[Cite as *Godsey-Marshall v. Phillipsburg*, 2010-Ohio-2266.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

TONYA GODSEY-MARSHALL	:	
	:	Appellate Case No. 23687
Plaintiff-Appellant	:	
	:	Trial Court Case No. 2008-CV-10921
v.	:	
	:	
VILLAGE OF PHILLIPSBURG, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 21st day of May, 2010.

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BROGAN, J.

{¶ 1} Tonya Godsey-Marshall (plaintiff-appellant) has appealed a trial court's order entering summary judgment in favor of the Village of Phillipsburg, David P. Evans, John Doe, and Brenda K. Etter (defendant-appellees) on all of her employment-related claims against them. We conclude that the court correctly found that no genuine issues of material fact exist for trial and that the

defendant-appellees are entitled to judgment as a matter of law. Therefore, we will affirm.

I

{¶ 2} In 1989, Godsey-Marshall began volunteering for the Village of Phillipsburg's rescue squad. The rescue squad provides emergency medical services (EMS) and, while technically separate from the fire department, shares the fire department's building and resources and is under the authority of the fire department chief. In 2001, Larry Shields was hired as the fire department chief. In 2002, Godsey-Marshall was promoted to lieutenant, and, in 2005, she was promoted to captain. At the time, the organizational structure of the fire-department leadership was such that there was one fire department chief, two assistant chiefs (fire department and EMS), one captain, and one lieutenant.

{¶ 3} In October 2004, Godsey-Marshall accused Shields of inappropriately disciplining her and accused him of sexual harassment. She lodged her accusations in a letter she sent to the Village's attorney. Shields denied any misconduct, but as a result of Godsey-Marshall's accusations, as well as other problems, the Village Council asked for Shields's resignation, which he submitted in October 2005. Doug Woolf was then appointed chief. In 2006, Godsey-Marshall was promoted to EMS Assistant Chief.

{¶ 4} In 2007, the Village hired David Evans as a consultant to investigate, identify issues and problems, and make recommendations to the Village on how to improve fire department operations. In his report to the Village Council, Evans

concluded that there were significant problems with the fire department because of animosity that had developed between the hourly part-time employees and the volunteer employees. The volunteer employees resented the part-time employees because they were paid for their time. Because they were paid, the volunteers attitude lead them to leave the "dirty work" for the part-time employees. Of course, the part-time employees were not pleased about how they were treated. In October 2007, the Village asked for Woolf's resignation and appointed Evans as the Interim Fire Chief.

{¶ 5} Among the changes that Evans instituted was a reorganization of the department leadership structure. Beginning on January 1, 2008, the new structure consisted of one chief, two captains, and three lieutenants. Accordingly, Godsey-Marshall's title changed from EMS Assistant Chief to EMS Captain, though she remained at the second-highest rank in the department. Evans said that he made this change because the department was too top-heavy.

{¶ 6} Godsey-Marshall mentions several occurrences at the fire department during 2008. For several days, one of the firefighters had posted over his gear-stall a sign that said, "GIGANTIC MEAT." Also, someone placed a sign on a broom that said, "Assistant Chief's Vehicle." Someone also ran up the flagpole a pair of mens boxer shorts, which flew for about a week. But the occurrence that Godsey-Marshall focuses on had to do with the women's restroom. While Woolf was chief, because of a leak in the wall of, presumably, the men's restroom, everyone used the women's. Some of the men who used the restroom left it filthy, "urinating on the seat and floor," and refused to clean up after themselves. Complaint, ¶12d.

Eventually, several people complained to the Village Council and the Council allowed them to install a lock on the women's restroom, giving only the women keys. But when Evans became chief, he removed the lock and allowed the men to use it again. The offending behavior of the men began again.

{¶ 7} At some point after Evans became chief, Godsey-Marshall, along with several other members of the fire department, complied thirteen pages of concerns and complaints about Evans, which they submitted to the Village Council. Godsey-Marshall typed the list based on contributions by the others and included concerns and complaints of her own. None of the complaints or concerns mention harassment.

{¶ 8} At the end of January 2008, Evans told Godsey-Marshall that a lieutenant had filed a complaint against her for unprofessional conduct. On February 10, 2008, Godsey-Marshall requested a 90-day personal leave-of-absence to begin the next day, the 11th. Godsey-Marshall was scheduled to work on the 11th, however, and Evans sent her a memo saying that if her request for leave were granted it would not begin until after her obligations that evening were fulfilled. Later saying that she did not receive Evans's memo, Godsey-Marshall failed to report for her shift. On February 21, 2008, Evans sent her a written reprimand for missing her shift and he sent her a written reprimand for the unprofessional behavior alleged in the lieutenant's complaint.

{¶ 9} Roughly two weeks after her 90-day leave-of-absence ended, Evans had yet to hear from Godsey-Marshall. So, on May 30, 2008, he sent her an e-mail asking if and when she intended to return to her position as EMS Captain. Evans

told Godsey-Marshall that if he did not hear from her by June 2, 2008, he would consider her failure to contact him a voluntary resignation from her position. Godsey-Marshall did not respond. On June 10, 2008, Evans personally delivered to Godsey-Marshall a memo accepting her voluntary resignation as EMS Captain. In the memo, Evans also told Godsey-Marshall that she was still considered an active volunteer firefighter, and he asked her to let him know by June 13, 2008, whether she wanted to remain active. Godsey-Marshall did not respond. On June 17, 2008, Evans sent her a memo saying that because she had not responded he was accepting her voluntary resignation from her position as a volunteer firefighter.

{¶ 10} On December 8, 2008, Godsey-Marshall filed a complaint against the defendant-appellees containing seven claims for relief: sexual harassment/creation of a hostile work environment in violation of R.C. 4112.02(A); constructive discharge; intentional infliction of emotional distress; negligent hiring; negligent training; negligent supervision; and retaliation. In June 2009, the defendant-appellees filed a motion for summary judgment on all seven claims. On September 8, 2009, the trial court sustained the motion and entered summary judgment on all claims. Godsey-Marshall appealed.

II

{¶ 11} In a single assignment of error, Godsey-Marshall argues that the trial court erred by entering summary judgment in favor of the defendant-appellees because issues of fact exist that should be resolved by a jury. A court should enter summary judgment on a claim if the evidence "show[s] that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C). On review, "in determining whether a genuine issue exists as to a material fact, a court of appeals must determine whether the evidence presented a 'sufficient disagreement to require submission to a jury' or [is] 'so one-sided that one party must prevail as a matter of law.'" *Myocare Nursing Home, Inc. v. Fifth Third Bank*, 98 Ohio St. 3d 545, 2003-Ohio-2287, at ¶33, quoting *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340. Appellate courts review grants of summary judgment de novo. *Sogg v. Zurz*, 121 Ohio St.3d 449, 2009-Ohio-1526, ¶5 (Citation omitted). We will now consider the evidence with respect to each claim.[1]

A. Hostile environment sexual harassment

{¶ 12} Godsey-Marshall's claim for hostile-environment sexual harassment is based on R.C. 4112.02(A), which prohibits an employer from discriminating against an employee "with respect to * * * any matter directly or indirectly related to employment" "because of [the employee's] * * * sex." Phillipsburg argues that Godsey-Marshall cannot prove that it violated this statutory prohibition. To be entitled to relief for a violation of R.C. 4112.02(A), a plaintiff must prove that the defendant unlawfully discriminated against her. The statute does not expressly prohibit sexual harassment, so sexual harassment violates the statute only if it

[1]We note that the record before us is missing one key piece of evidence–Godsey-Marshall's deposition. While the docket sheet shows that it was filed with the trial court, we did not receive it. Consequently, her deposition testimony, which the parties frequently cite, is not evidence that we can consider. Based on the citations to her deposition, however, we doubt that its inclusion would have changed the outcome of this appeal.

amounts to discrimination "because of * * * sex." *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, 176. The type of sexual harassment based on an employer's creation of a hostile environment can amount to discrimination because of sex.[2] To successfully prove a claim for hostile-environment sexual harassment, the plaintiff must prove four elements: (1) the harassment was unwelcome, (2) the harassment was based on sex, (3) the harassing conduct was severe or pervasive, and (4) the defendant-employer may be held liable for the harassment. *Hampel*, at paragraph two of the syllabus. Here, Godsey-Marshall disputes the trial court's finding that she failed to show a genuine issue of material fact with respect to the last three elements.

1. Harassment based on sex

{¶ 13} The Ohio Supreme Court has observed that "[h]arassment 'because of * * * sex' is the *sine qua non* for any sexual harassment case." *Hampel*, at 178. And the U.S. Supreme Court has called it the "'critical issue'" in such a claim. *Oncale v. Sundowner Offshore Services, Inc.* (1998), 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201, quoting *Harris v. Forklift Systems, Inc.* (1993), 510 U.S. 17, 25, 114 S.Ct. 367, 126 L.Ed.2d 295 (Ginsburg, J., concurring). The issue, as the U.S. Supreme Court framed it, is "'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" Id. The harassment, then, must involve differential treatment

[2]Just as the other type of sexual harassment, *quid pro quo* harassment can amount to discrimination because of sex. See *Hampel*, at 176.

of male and female employees. See *Meritor Savings Bank, FSB v. Vinson* (1986), 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49. Accordingly, to establish this element, the plaintiff must present evidence of unequal treatment, treatment that would not have occurred but for the plaintiff's sex, treatment that was "directed at the plaintiff because of his or her sex." *Hampel*, at 178-179.

{¶ 14} Here, as the trial court pointed out, every example of harassment recounted by Godsey-Marshall was suffered by all the fire department employees–male and female. Both men and women could see the "GIGANTIC MEAT" sign; both men and women could see the boxer shorts strung up on the flag pole; and both men and women used the filthy restroom. Members of both sexes, then, were equally harassed. There is no evidence of differential treatment; no evidence that the harassment was directed at Godsey-Marshall (or any other female employees) because she is a woman; and no evidence that the harassment would not have occurred but for the fact that Godsey-Marshall is a woman.

{¶ 15} Based on the evidence presented, then, a reasonable mind can conclude only that the harassment was based on something other than sex.

{¶ 16} Although our conclusion regarding the "because of" element logically means the end of our analysis for the hostile-environment sexual-harassment claim, we will nevertheless examine the final two elements of her claim.

2. Harassment that was "severe or pervasive"

{¶ 17} To satisfy this quintessential question of fact, see *Hidy Motors, Inc. v. Sheaffer*, 183 Ohio App. 3d 316, 2009-Ohio-3763, at ¶21, the harassment must meet

three requirements. First, the harassment must "affect the terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." *Hampel*, at 179, quoting R.C. 4112.02(A). Second, the harassment must be objectively severe, that is, "a reasonable person in the plaintiff's position, considering 'all the circumstances'" must think it severe. *Oncale*, at 23, quoting *Harris*, at 23. The totality-of-the-circumstances standard employed here considers the entire work environment, all the relevant facts, all the surrounding circumstances, and the cumulative effect of all the incidents. *Hampel*, at 181. In determining what a reasonable person would think, not only should the psychological effect of the conduct be considered, but also "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a merely offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 180, quoting *Harris*, at 23. "[N]o single factor is required." *Harris*, at 23. Finally, third, the plaintiff herself must "perceive the environment to be abusive." Id. at 21.

{¶ 18} Here, too, we agree with the trial court that the evidence presented is so one-sided that reasonable minds can conclude only that the harassment was not severe or pervasive. Considering the totality of the circumstances, the harassment that Godsey-Marshall recounts was infrequent, relatively moderate, not physically threatening or humiliating (as the trial court noted, the boxers were not Godsey-Marshall's), and there is no evidence that it interfered with, let alone *unreasonably* interfered with, Godsey-Marshall's work performance. The harassment suffered by the fire department employees was neither severe nor

pervasive.

3. The employer's liability

{¶ 19} An employer may be held liable for the harassment when "either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action." See *Hampel*, at 176-177. When a co-worker does the harassing the employer may be held liable for unlawful discrimination not because it subjected the employee to harassing conduct but because it failed to take steps that would end the harassment. See *Blankenship v. Parke Care Centers, Inc.* (C.A.6, 1997), 123 F.3d 868, 873.

{¶ 20} As the trial court noted, Godsey-Marshall never complained about most of the harassment to the Village Council. When she did complain about the restroom, the Council took immediate steps to end the problem by allowing a lock on the women's restroom door. We note too that when she complained about Shields's harassment, the Council took quick action and asked for his resignation. Godsey-Marshall asserts that the Council must have known, but this conclusory assertion does not create an issue of fact. Godsey-Marshall presents no evidence that the Council knew or should have known about the harassment. No basis, therefore, exists on which the Village of Phillipsburg may be held liable.

{¶ 21} The trial court correctly concluded that summary judgment was proper on Godsey-Marshall's claim for hostile-environment sexual harassment. No genuine issue of material fact remains with respect to this claim; the evidence is so one-sided

that the defendant-appellees must prevail as a matter of law.

B. Constructive discharge

{¶ 22} Godsey-Marshall also claims that she is entitled to relief because the Village of Phillipsburg constructively discharged her from her position with the fire department. Like in response to her discrimination claim, the defendant-appellees argue that she cannot present enough evidence to prove this discharge claim.

{¶ 23} To successfully establish a claim for constructive discharge, a plaintiff must prove that "the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *Mauzy v. Kelly Serv., Inc.* (1996), 75 Ohio St.3d 578, paragraph four of the syllabus. Here, Godsey-Marshall's constructive-discharge claim "stems from, and can be regarded as an aggravated case of, sexual harassment or hostile work environment." *Pennsylvania State Police v. Suders* (2004), 542 U.S. 129, 146, 124 S.Ct. 2342, 159 L.Ed.2d 204. While a hostile-work-environment claim requires a plaintiff to prove "severe or pervasive" harassment, "[a] hostile-environment constructive discharge claim entails something more: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign." Id. at 147. Because we concluded above that Godsey-Marshall has not presented evidence of severe or pervasive harassment, we can conclude here only that she has not presented evidence of intolerable working-conditions that would justify her resignation from the fire department.

{¶ 24} Also, a reasonable person would not feel compelled to resign before

giving her employer an opportunity to correct the situation. We have held that a plaintiff acted unreasonably when she quit her job after concluding that she was the subject of sex discrimination but before giving the employer an opportunity to help. See *Biles v. Ohio Bur. of Emp. Serv.* (1995), 107 Ohio App.3d 114, citing *Yates v. Avco Corp.* (C.A.6, 1987), 819 F.2d 630. Here, other than the restroom problem (which the Village Council immediately took steps to correct), Godsey-Marshall failed to inform the Council of the harassment and so did not give the Village the chance to remedy it.

{¶ 25} The trial court therefore also correctly concluded that summary judgment was proper on Godsey-Marshall's claim for constructive discharge. Again, no genuine issue of material fact remains with respect to this claim; the evidence is so one-sided that the defendant-appellees must prevail as a matter of law.

C. Retaliation and reprisal

{¶ 26} Godsey-Marshall claims that she is entitled to relief because the Village of Phillipsburg retaliated against her for her allegations of sexual harassment against Shields. The Village argues that she cannot present enough evidence to prove retaliation.

{¶ 27} A claim for retaliation invokes a shifting-burden method of proof. First, a plaintiff must establish a prima-facie case, consisting of four elements: "(1) she engaged in protected activity; (2) the employer knew of her participation in the protected activity; (3) the employer took adverse action against her; and (4) a causal link existed between the protected activity and the adverse action." *Eisman v. Clark*

Cty. Dept. of Human Serv., Clark App. No. 02CA0031, 2002-Ohio-6781, at ¶28, citing *Chandler v. Empire Chem., Inc.* (1994), 99 Ohio App.3d 396. Then, if the plaintiff establishes a prima-facie case, the burden shifts to the defendant-employer, and it must state a legitimate, non-discriminatory reason for taking the adverse action. Id. Finally, if the defendant-employer proves equal to its burden, the burden shifts back to the plaintiff, and she must prove that the defendant-employer's reason is mere pretext for unlawful retaliation. Id. Under this method of proof, then, if the defendant-employer fails to satisfy its burden, the plaintiff has proved retaliation, and if the defendant-employer satisfies its burden but the plaintiff cannot prove pretext the plaintiff has failed to prove retaliation.

{¶ 28} Here, Godsey-Marshall satisfies the first two elements of the prima-facie case. She argues that the Village retaliated against her for her allegations of sexual harassment. Phillipsburg concedes for purposes of summary judgment that she engaged in a protected activity when she made the allegations. And because the Village was aware of her complaints, Godsey-Marshall establishes that the Village knew that she had engaged in a protected activity.

{¶ 29} But Godsey-Marshall has not satisfied the second two prima-facie elements. An adverse action in the retaliation context is one that would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe. Ry. Co. v. White* (2006), 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345. Here, Godsey-Marshall asserts that the change in her title from "Assistant Chief EMS" to "Captain EMS," a reduction in her pay, and a change in her duties were adverse actions taken by the Village in response to her

allegations. To establish a causal connection between the adverse action and the protected activity, the plaintiff "must produce evidence 'sufficient to raise the inference that [her] protected activity was the likely reason for the adverse action.'" *Eisman*, at ¶31, quoting *Zanders v. National R.R. Passenger Co.* (C.A.6, 1990), 898 F.2d 1127, 1135. Where evidence of a causal connection is sparse, the amount of time that elapses from the protected activity until the adverse action is often used to determine whether a permissible inference of a causal connection exists. See *Baker v. The Buschman Co.* (1998), 127 Ohio App.3d 561, 568. But, as the U.S. Supreme Court has said, "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'" *Clark County School Dist. v. Breeden* (2001), 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (rejecting as too long to support a causation inference 20 months between the filing of an EEOC charge and an involuntary transfer, saying that "[a]ction taken (as here) 20 months later suggests, by itself, no causality at all"); see, also, *Baker*, at 568 (concluding that no reasonable person could find a causal connection between the protected activity and the alleged retaliation when 1 year separated them).

{¶ 30} Here, Godsey-Marshall presents no evidence from which it would be reasonable to infer a causal relationship between the activity and the actions. We observe first that the evidence strongly suggests that the adverse actions Godsey-Marshall cites were taken because of the general reorganization of the fire department that Evans undertook with the Village Council's blessing. Also, no

permissible inference of causality arises from the temporal proximity. Godsey-Marshall complained to the Village Council in 2004 but the adverse action she cites did not occur until 2007–roughly three years later. The temporal proximity is much too great to permit a reasonable inference that the two are causally connected. Therefore, Godsey-Marshall fails to establish the fourth prima-facie element.

{¶ 31} The trial court therefore also correctly concluded that summary judgment was proper on Godsey-Marshall's claim for retaliation. Again, no genuine issues of material fact remain with respect to this claim. As with the previous two claims, the evidence here is so one-sided that the defendants-appellees must prevail as a matter of law.

D. Intentional infliction of emotional distress

{¶ 32} A defendant is liable for intentional infliction of emotional distress only "where the conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, as to be regarded as atrocious, and utterly intolerable in a civilized community." *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375. Godsey-Marshall does not address this claim in her brief. Construing the evidence most strongly in her favor, we see no conduct that singly or together meets this standard.

{¶ 33} Summary judgment on this claim is proper.

E. Negligent hiring, negligent supervision, and negligent training

{¶ 34} Neither does Godsey-Marshall address the three negligence-based claims. "An underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer." *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 217. The same may be said for negligent hiring. See *Cooke v. Montgomery Cty.*, 158 Ohio App.3d 139, 2004-Ohio-3780, at ¶22 (saying that the elements of claims for negligent hiring are the same as those for negligent supervision). As the trial court said, Godsey-Marshall does not allege, nor is there any evidence, that Evans, the person she claims the Village hired, supervised, and trained negligently, is individually liable for any wrongdoing. Summary judgment on these three claims is proper.

{¶ 35} Godsey-Marshall fails to demonstrate a genuine issue of material fact that would require submitting any of her claims to a jury. Nor has she demonstrated any other reason that summary judgment should not be entered. Her sole assignment of error, therefore, is overruled.

III.

{¶ 36} Having overruled the sole assignment of error, the trial court's judgment is Affirmed.

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DONOVAN, P.J., and FAIN, J., concur.

Copies mailed to:

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