improperly granted. We disagree.

We review decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 490; 579 NW2d 411 (1998). When reviewing a motion for summary disposition based on MCR 2.116(C)(10), this Court must determine whether any genuine issue of material fact exists which would preclude judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). All pleadings, affidavits, depositions, admissions, and other documents are considered in favor of the party opposing the motion. *Id*.

In order to establish a prima facie case of discrimination based on hostile work environment,[2] a plaintiff must prove that: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of her protected status; (3) the employee was subjected to unwelcome conduct or communication involving her protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996); *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993); *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 629; 576 NW2d 712 (1998). Whether a hostile work environment was created by the unwelcome conduct is determined by whether a reasonable person, in the totality of

the circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment. *Quinto, supra* at 369. Therefore, in order to survive summary disposition, plaintiff was required to present documentary evidence to the trial court that a genuine issue existed regarding whether a reasonable person would find that, in the totality of circumstances, Hawley's comments to plaintiff were sufficiently severe or pervasive to create a hostile work environment. *Id*.

The trial court found that plaintiff had established the first two elements of a hostile work environment claim: that she was a member of a protected class, and that she was subjected to communication or conduct on the basis of the protected status. The court further opined that plaintiff had "maybe" established the third element of the claim, that she was subjected to unwelcome conduct or communication on the basis of her protected status. However, the trial court held that plaintiff had failed to demonstrate that the unwelcome conduct or communication interfered substantially with her employment or created a hostile work environment, and, further, that there was no evidence of respondeat superior.

We agree that plaintiff failed to establish the existence of a genuine issue of material fact regarding the fourth and fifth elements of her claim. In order to survive a motion for summary disposition, a plaintiff asserting a hostile work environment claim must demonstrate that the unwelcome comments were of a type, severity, or duration to have created an objectively hostile work environment. *Quinto, supra* at 370. Moreover, the trial court was required to consider where the alleged communications were " 'physically threatening or humiliating, or . . . mere offensive utterance[s].' " *Id*. at 370 n 9, quoting *Harris v Forklift Systems, Inc*, 510 US 17, 22-23; 114 S Ct 367; 126 L Ed 2d 295 (1993).

In response to defendants' motion for summary disposition, plaintiff presented evidence, in the form of her own deposition testimony, that Hawley continually "harassed" her by, for instance, standing over her while she was on the phone and changing her work schedule. While plaintiff asserted that Hawley "intimidated," "threatened," and "harassed" her, she presented no evidence to support a finding that any unwelcome, racially-motivated communications interfered with her employment or created a hostile work environment. One of the three allegedly racist comments was made in 1994; another was not made until plaintiff's last day of employment in 1996. In between, plaintiff was given two "excellent" performance appraisals; in her final appraisal, dated July 17, 1995, plaintiff noted that she was "looking forward to the new upcoming year" of her employment. Aside from plaintiff's conclusory allegations that she was subjected to a hostile and threatening environment, she provided no objective evidence that Hawley's comments interfered with her employment. See *Quinto, supra* at 370. A reasonable jury could not have found from a preponderance of the evidence that the three isolated and relatively benign comments, made over a two-year period, were of a type, severity, or duration to have created an objectively hostile work environment. *Id*.

Furthermore, plaintiff did not establish the existence of a genuine issue of material fact regarding respondeat superior. If the plaintiff can show that a hostile work environment existed, she must then also prove that her employer 'tolerated or condoned the situation' or 'that the employer knew or should have known of the alleged conduct and failed to take prompt remedial action.' " *Jackson v Quanex*

Corp, ___ F3d ___ (CA 6) (Docket No. 98-1515, issued 9/9/99), slip op p 10, quoting *Davis v Monsanto Chem Co*, 858 F2d 345, 349 (CA 6, 1988).

Here, plaintiff did not present any evidence that HFH tolerated or condoned Hawley's conduct or failed to take corrective action in the face of knowledge or constructive knowledge of plaintiff's hostile work environment. Plaintiff's conclusory allegation that she "received no assistance and was forced to withhold her concerns" is unsupported by the factual record. Plaintiff presented no evidence that HFH was aware of Hawley's alleged race-based communications or conduct toward her until March 1, 1996, when she contacted her supervisor about the February 28, 1996, incident. It is undisputed that the Hemopathology Department administrator, beginning on March 21, 1996, called plaintiff several times and contacted her by letter, asking that she come to HFH to discuss the grievance. However, plaintiff refused to respond. In light of the uncontroverted evidence that HFH " 'exercised reasonable care to prevent and correct promptly any [racially] harassing behavior,' " and that plaintiff " 'unreasonably failed to take advantage of any preventive or corrective opportunities' " provided by HFH, *Jackson*, *supra*, slip op p 10, summary disposition of plaintiff's race discrimination was appropriate.

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Richard Allen Griffin

[1] Plaintiff also brought claims of gender discrimination and intentional interference with employment relationship; however, she appeals from only that portion of the trial court's order granting summary disposition of her race discrimination claim.

[2] Defendants correctly note that Michigan's appellate courts have yet to specifically address a hostile work environment or harassment claim in the context of race discrimination under the Civil Rights Act. See *Quinto v Cross & Peters Co*, 451 Mich 358, 368; 547 NW2d 314 (1996) ("We have not had occasion to address whether a claim of discrimination based on hostile environment, when the allegations of discrimination involve conduct or communication that is not 'of a sexual nature,' is encompassed by the Civil Rights Act"). To date, this Court and our Supreme Court have only addressed such claims in the context of discrimination based on sex (see *Koester v Novi*, 458 Mich 1; 580 NW2d 835 (1998)), age (see *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621; 576 NW2d 712 (1998)), and handicap (see *id.*). However, as this Court held in *Downey*, *supra* at 626-628, and *Malan v General Dynamics Land Systems, Inc*, 212 Mich App 585, 587; 538 NW2d 76 (1995), harassment based on any of the enumerated classifications in § 202(1)(a) of the Civil Rights Act is an actionable offense.