STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH WHITE,

Plaintiff-Appellant,

v

DETROIT EAST COMMUNITY MENTAL HEALTH, MARILYN SNOWDEN, SHIRLEY CALHOUN, DORIS STERRETT, and GATEWAY COMMUNITY HEALTH PROVIDER,

Defendant-Appellees.

UNPUBLISHED
July 22, 2014

No. 314990
Wayne Circuit Court
LC No. 11-011126-CZ

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals from two orders of the trial court, one granting summary disposition to defendant Gateway Community Health Provider ("Gateway") pursuant to MCR 2.116(C)(10), and one granting reconsideration to the remaining defendants, granting them summary disposition, and dismissing plaintiff's case. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff began working for defendant Detroit East Community Mental Health ("Detroit East") in 2002. Detroit East is a facility that provides mental health services. Gateway is a non-profit corporation that contracts with Detroit East. Gateway operates a "managed care provider network" that disperses Medicaid funds to Detroit East to fund mental health services to patients. In essence, Medicaid pays Wayne County, Wayne County pays Gateway, and Gateway pays Detroit East. The agreement between Gateway and Detroit East states that each is an independent contractor and is not a servant, agent, or principal of the other party.

In 2003, plaintiff began working as a therapist for the "Co-occuring" department of Detroit East, under the supervision of defendant Doris Sterrett ("Sterrett"). Payroll records list his workplace location as "6309 Mack." On March 29, 2004, plaintiff filed a written internal complaint against Sterrett, directed to defendant Marilyn Snowden ("Snowden"), which stated in relevant part:

> Dear miss [sic] Snowden, Doris Sterrett continues to asked [sic] me for sex. I told her over and over it will not happen. When I mention my wife she becomes out of control. Doris cannot take no for an answer. The last time I said no to her she attacked me in my office, I am asking you to conflict resolute [sic] between Doris and I . . . . This incident occurred on 3/25/2004.

Detroit East suspended Sterrett without pay pending the outcome of an internal investigation; Sterrett resigned from employment with Detroit East rather than go through the investigation. After Sterrett's resignation, Detroit East informed plaintiff that the results of the investigation were "inconclusive." On April 23, 2004, Detroit East rehired Sterrett as a contract therapist; payroll records list her workplace location as "9141 E. Jefferson."

In 2005, plaintiff moved to the "Mobile ACT" program with Detroit East. The following week, Sterrett again became a supervisor of Detroit East's "Co-occurring" department, which plaintiff had just left. The two programs were housed in the same building. Sterrett stated in her deposition that although she worked in the same building as plaintiff after this switch, she worked 9 a.m. to 5 p.m. while plaintiff worked 6 p.m. to 11 p.m.; she stated that she did not run into plaintiff at work.

Plaintiff testified that upon Sterrett's return, she began calling him and talking to him periodically, "[s]aying things like, you know, why did I do what I did to her. Why did I, you know, report her." He stated that "well, everybody make a mistake, you know. Maybe she was just overwhelmed at some point." Plaintiff also stated that Sterrett required him to take her shopping and running errands. He indicated that he assisted Sterrett in learning to drive, and at her request allowed her to be in a leadership program with him. Plaintiff described that she went to the leadership seminars and told people that she and plaintiff were "romantic" and "having a relationship"; she would also cry and say plaintiff was "breaking her heart." Plaintiff stated that Sterrett was involved in the leadership program in 2006 and stopped being involved "[a]bout a year after." According to plaintiff, he believed he needed to do things for Sterrett in order to keep his job.

Plaintiff presented telephone records indicating that he received a large number of telephone calls from Sterrett between 2005 and 2011. The bulk of the calls occurred from 2005 through 2007. Plaintiff stated that he complained orally about Sterrett to Snowden and Shirley Calhoun ("Calhoun").[1] Specifically, he complained in 2009 that Sterrett had called and asked him to pick her up for a Christmas party and that he "didn't feel comfortable doing that." Plaintiff also stated generally that he discussed "his concerns" "off and on" with Sterrett and Calhoun, among others.

Plaintiff presented the trial court with affidavits from Pearl Brooks, John Gregson, and Donna Edwards in support of his claim that Sterrett continually harassed him. Brooks's affidavit stated she had worked at Detroit East since 2000, that she had heard Sterrett refer to plaintiff as "handsome" and that Sterrett shared inappropriate details about plaintiff's history of drug

[1] Calhoun was plaintiff's supervisor in 2009 through 2011.

addiction with clients. It is unclear when these incidents occurred. Gregson's affidavit stated that he worked as a contract employee with Detroit East from 2008 to 2011, and that he witnessed plaintiff making complaints to Calhoun about "the goings on" at Detroit East, although the affidavit does not state that he witnessed plaintiff make complaints about sexual harassment by Sterrett. Edwards's affidavit stated that she was a retired social worker who participated in the leadership program with plaintiff and Sterrett in 2006. The affidavit further states that she was confronted by Sterrett at a leadership event in 2006 and told to "get her own boyfriend," that she received numerous abusive phone calls in 2006, that she spoke to plaintiff about these calls and that plaintiff told her his wife had also received similar calls and he believed they came from Sterrett. The affidavit states that the calls stopped after Sterrett stopped coming to leadership meetings.

Plaintiff received a "plan of correction" from Calhoun on September 22, 2010. Plaintiff resigned from Detroit East in 2011. On September 12, 2011, plaintiff filed a pro se complaint against defendants, alleging violations of the Michigan Whistleblower's Protection Act (WPA), MCL 15.361 et seq. On November 11, 2012, plaintiff filed a first amended complaint, adding additional counts related to alleged fraudulent billing practices as well sexual harassment. After numerous procedural actions, including assignment to a different trial judge, plaintiff, now represented by counsel, was given leave to file a second amended complaint, which he did on June 18, 2012. The complaint alleged violations of Michigan's minimum wage law, MCL 408.393(1)(A), hostile work environment sexual harassment, retaliation, and retaliatory termination in violation of the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 et seq., and violation of the WPA.

Gateway moved the trial court for summary disposition, which the trial court granted on the ground that under the "economic realities" test, plaintiff had presented no evidence that Gateway was his "employer" for the purposes of violations of the minimum wage act, the WPA, or the ELCRA. Detroit East and the other defendants also moved for summary disposition, which the trial court granted with respect to the majority of plaintiff's claims, but which it denied with respect to plaintiff's sexual harassment claim under the ELCRA, finding that a question of fact existed as to two elements of plaintiff's claim.

Defendants (apart from Gateway) moved the trial court for reconsideration, alleging that plaintiff did not demonstrate that he had complained of *sexual* conduct on the part of Sterrett, or demonstrate that Sterrett's conduct altered the condition of his employment and created a hostile work environment. On reconsideration, the trial court held that it had committed a palpable error by not granting defendants summary disposition on plaintiff's claims under the ELCRA. Specifically, the trial court held that "there is no evidence of any <u>sexual</u> conduct or communication after the 2004 complaint and that the leadership meeting disruptions took place prior to the 2004 complaint." (Emphasis in original).

Plaintiff appeals from the orders of the trial court, both as to Gateway and the remaining defendants, but limits his appeal only to the claim of sexual harassment under the ELCRA.

II. STANDARD OF REVIEW

Gateway moved for summary disposition pursuant to MCR 2.116(C)(10). The remaining defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court granted summary disposition to Gateway pursuant to MCR 2.116(C)(10). The court did not specify the grounds upon which it granted summary disposition to the remaining defendants; however, because it is clear that the trial court considered information beyond the pleadings in making its rulings, we treat its grant of summary disposition as being pursuant to MCR 2.116(C)(10).

We review a trial court's decision on a motion for summary disposition de novo. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant, *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. SUMMARY DISPOSITION—DEFENDANT GATEWAY

The trial court granted summary disposition to Gateway on the ground that there was no evidence that Gateway was an "employer" of plaintiff under the "economic realities" test, because the evidence showed that Detroit East, plaintiff's employer, was an independent contractor of Gateway. We agree.

The "economic realities" test is the appropriate test to apply for determining whether a party is an "employer" for purposes of claims under the ELCRA. See *Ashker v Ford Motor Co*, 245 Mich App 9, 14-15; 627 NW2d 1 (2001); see also *Buckley v Professional Plaza Clinic Corp*, 281 Mich App 224, 235; 761 NW2d 284 (2008).

> Although the totality of the circumstances are considered, in applying the economic realities test, the courts generally consider the following four factors[:] (1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal. No one factor is controlling. [*Clark v United Technologies Automotive, Inc*, 459 Mich 681, 688; 594 NW2d 447 (1999) (quotation marks and citations omitted).]

In support of his claim that the trial court erred in its application of this test, plaintiff principally relies on Gateway's "Community Health Provider Manual." Plaintiff points out that

the manual states that Gateway is responsible for "overseeing" providers such as Detroit East, and provides a dictionary definition for "oversee" that indicates that the term can be synonymous with "supervision" and "direction." Plaintiff further argues that the manual provides protocols for providing treatment to patients according to their "Person Centered Planning." Plaintiff also points to the affidavit of Kenneth Conley, a former employee of Detroit East, which indicates that he "remember[ed] Gateway being involved with Detroit East Community Mental Health's business back in 2008[,]" that in 2009 he was informed "that Gateway was going to come in and change a lot of things[,]" and Snowden "had 1 [sic] Gateway employee come into some of our staff meetings and go over Gateway's policy of 'Person Centered Planning.'" Finally, plaintiff asserts that Detroit East employees are to "review records and bills for services at the direction of Gateway." Plaintiff thus concludes that Gateway was "effectively a dual employer of Plaintiff's" for the purposes of his claim under the ELCRA.

In rejecting plaintiff's position, the trial court stated:

> Using the Economic Realities test, it is clear that there is no evidence that Gateway was Plaintiff's employer for purposes of the alleged violation of the Whistleblower Protection Act, the Minimum Wage Act, or the ELCRA, and therefore summary disposition should be GRANTED pursuant to MCR 2.116(C)(10) in favor of Defendant Gateway. It is clear that Detroit East, not Gateway, had control over Plaintiff's day-to-day duties; Detroit East clearly paid Plaintiff's wages; and Detroit East, not Gateway, had the right to hire, fire, and discipline plaintiff. Notably, Gateway was not even informed of Plaintiff's resignation. Viewing these factors as a whole, it is clear that Gateway was not Plaintiff's employer for purposes of the Whistleblower's Protection Act. More accurately, Detroit East could be described as an independent contractor of Gateway; the Agreement between Detroit East and Gateway categorized their relationship as such.

We find no error in the trial court's holding. The manual referenced by plaintiff does not support his contention that Gateway was an employer of his, but instead merely indicates that Gateway imposed certain standards on the work performed by Detroit East for which it paid. There is no indication that Gateway exerted any day-to-day control over the activities of either plaintiff or Detroit East, notwithstanding the imposition of some guidelines "with respect to the results to be achieved." See *Chilingirian*, 194 Mich App at 70. Further, Conley's affidavit contains only the vague statement that Gateway was "involved" with Detroit East's "business" and a statement that a meeting was held on one occasion. In sum, there is no evidence that Gateway controlled the manner in which Detroit East or plaintiff performed their duties, as well as a complete dearth of evidence that Gateway held any authority to discipline or fire plaintiff, or ever paid plaintiff's wages.[2] We therefore uphold the trial court's grant of summary disposition to defendant Gateway.

[2] Plaintiff asserts that Gateway in fact paid plaintiff's wages because it provided Medicaid funds to Detroit East in return for the provision of mental health services. We do not find this fact

IV. SUMMARY DISPOSITION—REMAINING DEFENDANTS

Finally, plaintiff argues that the trial court erred in granting summary disposition, on reconsideration, to the remaining defendants, on plaintiff's ELCRA claim. We disagree.

To make out a prima facie case for a hostile work environment sexual harassment claim under the ELCRA, a plaintiff must establish five elements:

> (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 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; 501 NW2d 155 (1993), citing MCL 37.2103(h), MCL 37.2202(1)(a).]

Additionally, to sustain a claim for sexual harassment under the ELCRA, a plaintiff must file suit within three years from the date of the harassing conduct. See *Magee v DaimlerChrysler Corp*, 472 Mich 108, 113; 693 NW2d 166 (2005); MCL 600.5805(10).

Plaintiff meets the first prong, because "all employees are inherently members of a protected class in hostile work environment cases because all persons may be discriminated against on the basis of sex." *Radtke*, 442 Mich at 383. However, plaintiff cannot establish any of the other prongs within the relevant statutory period. Plaintiff filed suit on September 12, 2011. The majority of the harassing conduct alleged by plaintiff on the part of Sterrett thus occurred outside the applicable period of limitations, such as the allegations concerning Sterrett's behavior at the leadership seminars. Further, the record is simply devoid of evidence that plaintiff's employment was substantially interfered with, or an intimidating, hostile or offensive work environment existed, between September 12, 2008 and the filing of plaintiff's suit. Although plaintiff alleges that Sterrett demanded he drive her to a Christmas party in 2009,[3] and

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significant. It is undisputed that the relationship between Gateway and Detroit East involved the disbursement of Medicaid funds. Plaintiff has presented no evidence that Gateway could, for example, withhold, raise, or lower his wages, or that the failure of Gateway to pay Detroit East would result in plaintiff's wages going unpaid. We decline to hold that Gateway paid plaintiff's wages by disbursing federal funds to Detroit East. See *Chilingrian*, 194 Mich App at 70 ("Plaintiff was not involved in the city's pension program and the city did not pay plaintiff's salary. Instead, plaintiff would bill the city on a monthly basis at an hourly rate for the services rendered.").

[3] We note that according to plaintiff's own appellate brief, the call requesting a ride was the only call made by Sterrett to plaintiff in 2009.

that he complained to Snowden about it, there is no evidence that Sterrett's conduct in asking plaintiff for a ride, or indeed any other conduct within the statutory period, was "communication or conduct on the basis of sex," such that "but for the fact of [his] sex, [he] would not have been the object of harassment." *Radtke*, 442 Mich at 163 (quotation marks and citation omitted). Further, plaintiff similarly cannot demonstrate that he was subject to unwanted *sexual* conduct or communication during the relevant period. *Id*. Nor has plaintiff provided evidence that any of Sterrett's conduct in the relevant time period created a hostile working environment for plaintiff, such that "a reasonable jury could have found from a preponderance of the evidence that the comments were of a type, severity, or duration to have created an objectively hostile work environment." See *Quinto v Cross and Peters Co*, 451 Mich 358, 371; 547 NW2d 314 (1996).

Finally there is no evidence, related to the respondeat superior element, that plaintiff ever complained during the relevant time period that Sterrett's conduct was sexual in nature. When plaintiff did make such a complaint in 2004, Detroit East responded by taking steps to insure that Sterrett and plaintiff did not work together and conducted an investigation. Plaintiff and Sterrett never worked the same shift in the same building again after 2004. Plaintiff thus failed to establish that Detroit East or any defendant was given sufficient notice of any *sexual* conduct apart from the 2004 incident. See *Elezovic v Ford Motor Co*, 472 Mich 408, 417, 426; 697 NW2d 851 (2005).

The trial court therefore did not err in granting summary disposition to defendants on the ground that plaintiff did not carry his burden of showing that a genuine issue of material fact existed regarding his sexual harassment claim. Although the trial court focused on only the fourth and fifth elements of such a claim under the ELCRA, our de novo review of the trial court's grant of summary disposition leads us to conclude that plaintiff actually failed to establish any of the elements of his claim apart from membership in a protected class. *Moser*, 284 Mich App at 538.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto