STATE OF MICHIGAN

COURT OF APPEALS

CHERYL L. CARROLL,

Plaintiff-Appellant,

v

CITY OF FLINT and WILL NEWSON,

Defendants-Appellees.

UNPUBLISHED
June 25, 2002

No. 230829
Genesee Circuit Court
LC No. 99-066110-CL

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10). We reverse and remand for further proceedings.

I

This is a case involving allegations of sexual harassment against defendant city of Flint and stalking against defendant Will Newson. Plaintiff began working for defendant city in September 1996 as an automation clerk in the Water and Sewer Department. Defendant Newson worked as a laborer in the Water Service Center, in the same department as plaintiff, until he was transferred in January 2000 to a different department.

At her deposition taken in June and August of 2000, plaintiff testified that from the beginning of her employment, Newson engaged in inappropriate conduct. Although she did not recall the dates, plaintiff stated that Newson brushed up against her on five to ten occasions in the hallway or as she walked through a doorway. She did not report these incidents, and instead would try to ignore him. Another incident that occurred shortly after plaintiff began her employment involved Newson interrupting her saying, "CC, you in love, CC, you in love?" while she was on the telephone with her boyfriend. Plaintiff reported this incident to her supervisor, Clarence Dishman.

Plaintiff recalled another incident in which Newson followed her and her boyfriend home from work one time in May 1998. As they were driving home, Newson followed plaintiff while her boyfriend was driving. They ultimately drove into the driveway of plaintiff's house and she later noticed that Newson drove slowly on her street past her house a couple of times. Although plaintiff did not confront Newson about this, she did report it to a foreman the following day.

Plaintiff stated that there were two occasions that she recalled before July 1998 when Newson called her a "bitch." He would say it under his breath when she walked by him. Plaintiff believed that the reason for this behavior was that she was acting as payroll clerk for a time when the usual payroll clerk was on leave and when Newson punched in late, she would have to dock his pay as the payroll clerk. Newson would get very upset about plaintiff docking his pay. Plaintiff reported Newson's behavior to Dan Larson, the sewer maintenance supervisor. In fact, this situation led to a memorandum, dated January 27, 1999, sent by Larson to the water service center employees to not disrupt the front office employees and that pay issues were to be addressed to the foremen. After Larson's memorandum was posted, plaintiff heard Newson say in the lunchroom that the memorandum did not pertain to him and that he could do whatever he wanted to do. Newson continued to enter the clerical area while the "other workers pretty much stayed away," even after the memorandum was posted.

The major incident of this case occurred on July 2, 1998. Early in the day, Newson was using profane language over the radio that plaintiff and Randy Fahey overheard. Plaintiff could not exactly recall, but she believed that Newson was talking about the payroll clerk, Suzy Bye, and called her a "c---" and "f---ing bitch" over the radio. Plaintiff asked Larson to do something about this and Larson got on the radio and told Newson to report in to the building at once.

Later that day, at about 2:50 p.m., plaintiff went outside on her break to smoke a cigarette. Several other employees (Mark Librette, Bruce Miller, Craig Combs, John Mockdy, Joe Glenn, Dan Wilson, Howard Swickard, and others) were around a picnic table when Newson walked up and stood next to plaintiff at the table. Newson started swearing, saying, "F--- you. F--- this place." He then began to gyrate his hips back and forth and plaintiff turned away from him. Bobbie Vaughn then drove by in his truck and yelled something at Newson, to which Newson responded by yelling, "F--- you, too, you motherf-----. F--- this." Newson again began gyrating his hips.

Newson then walked into the building. A few minutes later, plaintiff proceeded to return to the building and as she was walking toward the building, Newson exited. Plaintiff waited for Newson to walk by her and Dave Wilson then said to Newson, "Yeah, Will, don't let him blow sand up your ass, especially that white sand." Wilson and Newson were "hooting and hollering" over this comment and plaintiff turned around to tell them to grow up. When she turned around, Newson had his pants unzipped and partially pulled down and he was gyrating his hips again. Plaintiff told Newson that he "was the stupidest motherf----- I had ever seen." Newson responded by saying, "Well, f--- you. Suck this." Plaintiff then walked into the building.

Plaintiff immediately reported the incident to Larson. She was told to put her complaint in writing and give it to Larson after the July 4th holiday. Plaintiff prepared a written complaint, dated July 6, 1998. Plaintiff also contacted her union president, Sam Muma, and discussed the incident with him on July 6, 1998. Muma believed that the conduct was under the city's guidelines of sexual harassment, and Muma advised plaintiff to speak to Antonio Morolla, the director of personnel. Plaintiff did speak with Morolla, who asked plaintiff is she had considered transferring out of her department. She said that she did not want to transfer because she was happy with her job and the problem was with Newson. Morolla explained the city's sexual harassment policy to her, had her sign it, and told her that an investigation would be conducted.

The day after speaking with Muma and Morolla, plaintiff talked with Larson. Larson had a meeting with Morolla and Lucius Henry, Labor Relations Specialist. Larson was advised to interview the witnesses to the incident, which he did, and he prepared a report dated July 8, 1998. Larson did not review the results of the investigation with plaintiff. In September 1998, an assistant city attorney sent a letter to plaintiff stating that her complaint would be investigated by the city attorney's office and that plaintiff was scheduled for an interview on September 11, 1998. Plaintiff met with Denise Davis for the interview.

Plaintiff testified that, with regard to the incident on July 2nd, Newson's behavior of pulling down his pants was disgusting and humiliating to her. As she related to Davis, plaintiff stated that Newson's conduct at work causes her to "look over [her] shoulder" and constantly watch out for him. After the July 2nd incident, Newson called plaintiff a "bitch" three or four times. One occasion occurred as she was waking in the hallway to the cafeteria. Another occasion occurred in August 1998 when plaintiff had her daughter with her and Newson was saying, "f---" and "f---ing" when she went to the vending machine to get a juice for her daughter. During the week of August 17, 1998, as plaintiff was entering the building to begin work, Newson was in the doorway of the front office. Someone told Newson to move, and Newson looked at plaintiff, grabbed his crotch and said, "Suck this." Plaintiff complained about this to Larson and to Roger Clapp.

Plaintiff filed her complaint on August 24, 1999, alleging sexual harassment and "reverse" racial discrimination against both defendants, a retaliation claim against defendant city only, and a stalking claim against defendant Newson only. Both defendants filed their motions for summary disposition and the hearing was held on October 10, 2000. The sexual harassment and racial discrimination claims against defendant Newson were dismissed by stipulation. The trial court granted defendants' motions, finding that plaintiff failed to prove that there was a hostile work environment, failed to prove that she was treated differently than African-American employees, failed to prove that an adverse employment action was taken against her with regard to the retaliation claim, and failed to prove her stalking claim. The trial court dismissed plaintiff's complaint in its entirety. Plaintiff now appeals, challenging the dismissal of the sexual harassment claim against defendant city and the stalking claim against defendant Newson.

II

A trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim and is reviewed de novo. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537; 620 NW2d 836 (2001). The court is to consider the pleadings, affidavits, admissions, depositions, and any other documentary evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Where the substantively admissible evidence proffered by the nonmoving party does not establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120-121.

III

Plaintiff first argues that the trial court erred in granting summary disposition to defendant city regarding her sexual harassment claim. The trial court specifically found that plaintiff failed to establish that there was a hostile work environment.

To establish a claim of hostile work environment sexual harassment, an employee must prove the following elements: (1) the employee belonged 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. *Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000), quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). The only element at issue here is the fourth element, that being the basis of the trial court's ruling. In *Radtke, supra* at 398, the Court held:

> A hostile work environment claim is actionable only when, in the totality of the circumstances, the work environment is so tainted by harassment that a reasonable person would have understood that the defendant's conduct or communication had either the purpose or effect of substantially interfering with the plaintiff's employment, or subjecting the plaintiff to an intimidating, hostile, or offensive work environment.

Upon review of the record, we find that, contrary to the trial court's ruling, plaintiff has presented sufficient evidence to create a genuine issue of material fact regarding whether she was subjected to a hostile work environment. Taken in a light most favorable to plaintiff, the evidence establishes the following acts by defendant Newson that occurred before July 2, 1998: (1) Newson brushed up against plaintiff as she walked in the hallway on five to ten different occasions; (2) Newson called her a "bitch" on at least two occasions; (3) Newson commented on her telephone conversation with her boyfriend ("Are you in love, CC?). The major incident in this case then occurred on July 2, 1998, where Newson began by calling another female employee a "c---" and "f---ing bitch" over the radio. Newson later appeared at the picnic table where plaintiff was taking a smoking break and began swearing and then gyrating his hips while standing next to plaintiff. As plaintiff walked into the building, she turned and saw Newson with his pants unzipped and partially pulled down and he again began gyrating his hips at her. Plaintiff responded by calling Newson the "stupidest motherf-----" she had ever seen, and Newson responded by saying, "Well, f--- you. Suck this." Plaintiff created a written complaint about this incident, dated July 6, 1998. Larson then conducted an investigation and his memorandum of July 8, 1998, indicates that he interviewed several employees who corroborated plaintiff's version. After the July 2, 1998, incident, Newson grabbed his crotch and said to plaintiff, "Suck this." He also called plaintiff a "bitch" on three or four occasions and used other profane language toward plaintiff after July 2, 1998.

Plaintiff clearly testified to more than one incident of sexual harassment and, in the totality of the circumstances, a jury could reasonably conclude that the work environment was so tainted by harassment that a reasonable person would have understood that Newson's conduct had the purpose or effect of subjecting plaintiff to an intimidating, hostile, or offensive work environment. Accordingly, the trial court erred in granting summary disposition to defendant city with regard to the sexual harassment claim because there is a genuine issue of material fact regarding whether plaintiff was subjected to an intimidating, hostile, or offensive work environment.

IV

Plaintiff also argues that the trial court erred in granting summary disposition in favor of defendant Newson with regard to her stalking claim. The trial court ruled that there was insufficient evidence presented to establish the stalking claim as that claim is statutorily defined.

Plaintiff's civil action of stalking is premised on MCL 600.2954, which allows a victim to maintain a civil action against an individual who engages in conduct that is prohibited under MCL 750.411h. MCL 750.411h(1)(d) defines stalking as:

> "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

The crux of plaintiff's stalking claim revolves around the incident in May 1998 when Newson followed plaintiff home after work, and drove slowly on her street and passed her home a couple of times. Other conduct that plaintiff testified to included that Newson called her a "bitch" on several occasions and used other profane language directed toward her. Newson also used obscene gestures toward plaintiff and actually brushed against her on more than one occasion. Further, plaintiff testified that Newson would appear in the water service clerical offices after Larson issued his January 27, 1999, memorandum directing that employees to stay away from the front offices, while other employees essentially followed the memorandum's directive.

Additionally, plaintiff testified that Newson's conduct at work causes her to look over her should and constantly watch our for him. She testified that she has suffered weight loss, lack of sleep, has headaches, "feels like a nervous wreck," and is "constantly having to watch over [her] shoulder."

We find that, contrary to the trial court's ruling, these allegations are sufficient to raise a material factual dispute regarding the stalking claim. Plaintiff's proffered evidence indicates a willful course of conduct involving repeated or continuing harassment causing plaintiff to feel frightened, intimidated, threatened, or harassed. Accordingly, the trial court erred in granting summary disposition to defendant Newson regarding the stalking claim because the evidence submitted by plaintiff is sufficient to meet the statutory definition of stalking.

V

We reverse the trial court's order granting summary disposition in favor of defendant city because plaintiff has presented sufficient evidence to create a genuine issue of material fact regarding whether she was subjected to an intimidating, hostile, or offensive work environment. We likewise reverse the order granting summary disposition in favor of defendant Newson because plaintiff presented sufficient evidence to create a genuine issue of material fact regarding whether Newson engaged in a willful course of conduct involving repeated or continuing harassment of plaintiff such that she felt terrorized, frightened, intimidated, threatened, harassed, or molested.

Reversed and remanded for further proceedings. Jurisdiction is not retained.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly