STATE OF MICHIGAN

COURT OF APPEALS

DAWN FRANTZ,

Plaintiff-Appellant,

v

EAST CHINA SCHOOL DISTRICT and JOSEPH PIUS,

Defendants-Appellees,

and

THOMAS MALLOY,

Defendant.

UNPUBLISHED
September 1, 2000

No. 214283
St. Clair Circuit Court
LC No. 96-003763-NZ

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants East China School District (hereinafter East China) and Joseph Pius pursuant to MCR 2.116(C)(10) and from an order dismissing with prejudice her claims of sexual harassment and unlawful retaliation. We affirm in part and reverse in part.

This case arises out of plaintiff's claim that defendant Thomas Malloy, a teacher and media specialist at St. Clair Middle School, sexually harassed her while she was working as a library aide. Plaintiff claims that the harassment began in 1992. In January 1996, plaintiff was hospitalized after she attempted to take her own life by taking an overdose of medication. After plaintiff's allegations were investigated, plaintiff was transferred to a comparable position at a nearby elementary school. Approximately eight days later, plaintiff stopped coming to work. Then, in a letter dated May 16, 1996, plaintiff was informed that because some of the district's regularly employed teachers expressed interest in serving as High School cheerleading advisor, pursuant to the collective bargaining agreement

between the teachers and the district, plaintiff's services as cheerleading advisor were "no longer necessary." Plaintiff never returned to work for East China in any capacity.

On June 4, 1997, the trial court ordered the case submitted to mediation. Mediation was adjourned twice during the ensuing months. Before mediation could take place, East China and Pius filed their motion for summary disposition. The trial court granted the motion in an order dated March 25, 1998. The trial court explained that plaintiff's hostile work environment claim against these two defendants was being dismissed because East China and Pius did not have actual or constructive notice of the alleged harassment, and that once they became aware of the situation in January 1996, East China and Pius took prompt and appropriate remedial action. The court dismissed plaintiff's quid pro quo sexual harassment claim because it concluded that "by any objective examination of the facts," it was clear that plaintiff and Malloy were coworkers, i.e., Malloy was not plaintiff's supervisor. Finally, the court concluded that plaintiff could not maintain her retaliation cause of action because "no plausible explanation has been offered to rebut" the argument that the cheerleading position had to be offered to a regular employee under the collective bargaining agreement.

The mediation hearing was finally held on April 24, 1998. The notice of mediation evaluation indicates an award of "[$]18[,]500 for Plaintiff against Malloy." The mediation evaluation was accepted by both plaintiff and Malloy. Finally, on August 17, 1998, in response to the acceptance of the mediation evaluation, the court entered an order dismissing with prejudice the cause of action "as to all parties."

On appeal, plaintiff argues that the trial court erred by entering the order of dismissal with prejudice as to "all parties" because only her claims against Malloy were submitted to mediation. We agree. "[T]his Court has jurisdiction only over appeals filed by an 'aggrieved party'" pursuant to MCR 7.203(A). *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990). A party who accepts a mediation award is not an "aggrieved party" within the meaning of MCR 7.203(A). *Id*. However, if a party makes a showing that less than all the issues were submitted to mediation, that party is deemed to be an "aggrieved party" regarding those issues that were not submitted to mediation.

We conclude that plaintiff made a showing that only her claims against Malloy were submitted to mediation. The mediation evaluation only lists counsel representing Malloy and expressly awards "[$]18[,]500 for Plaintiff against Malloy." The mediation evaluation does not include either an indication of a damage award assessed against East China and Pius, or conversely, an indication that no damages were assessed against one or both. Moreover, the record only includes acceptances of the settlement by plaintiff and Malloy. Further, we do not believe it makes any sense for the claims against East China and Pius to be submitted to mediation after their motion for summary disposition had been granted. Accordingly, with respect to plaintiff's claims against East China and Pius, we conclude that plaintiff is an "aggrieved party," thus giving this Court jurisdiction to hear plaintiff's appeal regarding those claims.

Next, plaintiff argues that the trial court erred in granting summary disposition to East China and Pius on plaintiff's hostile work environment cause of action. We agree. This Court reviews decisions

on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the motion was premised on MCR 2.116(C)(7),(8), and (10), because the trial court examined evidence outside the pleadings when rendering its decision, the issue will be reviewed under the standard of review applicable to (C)(10) motions. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633, n 4; 601 NW2d 160 (1999).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*., an employer or its agent cannot discriminate "against an individual with respect to employment, compensation, or a term, condition, or privilege of employment because of . . . sex." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). To establish a hostile work environment sexual harassment cause of action, the plaintiff must prove the following elements:

> (1) the employee belongs 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).]

"[A]n employer may avoid liability under the CRA 'if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment.'. . . . Such prompt and appropriate remedial action will permit an employer to avoid liability if the plaintiff accuses either a co-worker, or a supervisor of sexual harassment." *Id.* at 396, quoting *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 234; 477 NW2d 146 (1991). The employer has a duty to investigate only when it has actual or constructive notice of the alleged harassment, i.e., the

employer knew or should have known of the alleged harassment. *Grow v W A Thomas Co*, 236 Mich App 696, 702-703; 601 NW2d 426 (1999); *Downer*, *supra* at 234-235.

After reviewing the record in the appropriate light, we conclude that a genuine issue of fact exists with respect to whether East China and Pius had actual or constructive notice of the alleged harassment before plaintiff's attempted suicide. Further, even it were to be established that East China and Pius did not have notice before the suicide attempt, it is undeniable that they did have actual notice of plaintiff's allegations after that event.

We also conclude that a genuine issue of fact exists with respect to whether the response taken by East China and Pius to the allegations was prompt and adequate under the circumstances. For example, given the gravity and severity of the alleged sexual harassment, a trier of fact could reasonably conclude that the giving of a written reprimand to Malloy and the reassignment of plaintiff to another school in the district was not an "appropriate remedial action." Indeed, a trier of fact could find that Malloy should have been discharged from his job or at the very least should have been moved to another employment location instead of plaintiff.

Plaintiff further argues that the trial court erred in granting summary disposition in favor of East China and Pius regarding her quid pro quo sexual harassment cause of action. We disagree. As recognized in *Champion v Nation Wide Security, Inc*, 450 Mich 702, 708; 545 NW2d 596 (1996), the CRA sets forth two separate theories for a quid pro quo sexual harassment cause of action:

> (i) Discrimination because of sex includes sexual harassment. 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:
>
> *(i)* Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
>
> *(ii)* Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing. [MCL 37.2103(i)(*i*), (*ii*); MSA 3.548 (103)(i)(*i*), (*ii*).]

Plaintiff's cause of action has its genesis in subsection 103(i)(*ii*). In order to sustain this cause of action, plaintiff must establish "(1) that she was subject to any of the types of unwelcome sexual conduct or communication described the statute, and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment." *Champion*, *supra* at 708-709. Plaintiff may establish the second element by showing that she was constructively discharged because of her response to the harassment. *Id*. at 710-711. "[C]onstructive

discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." *Id*. at 710.

We conclude that plaintiff failed to establish her quid pro quo sexual harassment cause of action because she failed to show that Malloy was "in a position to offer tangible job benefits in exchange for sexual favors or alternatively, threaten job injury for a failure to submit." *Id*. at 713. It does not appear that Malloy had the authority to hire or promote plaintiff, nor does it appear that he had the authority to discharge or demote her. The only authority Malloy seemed to have over plaintiff was the ability to assign her daily work duties and alter her work schedule. Moreover, plaintiff even testified that she believed Pius, who hired her, was her boss and that Malloy was merely a coworker.

Finally, plaintiff argues that the trial court erred in granting summary disposition in favor of defendants East China and Pius regarding her retaliation cause of action. Again, we disagree.

Under subsection 701(a) of the CRA, MCL 27.2701(a); MSA 3.548(701)(a), a plaintiff can establish a retaliation cause of action by showing that: (1) she engaged in a protected activity described in the statute; (2) the defendant knew that she engaged in a protected activity; (3) the defendant took an adverse employment action against 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). To establish a causal connection between the protected activity and the adverse employment action, the plaintiff must show that his participation in the protected activity was a significant factor in the adverse employment action. *Polk v Yellow Freight System, Inc*, 801 F2d 190, 197 (CA 6, 1986).

Plaintiff argues that she has established her cause of action by showing that once she told defendants that Malloy was sexually harassing her, they retaliated against her in several ways, including: (1) ordering her not to return to the cheerleading coach position until she was evaluated by a psychiatrist; (2) instructing the cheerleaders not to speak with her until she returned to the position; (3) refusing to pay her medical bills, which resulted from her attempt to end her life; (4) transferring her to a new job across the street at the elementary school; and (5) not rehiring her as a cheerleading coach for St. Clair High School.

Even if plaintiff could establish that the alleged employment actions occurred, we conclude that she has not shown that she has suffered any type of "adverse employment action" sufficient to sustain a retaliation cause of action against defendants. For example, while there was clearly a causal connection between plaintiff having told East China and Pius that Malloy was sexually harassing her and defendants transferring her, it appears that this action was not taken for retaliatory purposes but rather to alleviate her discomfort with having to work near Malloy.[1] The other actions cited cannot be characterized as adversely altering to the conditions of her employment. Additionally, other than the transfer, plaintiff has failed to establish the requisite causal connection. For example, the record shows that East China did

[1] This observation does not undermine our earlier conclusion that a reasonable tier of fact could have found that the moving of plaintiff, not Malloy, to a new work location was not a prompt and adequate response to the allegations of harassment.

not rehire plaintiff to the cheerleading advisor position because, according to the teacher's collective bargaining agreement, if a qualified tenured teacher expressed an interest in the position, East China was required to give them hiring preference. Plaintiff has failed to offer any proof that a qualified tenured teacher did not express interest in the cheerleading coach position, which would suggest that defendants may have been acting for retaliatory purposes.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey G. Collins

I concur in result only.

/s/ Michael J. Kelly