STATE OF MICHIGAN

COURT OF APPEALS

CRYSTAL PERRY, Plaintiff-Appellee,	UNPUBLISHED June 26, 2014
v	No. 315243 Ingham Circuit Court
DEPARTMENT OF HUMAN SERVICES, Defendant-Appellant.	LC No. 10-001501-CD

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant Department of Human Services (DHS) appeals as of right a February 25, 2013, judgment in favor of plaintiff following a bench trial wherein the trial court awarded plaintiff $21,000 in damages after finding that plaintiff alleged and proved a hostile work environment claim under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. For the reasons set forth in this opinion, we reverse the judgment in its entirety and remand for entry of an order of involuntary dismissal pursuant to MCR 2.504(B)(2).

I. FACTS & PROCEDURAL HISTORY

Plaintiff, who is African-American, began working at DHS in 2003. In 2009, one of her co-workers placed a stuffed toy gorilla on a cubicle wall that separated her workspace from common areas and other employee work stations. According to plaintiff, the event coincided with her supervisor giving her a negative evaluation for an application to a leadership academy within DHS. Plaintiff complained to defendant's office of Equal Employment Opportunity (EEO). James Flanigan of the EEO office immediately responded and informed plaintiff that the gorilla would be removed. However, according to plaintiff, the gorilla was not removed until three weeks later.

At a deposition, plaintiff testified that her coworker Kelly Morse accepted responsibility for the gorilla. Plaintiff testified that she had a good relationship with Morse and stated that Morse was cordial to her and they did not have any personal issues between one another. When the trial court asked plaintiff how the gorilla was connected to her, plaintiff responded, "I don't connect it to me whatsoever." Plaintiff denied that the gorilla was directed at the coworker near her work station.

Plaintiff testified that she was "quite distraught" by the presence of the stuffed gorilla and immediately made known that she wanted it removed. Plaintiff testified that the five-foot tall gorilla was clearly visible to the entire office. She stated that during the three weeks the stuffed gorilla remained on the wall, co-workers stopped by and looked at it and laughed and left notes on the stuffed animal. Plaintiff testified that she was humiliated, embarrassed, angry, and hurt that the stuffed gorilla appeared and was not removed even after she complained. She stated that she felt ostracized and emotionally upset, and that she sought mental health treatment as a result.

Plaintiff commenced this suit on September 28, 2010, alleging a claim of race-based discrimination contrary to MCL 37.2202 of the ELCRA. Plaintiff alleged that certain of DHS' "management employees" denied her opportunities for promotions, "working out of class positions," and training opportunities because of her race. Plaintiff requested lost wages, benefits, pain and suffering, and requested an order "[p]romoting plaintiff to the highest position plaintiff was denied as a proximate cause of defendant's employees' discriminatory actions. . . ."

At trial, James Newsom testified as an adverse witness for plaintiff and as a representative of DHS for the defense. He testified that he thought very highly of plaintiff and actively assisted her in getting hired at DHS; he also actively facilitated her move out of her department and into his unit when plaintiff began having difficulties with her supervisor. Newsom indicated that plaintiff was a capable and well-liked employee. Newsom testified that his department closely reviewed hiring decisions for potential discrimination problems, and he found no evidence that plaintiff was wrongly denied any promotions or wrongly screened out for interviews by DHS because of her race.

Defendant moved for a directed verdict following plaintiff's close of proofs, arguing that plaintiff failed to prove a prima facie case of racial discrimination under MCL 37.2202. Plaintiff responded, arguing that the gorilla incident was evidence of discrimination. The trial court noted that plaintiff had not plead a harassment claim and stated, "[plaintiff] may have encountered more of a hostile work environment, a bullying type of situation . . . than a situation where it affected what she's claiming, which is I was never promoted properly." However, the trial court denied defendant's motion for directed verdict.

Following closing arguments, the trial court found that plaintiff failed to produce evidence to support that she "suffered adverse employment actions" because of her race. Instead, the evidence supported that defendant "protected" plaintiff. Furthermore, there was no evidence that "white people, younger people" were hired instead of plaintiff. The court explained, "I see a department who has well exceeded the hiring of African-American employees, and so I can't say that the evidence bears out that you were discriminated against."

Nevertheless, the trial court found that plaintiff had alleged and proved a racial harassment/hostile work environment claim. The court acknowledged that plaintiff did not specifically allege this claim in her complaint, but found the "ape issue," "very troublesome." The court explained as follows:

> And I know that this was not the best complaint in terms of laying it out, but I also know there is enough gray language in there and I think that the

> Department has been on notice, as indicated by Defendant's trial brief, that this was an issue. Everybody has danced around it. []
>
> And it very much goes through what counsel has stated in opening and closing and in a few objections, and essentially there is a claim that 'There is only really one incident. And really she shouldn't have a problem with this because it was taken care of, and really it's isolated.'
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> I'm sorry. I'm not buying that today or any day because when we have these kinds of claims, when we have these problems, they need to be taken care of the minute we find out about them. We don't have discussions, e-mails, and telephone calls and wait three weeks and call that an isolated incident. We don't wait for the whole Department, any visitors, trash collectors, mailmen to see it. That is ongoing, continued harassment. That is despicable. It is not worthy of any state department. It is continued hostile work environment. It is upsetting. It is beneath any American . . . The minute that that monkey, ape, gorilla was not removed, that became a violation every single day.
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> * * *
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> I do believe that she suffered psychological harm. I think it's a really poor message to send to an employee. And the monkey connotation, I don't think I need to go there. I think that if I walked down the streets of Detroit or Flint carrying that gorilla, I'd be shot, and I'd deserve to be shot. It is as bad and as offensive as words that also should not be said. I won't go there. I don't have to. And the records should reflect that I'm very, very angry. People died in this country so that these things don't happen . . . I don't expect this kind of behavior and certainly not in this Department.

The court awarded damages in the amount of $1,000 per day for each of the 21 days that the gorilla was in the workplace. In addition, the court ordered any "negative evaluation" given by plaintiff's supervisor be removed from her file. The court did not articulate a legal rationale for this aspect of its order. This appeal ensued.

II. ANALYSIS

On appeal, defendant argues that the trial court erred in denying its motion for directed verdict and in awarding damages on a hostile work environment claim. Defendant argues that plaintiff did not allege, nor was there evidence to support, a hostile work environment claim.

In a bench trial, a motion for a directed verdict should be treated as a motion for an involuntary dismissal. MCR 2.504(B)(2); *Samuel D. Begola Servs, Inc, v Wild Bros*, 210 Mich App 636, 639; 534 NWd2d 217 (1995). MCR 2.504(B)(2) provides that in a bench trial, a trial court may dismiss an action "on the ground that, on the facts and the law, the plaintiff has no right to relief." We review de novo a trial court's ultimate determination on a motion for involuntary dismissal while the court's factual findings are reviewed for clear error. *Begola*, 210 Mich App at 639 (citations and quotations omitted).

A party must file a complaint to initiate a lawsuit. MCR 2.101(B). The complaint must include a "demand for judgment for the relief that the pleader seeks." MCR 2.111(B)(2). The complaint must contain "specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend," MCR 2.111(B)(1), and each allegation must be "clear, concise and direct." MCR 2.111(A)(1).

A claim of race-base discrimination is distinct from a hostile work environment claim. The ELCRA prohibits an employer from failing to "hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment [because of race]." MCL 37.2202(1)(a). A claimant may prove that an employment action was based on racial discrimination through either direct or indirect evidence. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 464 NW2d 456 (2001). In cases where there is no direct evidence of discrimination, "[t]o establish a rebuttable prima facie case of discrimination, a plaintiff must present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) [the adverse employment action] occurred under circumstances giving rise to an inference of unlawful discrimination." *Sniecinski v BCBSM*, 469 Mich 124, 134; 666 NW2d 186 (2003).

In contrast, to establish a prima facie case of a hostile work environment based on race, a plaintiff must prove the following:

> (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 [race];
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> (3) the employee was subjected to unwelcome [racial] conduct or communication;
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> (4) the unwelcome [racial] 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
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> (5) respondeat superior. [*Haynie v State*, 468 Mich 302, 307–308; 664 NW2d 129 (2003), citing *Radtke v Everett*, 442 Mich 368, 382-383; 664 NW2d 129 (2003).]

"[A] hostile work environment claim is actionable when the work environment is so tainted that, in the totality of the circumstances, a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Radtke*, 442 Mich. at 372.

In this case, plaintiff alleged race-based discrimination with respect to a term of employment. Specifically, plaintiff claimed that DHS denied her promotions, out-of-class work opportunities, training opportunities and pay because of her race. The alleged adverse employment action formed the crux of plaintiff's claim. Plaintiff did not allege a hostile-work environment in her original complaint, nor did she seek to amend the complaint to add a hostile-work environment claim. Rather, plaintiff sought relief from what she alleged was discriminatory conduct in a term of employment, i.e. that she was denied opportunities for

advancement because of her race. The trial court acknowledged that plaintiff did not specifically plead a claim of workplace discrimination, yet it found that the complaint contained "gray language" where plaintiff referred to workplace discrimination. This was error. As noted above, a plaintiff's allegations must be clear and direct. See MCR 2.111(A)(1). Plaintiff did not allege a workplace discrimination claim nor did she move to amend her pleading at any time during the proceeding. In short, the trial court erred as a matter of law in awarding damages on a claim that was not alleged in plaintiff's pleading. See *Barnett v Hargett*, 174 F 3d 1128, 1133 (CA 10, 1999) (a trial court may not "rewrite a petition to include claims that were never presented.")[1]

Moreover, even assuming plaintiff alleged a hostile work environment claim, the evidence at trial did not support the claim and the trial court clearly erred in finding otherwise.

In this case, there is no dispute that plaintiff was a member of a protected class. *Haynie*, 468 Mich at 307–308. However, there was insufficient evidence to establish that plaintiff was subjected to conduct premised on her race.[2] *Id*. To succeed on a hostile work environment claim, plaintiff was required to prove that the conduct at issue was inherently related to plaintiff's protected status. *Id*. at 308-309. Here, there was no evidence that the placement of the gorilla was racially motivated. Instead, Morse, a co-worker who was friendly to plaintiff, took responsibility for the stuffed animal that was placed on the cubical wall that separated plaintiff's work area from that of a co-worker nearby. As the trial court noted, the stuffed animal could have been directed at the co-worker and plaintiff testified that she did not connect the gorilla to herself "whatsoever." There was no evidence of racially derogative comments or threats directed at plaintiff in connection with the incident and plaintiff did not indicate that anyone displayed prejudice or animus toward her. Although plaintiff testified that co-workers stopped by the gorilla and laughed and left written comments on it, there was no evidence that any of the written comments were racial in nature or directed at plaintiff.

Moreover, while plaintiff testified that the placement of the gorilla caused her humiliation, embarrassment and dismay, "[w]hether a hostile work environment exists should be determined by an objective reasonableness standard, not by the subjective perceptions of a plaintiff." *Radtke*, 442 Mich at 388. In this case, plaintiff failed to prove that, given the totality of the circumstances, "a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Id*. at 372. Here, the conduct at issue was isolated in nature. The toy gorilla was in plaintiff's workplace for a total of three weeks during the course of plaintiff's employment at DHS—at the time, a period of over six years. This does not constitute proof of an intimidating, hostile, or offensive environment

[1] "Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues." *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 360, n 5; 597 NW2d 250 (1999).

[2] The trial court did not articulate the elements of a hostile work environment claim nor did it make findings of fact as to any of the elements.

toward plaintiff or African Americans in general. As the trial court noted the evidence showed that defendant "protected" plaintiff. Defendant did not condone or facilitate the conduct at issue and a representative from the EEO office immediately responded to plaintiff's complaint and informed her that the gorilla would be removed and the stuffed animal was eventually removed from the workplace. Plaintiff did not see the stuffed animal again and, other than the single incident, there were no other similar incidents. See e.g. *id*. at 368 (noting that "a single incident, unless extreme, will not create an offensive, hostile, or intimidating work environment. . . .") Furthermore, when plaintiff began having issues with her supervisor defendant created another position for her in a different department. On this record, we conclude that the totality of the circumstances did not constitute proof of severe and pervasive discriminatory conduct that created a hostile environment that interfered with plaintiff's employment. *Id*.

In sum, plaintiff did not allege, nor was there evidence to support a claim of hostile work environment under the ELCRA and the trial court clearly erred in concluding otherwise. Accordingly, defendant was entitled to involuntary dismissal under MCR 2.504(B)(2).[3]

Reversed and remanded for entry of an order of involuntary dismissal consistent with this opinion. No costs awarded to either party. MCR 7.219(A). We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Jane M. Beckering

[3] Defendant argues that the trial court improperly imposed punitive damages. However, given our resolution of the issues above, we need not address this argument.