STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA A. JOHNSON, Plaintiff-Appellant,	UNPUBLISHED January 27, 2004
v DEPARTMENT OF CORRECTIONS, Defendant-Appellee.	No. 241061 Ingham Circuit Court LC No. 00-092744-CD

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Plaintiff Patricia A. Johnson appeals as of right from the trial court's order dismissing her sexual harassment claim against defendant Department of Corrections, pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff worked as a food service supervisor for defendant at a maximum-security prison from 1993 until 1998, when she left defendant's employ for unrelated medical reasons. On November 14, 2000, plaintiff filed a complaint against defendant alleging, in pertinent part, sexual harassment. Specifically, plaintiff claimed that defendant and its employees discriminated against her on the basis of her sex, publicly ridiculed her, and unfairly reprimanded her due to her sex. The trial court concluded that plaintiff failed to establish a prima facie case of sexual harassment and that no genuine issue of material fact existed.

On appeal, plaintiff claims that she established a prima facie case for sexual harassment—hostile work environment under the Michigan Civil Rights Act (MCRA),[1] and that the trial court erred in dismissing her claim. We review a trial court's decision on a motion for summary disposition de novo.[2]

A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[3] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider

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[1] MCL 37.2101 *et seq*.

[2] *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

[3] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d

(continued…)

the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[4] Summary disposition under MCR 2.116(C)(10) is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[5]

According to our Supreme Court's decision in *Chambers v Trettco*,[6] an employee must establish each of the following by a preponderance of the evidence to establish a claim for hostile environment sexual harassment:

> (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.[7]

Assuming, without deciding, that plaintiff could establish the first and second elements in support of her claim, we find that she has failed to present any evidence showing that she was subject to unwelcome sexual conduct or communication from defendant. Our Supreme Court has recently explained that the third element requires a plaintiff to present evidence of "conduct or communication *of a sexual nature*[.]"[8] In this case, plaintiff admitted that she did not receive any unwelcome sexual conduct or remarks from Food Service Director Herbert Barry, Assistant Food Service Director Ray Gazlay, or Assistant Business Manager Peter Hanson. And in response to defendant's interrogatories asking plaintiff to state each unwelcome comment or offensive conduct, she responded as follows:

> Ray Gazlay "there's more memo's [sic] written about your buttocks in this institution than anything else" and "How can I convince you who have been a waitress for 35 years that a pat on the butt is a sexual assault. This whole thing is stupid."

This remark was made during a disciplinary investigation into plaintiff's failure to follow defendant's work policies and report a prisoner that had intentionally touched her buttocks.

(…continued)

685 (1999).

[4] *Singer v American States Ins,* 245 Mich App 370, 374; 631 NW2d 34 (2001).

[5] *Auto-Owners Ins Co, supra* at 397.

[6] *Chambers v Trettco, Inc*, 463 Mich 297; 614 NW2d 910 (2000).

[7] *Id*. at 311 (emphasis added).

[8] *Haynie v Dep't of State Police*, 468 Mich 302, 313; 664 NW2d 129 (2003) (emphasis added).

Considered in context, this remark was clearly not sexual in nature. Accordingly, the trial court properly determined that plaintiff failed to present a prima facie case of hostile work environment sex discrimination.

We note that plaintiff also takes issue with the fact that the trial court neglected to rule on the statute of limitations issue raised by defendant. "Whether [a] claim is statutorily time-barred is a question of law for this Court to decide de novo."[9] After reviewing the record evidence, we conclude that plaintiff's discrimination claims that occurred before November 14, 1997 were barred by the applicable three-year limitation period.[10]

"A claim accrues when all the necessary elements have occurred and can be alleged in a proper complaint."[11] Even assuming, arguendo, that plaintiff has a claim, the record shows that it accrued more than three years before plaintiff filed her complaint. The record does not support plaintiff's contention that the "continuing violation" exception would apply in this case. Under this exception, a party may "seek damages for violations that occurred outside the limitation period if the violations are 'continuing' in nature and at least one of the discriminatory acts falls within the statutory limitation period."[12] For the exception to apply, the party must show that the discriminatory act within the time period was not merely a later effect of a past discriminatory act and that it resulted from either a policy of discrimination or a continuing course of conduct.[13]

While plaintiff has presented independent acts within the time period, she fails to allege a "policy of discrimination" and cannot sustain a "continuing course of conduct." In this respect we note that plaintiff was on notice of a need to assert her rights as early as 1996, when she informed her union representative in a letter that she was being discriminated against and harassed.[14] Because plaintiff cannot avail herself of the continuing violation exception to the statute of limitations, her claim is time-barred.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper

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[9] *Regents of Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 731; 650 NW2d 129 (2002); see also *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 324; 651 NW2d 811 (2002).

[10] MCL 600.5805(9).

[11] *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 244; 492 NW2d 512 (1992).

[12] *Rasheed v Chrysler Motors Corp*, 196 Mich App 196, 207; 493 NW2d 104 (1992).

[13] *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 528-530, 538; 398 NW2d 368 (1986); see also *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 344-345; 483 NW2d 407 (1991).

[14] See *Sumner, supra* at 538; *Meek, supra* at 344-345.