

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NANCY M. BILLINGS,
Plaintiff

V.

TOWN OF GRAFTON, RUSSELL J.
CONNOR, JR., ROGER HAMMOND,
SUSAN M. MILLS, CHRISTOPHER R.
LEMAY, BROOK PADGETT and
PETER ADAMS,
Defendants

CIVIL ACTION NO. 02-40248-FDS

DEFENDANTS' RENEWED MOTION FOR DIRECTED VERDICT

Pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, the defendants, the Town of Grafton (the "Town"), Russell J. Connor, Jr. ("Mr. Connor"), Roger Hammond, Susan M. Mills, Christopher R. Lemay, Brook Padgett and Peter Adams (collectively, the "Defendants"), renew its motion for directed verdict in their favor on the plaintiff's claims of sexual harassment and retaliation under both Federal and Massachusetts law at the close of the evidence. The Defendants move for a directed verdict on the grounds that the evidence presented at trial is insufficient to permit a reasonable jury to return a verdict in her favor on these claims. Therefore, judgment should enter in favor of the Defendants on all claims as a matter of law.

I. Sexual Harassment Claims

In order for a jury to find for Ms. Billings on her claim for sexual harassment under 42 U.S.C. §2000e-2 ("Title VII"), it must hear credible evidence that supports all five of the following factors:

- a. that she was intentionally subjected to unwelcome harassment by the employer or by her supervisor;
- b. that the harassment was based upon her sex;
- c. that the conduct was sufficiently severe or pervasive, such that a reasonable person in Ms. Billings' position would find it hostile, intimidating or humiliating;
- d. that Ms. Billings herself did believe the environment was hostile, intimidating or humiliating; and
- e. that the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive working environment.

Massachusetts General Laws Chapter 151B contains requirements similar to Title VII for establishing a claim for sexual harassment under state law. See M.G.L. c. 151B, §1(18); College-Town Div. of Interco v. MCAD, 400 Mass. 156, 161-62 (1987). Upon the evidence that has been introduced at trial, the plaintiff has been unable to offer such evidence that would permit a reasonable jury to find under federal or state law that she has established all the elements of her claims for sexual harassment.

A. No intentional conduct of a sexual nature.

It is undisputed that the extent of the allegedly offending conduct in this case was the allegation that Mr. Connor stared at Ms. Billings' chest. No evidence has been presented that Mr. Connor's alleged conduct was sexual in nature or anything other than his normal mannerisms relative to his difficulty with eye contact. The observations and testimony of virtually all of the witnesses called by the plaintiff (including Nancy Hazen, Attorney Theresa Dowdy, Tammy Kalinowski, Jennifer O'Neil and Daniel Pogorzelski), as well as Mr. Connor, all support the undisputed fact that Mr. Connor's eye movements were involuntary and without intent or focus. Further, this involuntary eye movement was also diagnosed by Mr. Connor's optometrist, Dr. Brian Braveman, whose report has been introduced as agreed Trial Exhibit 22.

It is axiomatic that Mr. Connor could not have intentionally subjected the plaintiff to sexual harassment through involuntary conduct.

B. Absence of evidence of severity.

The plaintiff has also failed to establish that the conduct complained of was sufficiently severe and pervasive that it would create a hostile work environment. For conduct that is less severe, such as the staring alleged by the plaintiff, it must be more pervasive or frequent to constitute sexual harassment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993).

The evidence presented by Ms. Billings and taken in its most favorable light for the plaintiff was exclusively that Mr. Connor stared at her chest for no more than a few seconds on each occasion. With the exception of the comment made by Mr. Connor to Ms. Kalinowski which Ms. Billings did not even hear directly, there was no other conduct (sexual advances, propositions, touching, dirty jokes, questions about sexual experiences, etc.) to add to that evidence. This evidence does not reach the level of severity required to support a finding of sexual harassment.

C. Absence of evidence of pervasiveness.

The evidence presented by Ms. Billings through her own testimony and that of Ms. Hazen consisted of less than three (3) dozen instances of alleged staring over a three year period. Both Ms. Billings and Ms. Hazen testified that each and every instance of the alleged conduct was reported by Ms. Billings to Ms. Hazen and recorded by her. This evidence is simply insufficient to allow a reasonable jury to find that the actions complained of were sufficiently pervasive to support a verdict in her favor on her claim of sexual harassment.

D. Absence of evidence of hostile work environment.

Ms. Billings has also failed to offer evidence, as she must, that the alleged staring was so extreme to create a hostile work environment, such that there was a change in the terms and conditions of her employment. Farragher v. Boca Raton, 524 U.S. 775, 788 (1998). Ms. Billings' own testimony as corroborated by Ms. Hazen establishes that she was able to complete her job duties and there was no meaningful impact on her work performance or the terms and conditions of her job. At its best, the plaintiff's evidence may establish that the social atmosphere of the work environment had changes, but that is insufficient to support a claim for sexual harassment.

E. Absence of evidence that a reasonable person in the plaintiff's circumstances would perceive that the conduct of Mr. Connor was sufficiently severe and pervasive to have created a hostile work environment.

While the plaintiff's own testimony may be sufficient to establish the subjective element of her sexual harassment claim, the testimony of the two other witnesses called by the plaintiff who experienced the same conduct (Ms. Kalinowski and Ms. O'Neil) highlights the absence of sufficient evidence that the objective test for sexual harassment has been met. Further, the testimony of Theresa Dowdy, who also experienced the complained of conduct during the investigation similarly refuted the presence of any objective sexual harassment.

In light of the failure of the plaintiff to present sufficient evidence of four of the five elements necessary to prove her federal or state sexual harassment claims, a reasonable jury could not find in her favor and directed verdict should enter for the Defendants against whom that claim has been asserted (Mr. Connor and the Town of Grafton).

F. The Town of Grafton has established its affirmative defense to sexual harassment.

If the Court finds that the plaintiff presented sufficient evidence in support of her sexual harassment claims, directed verdict should enter for the Town of Grafton on its affirmative defense. The Town of Grafton will prevail if it establishes a two-part affirmative defense: “(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). The Town of Grafton promptly investigated each allegation of sexual harassment brought to their attention, including initiating three (3) separate sexual harassment investigations of Mr. Connor’s alleged conduct, in addition to other informal efforts by the Grafton Selectman Susan Mills individually to assist. It is undisputed that the plaintiff failed to accept offers to help from Ms. Mills. More importantly, it is admitted by the plaintiff that she refused to participate in an investigation initiated by the Town in November of 2001. She testified that her refusal was based upon her belief that the investigation would be biased because it was to be conducted by the Town’s Labor Counsel. In light of her prior participation in the investigation by Town Counsel in the spring of 2001, that refusal was unreasonable. By presenting sufficient evidence that a reasonable jury must find in the Town’s favor on its affirmative defense, directed verdict should enter for the Defendant Town of Grafton.

II. Retaliation Claims

To establish a claim of retaliation under federal and state law, Ms. Billings must also present sufficient evidence to support a jury verdict that the Defendants took a materially adverse employment action against her motivated by a desire to retaliate for her participation in a

protected activity. Burlington Northern v. White, 548 U.S. 53, 67-68 (2006); Tate v. Dept. of Mental Health, 419 Mass. 356, 364 (1995). Ms. Billings has failed to present sufficient evidence for the jury to find that the Defendants retaliated against her.

A. Absence of retaliatory motivation.

The evidence is devoid of any evidence that there is a causal link between Ms. Billings' activities in complaining about Mr. Connor's conduct and a materially adverse employment action. See Lee-Crespo v. Schering-Plough Del Caribe Inc., 354 F.3d 34, 44 (1st Cir. 2003). The testimony of the plaintiff's own witness, Mr. Pogorzelski, was that the decision to transfer Ms. Billings was for a legitimate, nondiscriminatory reason. The evidence is uncontroverted that after Mr. Connor suffered a serious heart attack, Ms. Billings was transferred as a medical accommodation to Mr. Connor, which the Town was required to do by the Americans with Disabilities Act. The evidence is also uncontroverted that the Town had no meaningful options other than what they did without creating a violation of its obligations under the Americans with Disabilities Act.

The plaintiff has also produced no evidence whatsoever that the Town's decision not to transfer Ms. Billings to the position of Secretary to the Town Administrator in February 2006 was motivated by a desire to retaliate.

B. Absence of evidence of materially adverse change.

In addition, Ms. Billings has failed to present evidence that she suffered a materially adverse employment action in being transferred to the position of Secretary to the Recreation Department. As Ms. Billings testified, the positions of Secretary to the Town Administrator and Secretary to the Recreation Department were virtually identical and the conditions of her job did not change. Ms. Billings admitted that she enjoyed the same pay, same raises, same benefits,

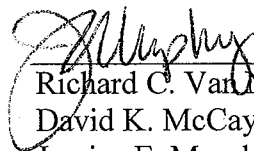
same hours, same schedule and in the essentially the same location in both positions, which fails to establish that the transfer was a materially adverse employment action. She also testified that there were certain additional advantages that she enjoyed in her new position that were not a part of her prior position, most notably just cause protection relative to termination of her employment.

Ms. Billings remaining allegations of retaliation—for Mr. Connor’s response to Ms. Billings question at the Board of Selectman’s meeting, providing written instructions, and acting “colder” to Ms. Billings—are “petty slights or minor annoyances that often take place at work and that all employees experience” and that fall outside the scope of a retaliation claim. Billings v. Town of Grafton, 515 F.3d 39, 54 (1st Cir. 2008).

By failing to present sufficient evidence that a reasonable jury could find in her favor on her retaliation claims, directed verdict should enter for the Defendants Town of Grafton, Russell J. Connor, Jr., Roger Hammond, Susan M. Mills, Christopher R. Lemay, Brook Padgett and Peter Adams.

WHEREFORE, for the reasons stated above, the defendants, the Town of Grafton, Russell J. Connor, Jr., Roger Hammond, Susan M. Mills, Christopher R. Lemay, Brook Padgett and Peter Adams, move that a directed verdict on all claims entered in their favor.

Respectfully submitted
TOWN OF GRAFTON, RUSSELL J.
CONNOR, JR., ROGER HAMMOND, SUSAN
M. MILLS, CHRISTOPHER R. LEMAY,
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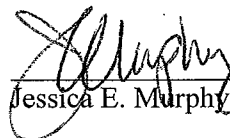
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Dated: October 30, 2008

CERTIFICATE OF SERVICE

I, Jessica E. Murphy, hereby certify that this document was served in hand and filed through the ECF system and be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent this day to those indicated as non-registered participants via first class mail, postage prepaid.

Dated: October 30, 2008



Jessica E. Murphy, Esq.