STATE OF MICHIGAN

COURT OF APPEALS

CAROL CARLISLE-BRADFORD, Plaintiff-Appellant,	UNPUBLISHED September 28, 2001
v	No. 223041 Jackson Circuit Court
DEPARTMENT OF CORRECTIONS, Defendant-Appellee.	LC No. 98-090597-CL

Before: Neff, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant on her sexual harassment claim under the Civil Rights Act (CRA), MCL 37.2101 *et seq*. We reverse and remand.

I

Plaintiff began employment as a corrections officer for defendant in February 1995. After her training was completed, plaintiff was assigned to work at the State Prison of Southern Michigan (SPSM) in Jackson. According to plaintiff's deposition testimony, shortly after she arrived at SPSM, she was sexually harassed by her male coworkers, including a sergeant who sometimes substituted for plaintiff's supervisor. Plaintiff testified that beginning in June 1995, a fellow corrections officer, Don Carrigan, repeatedly asked her on dates, as did Charles Ingersoll, another corrections officer. According to plaintiff, she was the object of ongoing sexual comments from these coworkers. For instance, Ingersoll once made an inappropriate comment about plaintiffs breasts, stating that her shirt was "bulging in the front," and he would make remarks such as "Ooh baby" when she walked by. Further, plaintiff was subjected to more explicit sexual behavior and touching by Carrigan.

Plaintiff testified that when she complained to a supervisor that her male coworkers were asking her out on dates and that she was not interested, no action was taken. She indicated that at the end of June 1995, after she rebuffed Carrigan's advances, she overheard him telling some of the inmates personal details about her life, such as where she lived and the age of her husband.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Further, at the end of July 1995, Carrigan asked her why she had married an older man, and he told her that he wanted to have sex with her.[1]

Additionally, plaintiff testified that one of her superiors, Sergeant Charles Matthews, also asked her out on dates, and that he would make "catcalls" when he saw her, like "Shake that ass, [and] oh, I like the way you look in those pants." Matthews also wrote down his numbers and asked plaintiff to call him because he wanted her to come over or meet him at a hotel.

In mid-October, 1995, plaintiff filed a formal sexual harassment complaint against Carrigan after he exposed his penis to her when he used a toilet in a prison cell across from where she was standing. The complaint also alleged that on October 13, 1995, Carrigan rubbed plaintiff's thigh when she was sitting at the officer's desk, telling her that she owed him for trading days off with her. Following an investigation of plaintiff's complaint, defendant suspended Carrigan for twenty-five days. Plaintiff was transferred to another area of the prison for about one month, but later was transferred back to her original unit. Plaintiff stated that after she filed the complaint against Carrigan, she was teased by other coworkers about seeing Carrigan's penis, what size it was, and whether if she wanted it.

Plaintiff also testified that after the complaint was filed, male and female coworkers were unfriendly toward her, and that she felt uncomfortable working in her assigned unit. For example, plaintiff reported being patted down more often by female officers when she entered the prison, and complained that her coworkers would not relieve her so that she could go to lunch or to the bathroom. Plaintiff testified that because she was uncomfortable working in the unit, she sought, but was not granted, a transfer.

On June 14, 1996, plaintiff was assaulted and beaten by a prison inmate. According to plaintiff, the inmate called her a "black bitch" before the assault, and when she questioned Ingersoll and Matthews about whether she should issue a citation to the inmate, they told her not to do so because the ticket "would not fly." Plaintiff also testified that when she was assaulted, Matthews and Ingersoll, who were two floors below plaintiff on the prison's base floor, did not immediately come to her aid, but instead were watching.[2]

Plaintiff stated during deposition that she was convinced that the inmate's attack was a "set up" by Matthews and Ingersoll because they were angry that she had rebuffed their sexual advances. In support of this contention, plaintiff testified that before the assault occurred, she observed Matthews talking with the inmate and laughing when the inmate called her an inappropriate name. Further, Ingersoll and Matthews routinely "bent the rules" for the inmate, allowing him to exit his cell to get ice and use the telephone, and to "run a store on [plaintiff's] gallery" even though the inmate was supposed to be under plaintiff's supervision.

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[1] Plaintiff indicated that Carrigan told her he wanted to "f**k [plaintiff] along with all the other people in the institution … [that] he wanted to fuck me like everyone else wanted to f**k me in the institution …."

[2] Plaintiff also stated that Matthews was one of the officers that eventually came to her aid.

After the assault, plaintiff went on a leave of absence and collected worker's compensation benefits, except for a brief period in the spring of 1997 when she worked as a building supervisor at the DeMarse Training Academy in Lansing. In July 1998, plaintiff was offered a word processing position with defendant's electronic monitoring unit. Plaintiff declined this position, purportedly under the advice of her treating psychologist, because it involved speaking with parole/probation recipients over the telephone. However, the record indicates that plaintiff's psychologist restricted her from being in proximity to inmates, but did not advise plaintiff against taking the offered position. Plaintiff's employment with defendant was subsequently terminated.

Plaintiff filed the instant lawsuit on October 9, 1998, alleging sexual discrimination in violation of the CRA. Specifically, plaintiff claimed that she was subjected to hostile work environment sexual harassment.[3] See MCL 37.2103(i)(*iii*).[4] After discovery, defendant moved for summary disposition under MCR 2.116(C)(7) and (10),[5] arguing, in part, that any acts occurring before October 9, 1995 could not support a claim of hostile work environment sexual harassment because they were time-barred and that plaintiff had not made out a prima facie claim of hostile work environment sexual harassment. Following a hearing, the trial court granted summary disposition in defendant's favor pursuant to MCR 2.116(C)(10). The trial court concluded that plaintiff's claims of sexual harassment that occurred before October 9, 1995 were untimely.[6] Further, after considering the totality of the circumstances, the trial court found that the "sporadic" instances of harassment alleged by plaintiff were insufficient as a matter of law to support a hostile work environment claim. The trial court observed that although the incidents leading to the formal complaint, namely Carrigan exposing himself to plaintiff and touching her thigh, were "protected under [the CRA]," the record was clear that defendant "took prompt and remedial action" following the filing of plaintiff's complaint. The trial court also concluded there was no evidence that defendant's employees instigated the June 16, 1996 attack against plaintiff.

II

On appeal, plaintiff contends that the trial court erred in concluding that plaintiff failed to establish a prima facie claim of hostile work environment sexual harassment, and, therefore, summary disposition of this claim was improper. We agree.

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[3] Plaintiff also alleged retaliation in violation of MCL 37.2701(a), and this claim was likewise summarily dismissed by the trial court. Plaintiff does not challenge the trial court's dismissal of the retaliation claim on appeal.

[4] Plaintiff filed the present action on October 9, 1998. Accordingly, the statutory language applicable in this case is that found in 1992 PA 124, rather than the current statutory language, which was enacted by 1999 PA 202, and which came into effect on March 10, 2000. See *Haliw v Sterling Heights*, 464 Mich 297, 303 n 6; 627 NW2d 581 (2001).

[5] Defendant's motion pursuant to MCR 2.116(C)(8) is not at issue.

[6] On appeal, plaintiff does not challenge the trial court's conclusion that the incidents before October 9, 1995 are time-barred.

III

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the claim. A trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Summary disposition is proper where the proffered evidence fails to establish a genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

IV

As this Court recently observed in *Corley v Detroit Bd of Education*, 246 Mich App 15, 19; 632 NW2d 147 (2001), "freedom from discrimination in employment because of a person's sex is a civil right." The CRA prohibits an employer from discriminating against an employee on the basis of sex, MCL 37.2202, and clearly provides that sex discrimination includes sexual harassment, MCL 37.2103(i). Plaintiff alleged that she was subjected to a hostile work environment, thus implicating MCL 37.2103(i),[7] which provides:

> Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
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> * * *
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> (*iii*) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment … or creating an intimidating, hostile, or offensive employment … environment.

In *Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000), our Supreme Court considered the elements of a claim of hostile work environment harassment, noting that a prima facie claim of hostile environment requires a plaintiff to prove by a preponderance of the evidence that:

> (1) the employee belonged to a protected group;
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> (2) the employee was subjected to communication or conduct on the basis of sex;
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> (3) the employee was subjected to unwelcome sexual conduct or communication;
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> (4) 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

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[7] This subsection has since been amended, but the changes are minor and do not affect our analysis. See n 4, *supra*.

(5) respondeat superior. [*Id.*, quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

At issue in the present case is whether the conduct "created an intimidating, hostile, or offensive work environment" as contemplated by § 103 of the CRA. "[W]hether a hostile work environment exists should be determined by an objective reasonableness standard, not by the subjective perceptions of a plaintiff." *Radtke, supra* at 388. This requires us to "objectively examin[e] the totality of the circumstances" to discern "whether a reasonable person … 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." *Id*. at 387, 394 (footnote omitted).

Our Supreme Court recognized that whether a hostile environment exists cannot be determined by a "mathematically precise test." *Quinto v Cross & Peters Co*, 451 Mich 358, 370 n 9; 547 NW2d 314 (1996), quoting *Harris v Forklift Systems, Inc*, 510 US 17, 22-23; 114 S Ct 367; 126 L Ed 2d 295 (1993). All the circumstances of the conduct must be considered:

> These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. [*Quinto, supra* at 370 n 9, quoting *Harris, supra*.]

Viewing the evidence in the light most favorable to plaintiff, we conclude that the trial court erred in determining that the evidence was insufficient as a matter of law to support a claim of hostile work environment sexual harassment. In our view, a genuine issue exists regarding whether a reasonable person would find that, in the totality of the circumstances, the conduct at issue was "sufficiently severe or pervasive" to create a hostile work environment. *Quinto, supra* at 369.

Plaintiff alleged that she was "set up" for the inmate assault by Matthews and Ingersoll as a consequence of her rejection of sexual advances on their part. This allegation is sufficient to set out a prima facie claim of hostile work environment. In *Radtke, supra* at 395, the Court noted that it is rare that a single incident will support a hostile work environment claim, but then specifically cited violent attacks like this one as examples of single incidents that might suffice.[8] Plaintiff came forward with considerable circumstantial evidence to support her claim that the attack was set up, relying not on mere allegations or surmise, but specific evidence that Matthews and Ingersoll frequently allowed the prisoner in question to violate prison rules, that there was an understanding that the prisoner would in return do what he was asked by them, that they frequently let the prisoner out of his cell in direct violation of prison rules at times when plaintiff

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[8] In addition, the attack, along with prior acts contributing to a hostile work environment, may have been part of a continuing violation under the standard set forth in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 510, 538, 543-544; 398 NW2d 368 (1986). On remand, we would urge the trial court to allow this evidence so that the attack may be considered in context; if nothing else, the prior acts may be considered as background. *Id*. at 527.

was nearby, that Matthews was laughing and joking with the prisoner, who was referring to plaintiff using vulgar language, shortly before the attack.

There was also evidence that Matthews observed the prisoner defy plaintiff's authority in the altercation immediately preceding the attack and laughed at the incident, that he convinced plaintiff not to discipline the prisoner for this incident and thereby remove him from the area just before the attack occurred, that he and Ingersoll saw the attack, but stood by and delayed helping plaintiff despite the fact that she had just asked both of them to watch her closely at this time because of her concern that there might be trouble. Further, Matthews, who was supervising plaintiff at the time, had a history of sexually abusive and violent behavior, including two incidents of sexual harassment of other employees while working for defendant and, before that, a conviction for what he described as "assault with intent to commit rape." This evidence, considered in its totality, as it must be, *id*. at 391, is sufficient to avoid summary disposition, where evidence must be considered in the light most favorable to the party against whom summary disposition is contemplated, giving that party the benefit of any reasonable doubt. *Id*. at 374. We reverse the trial court's grant of summary disposition with respect to plaintiff's hostile work environment claim.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Robert J. Danhof

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O'CONNELL, J. (*dissenting*).

I respectfully dissent. Having viewed the record evidence in the light most favorable to plaintiff, I am unable to conclude that the trial court erred in determining that the evidence was insufficient as a matter of law to support a claim of hostile environment sexual harassment. In my view, a careful review of the record does not yield genuine factual disputes on which reasonable minds could differ regarding whether, under the totality of the circumstances, the conduct at issue was "sufficiently severe or pervasive to create a hostile work environment." *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996). I would affirm the trial court's grant of summary disposition in favor of defendant.

In her brief on appeal, plaintiff argues that the June 1996 attack by an inmate is persuasive evidence of a hostile work environment when considered in conjunction with the totality of the circumstances. In *Slayton v Ohio Dep't of Youth Services*, 206 F3d 669, 677 (CA 6, 2000) the Sixth Circuit Court of Appeals recognized that inmate conduct, standing alone, will not support a hostile environment claim. Specifically, the *Slayton* Court opined:

> Prisoners, by definition, have breached prevailing societal norms in fundamentally corrosive ways. By choosing to work in a prison, corrections personnel have acknowledged and accepted the probability that they will face inappropriate and socially deviant behavior. [*Id.*]

However, the *Slayton* Court recognized that a hostile environment claim may be predicated on inmate conduct where prison personnel "encouraged, endorsed, and even instigated

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the inmates' harassing conduct." *Id.* at 678. In *Slayton*, there was evidence that the plaintiff's coworker encouraged the inmates to engage in harassing conduct, such as telling prisoners to drop their towels when the plaintiff was on shower duty, and leading the inmates in sexually provocative dances. *Id.* at 674. The coworker also provided the inmates with snacks and sexually explicit CDs, and made offensive comments to the inmates regarding the plaintiff.[1]

In my view, the fact that plaintiff was assaulted by an inmate, viewed in conjunction with the totality of the circumstances, is insufficient to create a factual dispute with regard to whether the conduct alleged was sufficiently severe and pervasive to create a hostile environment. A thorough review of the record evidence does not demonstrate that defendant's employees encouraged, endorsed or instigated the inmate's attack. Plaintiff asserted in her deposition that she observed Matthews talking and laughing with the prisoner shortly before the attack, and that Ingersoll and Matthews routinely bent the rules for the inmate, and did not immediately come to her aid when she was assaulted. Plaintiff also alleged that Matthews and Ingersoll "set [her] up." However, plaintiff was unaware of any agreement between Matthews and Ingersoll and the inmate to harm plaintiff. I share the trial court's view that plaintiff's general accusations are insufficient to demonstrate a genuine factual dispute regarding whether defendant's employees encouraged and instigated the attack. See also *McCallum v Dep't of Corrections*, 197 Mich App 589, 601; 496 NW2d 361 (1992) (declining to extend "single-incident" theory of hostile environment claim to prison setting because prisoners "are unable to be law-abiding and . . . live in an inherently hostile environment.").

I would affirm the trial court's grant of summary disposition in favor of defendant.

/s/ Peter D. O'Connell

[1] In *Slayton*, the plaintiff testified that she overheard the coworker tell the inmates "Don't worry about that b**ch; she's not going to be here that much longer; she's going to be fired." *Id.* at 674.