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STATE OF MICHIGAN

COURT OF APPEALS

DAVID NEWMAN,

Plaintiff-Appellant,

v

OAKLAND COUNTY MICHIGAN and SHERIFF MICHAEL BOUCHARD,

Defendants-Appellees.

UNPUBLISHED
November 24, 2026
9:46 AM

No. 375004
Oakland Circuit Court
LC No. 2023-203858-CD

Before: ACKERMAN, P.J., and BORRELLO and KOROBKIN, JJ.

PER CURIAM.

In this employment action under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., plaintiff, David Newman, appeals by right the trial court's order granting summary disposition in favor of defendants, Oakland County, Michigan, and Sheriff Michael Bouchard, and dismissing plaintiff's amended complaint. Plaintiff challenges the dismissal of his claims of sex discrimination, hostile work environment, and retaliation. For the reasons set forth in this opinion, we conclude that the trial court erred by granting summary disposition on plaintiff's sex discrimination claim but did not err by granting summary disposition on his hostile work environment and retaliation claims. We therefore affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND AND FACTS

In August 2022, plaintiff began training as a road deputy at the Oakland County Sheriff's Office. Plaintiff was told that he needed to improve and was offered the choice to work in the corrections division instead. On October 26, 2022, plaintiff began corrections officer training, joining a corrections class in progress with about 15 to 20 other deputies and receiving assignments, instruction, and completing physical training.

Plaintiff testified to several incidents that occurred shortly after he began training. During a lunch break on the first day, plaintiff conversed with four or five deputies at a table about their families and other topics. A male deputy asked plaintiff whether he was seeing anyone, to which plaintiff responded, "Yes, my partner. Yes, my significant other." One of the male deputies said,

"So you're gay," and plaintiff responded, "Yes." In response, the deputies at the table stopped talking and remained silent until plaintiff got up and left.

The next day, plaintiff again reported to the training area. When plaintiff was in the locker room with five or six deputies, he "didn't change because everyone walked away in the other room," and "[n]o one wanted to be around [him]." The class finished out the day's training by receiving instruction in inmate intake, specifically, learning to scan fingerprints and to take mug shots. The following day, the class had physical training, but plaintiff did not participate because one of his supervisors, Sergeant Brian Behrend, instructed him to paint rooms instead. Plaintiff was instructed to paint the walls in a room where two or three other deputies from a different class were cleaning. Plaintiff was later moved to another room to paint alone.

That same day, plaintiff was pulled into a different room by another supervisor, Captain Todd Hill, who informed plaintiff that there was a serious allegation against him. Captain Hill and Sergeant Behrend told plaintiff that there was a report that plaintiff had sexually harassed another deputy. Specifically, it was alleged that plaintiff had put his head on the deputy's chest and had stated that he could "hear his heartbeat" during intake training, and that they were looking into it. Plaintiff denied the allegation, telling them "that [he] was gay," and asked if the allegations were made "because . . . [he is] gay," but they did not answer. Plaintiff asked to review surveillance video of the room in which the training had occurred, which Captain Hill and Sergeant Behrend had not previously reviewed. Captain Hill and Sergeant Behrend agreed to watch with plaintiff.

In the video, which has no audio and is approximately one hour long, members of the class stand around two different computer stations and appear to engage in conversation with each other while waiting their turn to practice at the stations. As for the alleged incident in question, plaintiff can be seen approaching and standing close to another trainee, Deputy Vincent Haynes, whose back is to the camera, from the right side. The two appear to have a brief conversation for about fifteen seconds, during which plaintiff nods several times, gestures with his right hand, and laughs, before stepping forward toward the computer monitor. Plaintiff does not appear to touch or place his head on Deputy Haynes. After the conversation, for several seconds another deputy moves to the station, stepping between Deputy Haynes and plaintiff, and then another deputy steps forward next to Deputy Haynes.

Plaintiff retained an expert in lip-reading analysis, Jeremy Freeman, to analyze the video. Freeman opined that plaintiff states upon approach, " . . . had words with you." According to Freeman, Deputy Haynes appears to respond while plaintiff presumably listens, then plaintiff continues the conversation and gestures with his hand toward his mouth, mimicking a smoking action, as he says, "Do you think she is a bit cuckoo though?" After shifting his weight and looking at the computer screen, plaintiff "emits a laugh, which appears to carry a mocking tone, and steps forward . . . ."

Plaintiff testified that he initiated a conversation with Deputy Haynes about "Elon Musk's SpaceX," Deputy Haynes responded but did not speak much, and then plaintiff walked away to get a better view of the fingerprinting machine. According to written statements obtained by Sergeant Behrend, other deputies present had different recollections of the incident. Deputy Kaylee Percival stated that she observed plaintiff approach Deputy Haynes, stand extremely close to him, and say, "Does this make you uncomfortable?" When Deputy Haynes responded affirmatively,

plaintiff continued to speak with Deputy Haynes, who became "visibly more uncomfortable." When plaintiff stepped back, Deputy Percival, who was standing behind the two, stated that she stepped up next to Deputy Haynes in an effort to put space between the two. According to Deputy Anthony Halushka, who was also present, plaintiff stood "strangely close" to Deputy Haynes and stared at him for several moments of silence before saying something like, "Are you okay?" to which Deputy Haynes replied, "I'm great." Then plaintiff asked, "Am I standing too close to you?" and Deputy Haynes said, "Yeah, a little bit," to which plaintiff responded, "Ok, because I just want to make sure I'm not making you feel uncomfortable." Finally, at his deposition, Deputy Haynes recalled that plaintiff stood very close to him, either behind or beside him, and stated that he could feel Deputy Haynes's heartbeat. Deputy Haynes did not recall whether plaintiff was touching him, although in his written statement to Sergeant Behrend he had stated that plaintiff's body was touching his.

According to plaintiff's testimony, after Captain Hill and Sergeant Behrend reviewed the surveillance video footage, the allegations against him changed. Instead of alleging that plaintiff had placed his head on another deputy's chest, it was alleged that plaintiff was standing too close to the deputy who had complained. Pointing out this discrepancy, plaintiff expressed to Captain Hill and Sergeant Behrend that he felt that they were "coming after [him] because of [him] being gay." Plaintiff also testified that the captain and sergeant indicated that there was a complaint that the way in which plaintiff crossed his legs when he was sitting was "too feminine." After watching the video with plaintiff present, Captain Hill left the room for a short period of time. When he returned, he told plaintiff that he was being terminated and directed him to sign a separation of service agreement, which stated that plaintiff had violated Oakland County's sexual harassment policy.

Plaintiff thereafter filed this action, asserting three claims under the ELCRA: (I) sexual orientation discrimination, (II) hostile work environment on the basis of sexual orientation, and (III) retaliation. Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), which plaintiff opposed. The trial court issued an opinion and order granting defendants' motion for summary disposition and dismissing the case.

Plaintiff now appeals.

II. STANDARD OF REVIEW

"We review de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). "De novo review means that we review the legal issue independently and without deference to the lower court." *Wilcox v Wheatley*, 342 Mich App 551, 556; 995 NW2d 594 (2022) (quotation marks and citation omitted).

A motion for summary disposition under MCR 2.116(C)(10) "tests the *factual sufficiency* of a claim" and "may only be granted when there is no genuine issue of material fact," meaning that there is no issue in the record "upon which reasonable minds might differ." *El-Khalil*, 504

Mich at 160.[1] "When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* Specifically,

> the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996) (citations omitted).]

"The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

III. ANALYSIS

A. DISCRIMINATION CLAIM

Plaintiff first contends that the trial court erred by granting defendants' motion for summary disposition on his claim of sexual orientation discrimination. We agree.

Under former MCL 37.2202(1)(a), amended 2009 PA 190, an employer may not "[f]ail or refuse 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 religion, race, color, national origin, age, sex, height, weight, or marital status."[2] In *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 433; 987 NW2d 501 (2022), our Supreme Court held that under the ELCRA, "[d]iscrimination on the basis of sexual orientation necessarily constitutes discrimination because of sex."

"The courts have recognized two broad categories of claims under [MCL 37.2202(1)(a)]: disparate treatment and disparate impact claims." *White v Dep't of Transp*, 334 Mich App 98, 107; 964 NW2d 88 (2020) (quotation marks and citation omitted). This case involves a claim of

[1] Although the trial court did not indicate under what subrule it granted defendants' motion, because it considered documentary evidence outside of the pleadings we review the motion under the MCR 2.116(C)(10) standard of review. See *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012).

[2] The events in this lawsuit occurred before an amendment to MCL 37.2202(1)(a) added statutory language explicitly designating "sexual orientation" and "gender identity or expression" as distinct protected characteristics. 2023 PA 31. We refer to the statute's former version in this opinion.

disparate treatment because plaintiff claims that defendants intentionally discriminated against him on the basis of his sexual orientation. See *id*.

"In some discrimination cases, the plaintiff is able to produce direct evidence of . . . bias. In such cases, the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Direct evidence "is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Major v Village of Newberry*, 316 Mich App 527, 540; 892 NW2d 402 (2016) (quotation marks and citation omitted).

"In many cases, however, no direct evidence of impermissible bias can be located." *Hazle*, 464 Mich at 462. In that scenario, to avoid summary disposition, a plaintiff may proceed under the burden-shifting framework articulated by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle*, 464 Mich at 462. "Originally applied to cases of race discrimination, the test has been modified to accommodate cases of age and sex discrimination." *Town v Mich Bell Tel Co*, 455 Mich 688, 694-695; 568 NW2d 64 (1997) (footnotes and citations omitted). Under the *McDonnell Douglas* test, the plaintiff must initially establish a "prima facie case" of discrimination. *Hazle*, 464 Mich at 463. Establishing a prima facie case under *McDonnell Douglas*, however, does not necessarily preclude summary disposition in the defendant's favor. *Id*. at 463-464. Instead, it raises a rebuttable presumption of discrimination and shifts the burden to the defendant to produce evidence of a legitimate nondiscriminatory reason for the adverse action taken against the plaintiff. *Id*. At that point, if the defendant produces such evidence, then the presumption created by the prima facie case drops away and the burden shifts back again to the plaintiff to show that there is evidence from which a jury could find that the proffered reason was a pretext for unlawful discrimination. *Id*. at 465-466. This framework, which "is merely intended to progressively sharpen the inquiry into the elusive factual question of intentional discrimination," "provides a mechanism for assessing motions for summary disposition and directed verdict in cases involving circumstantial evidence of discrimination." *Id.* at 466 (quotation marks and citation omitted). Its "purpose[]" is to "assist[] trial courts in determining whether there is a jury-submissible issue on the ultimate fact question of unlawful discrimination." *Id*.

We begin with the prima facie case. As our Supreme Court has explained, "the elements of the *McDonnell Douglas* prima facie case should be tailored to fit the factual situation at hand." *Id.* at 463 n 6. Thus, to establish a prima facie case of sex discrimination, plaintiff here must present evidence that (1) he belonged to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) he suffered the adverse employment action under circumstances giving rise to an inference of unlawful discrimination. See *id.* at 463; see also *Wilcoxon v Minnesota Min & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999).

The trial court, in its opinion, held that plaintiff could not satisfy the fourth prong of the prima facie test because plaintiff failed to demonstrate that "he was treated less favorably than a similarly situated employee outside the protected class." This was a legal error. Although under the fourth prong a plaintiff *may* "prove discrimination by showing that the plaintiff was treated unequally to a similarly situated employee who did not have the protected characteristic," there are "multiple ways of proving the ultimate question of discrimination in a circumstantial evidence

case." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 607-608; 886 NW2d 135 (2016). Indeed, our Supreme Court has rejected the suggestion that "there are only two ways in which a plaintiff may meet its ultimate burden of demonstrating circumstances from which the fact-finder could conclude that [discrimination] occurred: by proving that the plaintiff was replaced by a person [who is not a member of the protected class] or by using the 'similarly situated' method." *Id.* at 609. Instead, "[a] plaintiff is not so limited." *Id.* In a case in which the plaintiff claimed she was not promoted because of her race, our Supreme Court articulated the fourth prong as offering sufficient additional evidence that the job was given to someone else "under circumstances giving rise to an inference of unlawful discrimination." *Hazle*, 464 Mich at 460-463; see also *White*, 334 Mich App at 103, 107. Accordingly, we disagree with the trial court and defendants that plaintiff could satisfy the fourth prong only by pointing to a similarly situated employee who was not a member of the protected class.

We also note that under the *McDonnell Douglas* test, a plaintiff's initial burden to establish a prima facie case is "not onerous." *Tex Dep't of Community Affairs v Burdine*, 450 US 248, 253; 101 S Ct 1089; 67 L Ed 2d 207 (1981).[3] Courts have described this requirement as " 'minimal,' " *Bucalo v Shelter Island Union Free Sch Dist*, 691 F3d 119, 128 (CA 2, 2012), quoting *St Mary's Honor Ctr v Hicks*, 509 US 502, 506; 113 S Ct 2742; 125 L Ed 2d 407 (1993), "light," *Willard v Huntington Ford, Inc*, 952 F3d 795, 808 (CA 6, 2020), and a "small showing" that is "easily made," *Kosereis v Rhode Island*, 331 F3d 207, 213 (CA 1, 2003) (quotation marks and citations omitted). It "is not meant to stymie plaintiffs." *Cline v Catholic Diocese of Toledo*, 206 F3d 651, 660 (CA 6, 2000). Instead, it is but the first step of the three-step *McDonnell Douglas* framework designed to "progressively sharpen the inquiry into the elusive factual question of intentional discrimination." *Hazle*, 464 Mich at 466 (quotation marks and citation omitted).

Turning to the facts of this case, it is undisputed that plaintiff belongs to a protected class on the basis of his sex by virtue of his sexual orientation, that he suffered an adverse employment action when he was terminated, and that he was qualified for the deputy position. Only the fourth prong is in dispute.

Regarding that fourth prong, plaintiff asserts that he proffered direct and circumstantial evidence giving rise to an inference of sexual orientation discrimination. First, plaintiff points to his coworkers learning that he was gay during a discussion at lunch on the first day of training. While plaintiff's coworkers discussed their wives, once plaintiff revealed that he had a same-sex partner, his coworkers fell silent. The next day, when plaintiff was in the locker room with several other deputies, he "didn't change because everyone walked away in the other room," and "[n]o one wanted to be around [him]." Plaintiff also points to being singled out to paint a classroom by himself while all his coworkers in the training program did physical training.

[3] "[I]n interpreting the ELCRA specifically, [our Supreme] Court has encouraged using as guidance federal precedent interpreting Title VII of the federal Civil Rights Act, the statute on which the ELCRA was based." *Rouch World*, 510 Mich at 411. And as stated, our courts have adopted the *McDonnell Douglas* burden-shifting test from Title VII caselaw for equivalent use under the ELCRA. See *Hazle*, 464 Mich at 463.

Plaintiff then connects his coworkers' apparent discomfort with him being gay to sexual harassment allegations against him being fabricated, as these events were close in time. Plaintiff supports his argument that the allegations are fabricated with video evidence, in which no touching is visible. Plaintiff also presented evidence from expert lip-reader Freeman of the interaction between plaintiff and Deputy Haynes that contradicts the accounts given by the other deputies. That is, although plaintiff's face is facing the camera, the expert did not discern him stating anything to the effect of "am I making you uncomfortable?" or that he could hear Haynes's heartbeat. And plaintiff testified in his deposition that when he pointed out the discrepancy between the initial allegation that he placed his head on Deputy Haynes's chest and the absence of any touching in the video during his interview with Captain Hill and Sergeant Behrend, they changed tack and stated that plaintiff was standing too close to Deputy Haynes.

The hour-long video also shows a number of other deputies playfully touching each other, standing closely together, and engaging in conversation, but no other deputies were punished. Finally, plaintiff testified that his supervisors indicated that someone complained that plaintiff was sitting in a manner that was "too feminine." Recognizing that establishing a prima facie case is not an onerous burden, see *Burdine*, 450 US 248, 253, and construing the evidence in the light most favorable to plaintiff as we must, see *El-Khalil*, 504 Mich at 160, we agree with plaintiff that he presented adequate evidence demonstrating circumstances giving rise to an inference of sex discrimination, see *Hazle*, 464 Mich at 462. Therefore, contrary to the trial court's determination, we conclude that plaintiff has met his initial burden under *McDonnell Douglas* of establishing a prima facie case.

As stated, under *McDonnell Douglas*, that is not the end of the inquiry. At the next step, if a plaintiff "establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *White*, 334 Mich App at 108 (quotation marks and citation omitted). "If the defendant gives a legitimate, nondiscriminatory reason for the employment decision, the presumption of discrimination is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination." *Id*. (quotation marks and citation omitted). Then, to survive a motion for summary disposition, "the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Id*. at 109 (quotation marks and citation omitted). In other words, "[o]nce the presumption drops out of the case, the plaintiff retains the ultimate burden of proving discrimination." *Town*, 455 Mich at 695. As compared to the plaintiff's burden to demonstrate a prima facie case, "[t]he pretext analysis . . . is more demanding." *Kosereis*, 331 F3d at 213. "To prevail, the employee must submit admissible evidence" from which a jury could find "that the employer's nondiscriminatory reason was not the true reason for the discharge and that the plaintiff's [protected status] was a motivating factor in the employer's decision." *Town*, 455 Mich at 697. It remains the plaintiff's ultimate burden to "prove that the employer's explanation was a pretext for discrimination." *Id*.

Turning back to the facts of this case, defendants articulated "a legitimate, nondiscriminatory reason for [their] employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *White*, 334 Mich App at 108 (quotation marks and

citation omitted). That is, defendants assert that plaintiff was terminated for violating Oakland County's sexual harassment policy, which states that sexual harassment "consists of unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature when: . . . The conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive environment."

A defendant's burden at this stage of *McDonnell Douglas* is a burden of production, not persuasion. But the burden cannot be satisfied merely through an answer to the complaint or by argument of counsel; some evidence must be produced to support it. *Hazle*, 464 Mich at 464-465. Reviewing the evidence in this case, we conclude that defendants' burden is met here. On October 28, 2022, Sergeant Behrend approached Captain Hill because three deputies—Deputy Halushka, Deputy Percival, and Deputy Haynes—reported sexual harassment by plaintiff against Deputy Haynes that morning. According to these reports, plaintiff allegedly made inappropriate comments to Deputy Haynes, including two days before at the lunch table, as well as the day before in the fingerprinting room, and had inappropriately stared at Deputy Haynes during classroom instruction. Deputy Haynes stated that when he was at the lunch table with plaintiff and three other deputies, they became acquainted and shared stories from the police academy. Deputy Haynes shared an incident when he was pepper sprayed "and said [he] was gay even though [he] was trying to say [he] was okay." The point of this story, according to Deputy Haynes, was that he misspoke in a humorous way because of the debilitating effect of the pepper spray. Deputy Haynes testified that plaintiff responded, "if you ever decide to switch sides, let me know." Deputy Haynes did not know plaintiff was gay at that point and told plaintiff that he was joking and was not actually gay. Deputy Haynes learned plaintiff was gay because plaintiff "told [him] . . . that he was into men," and "brought up he was having sex with males." After this incident, Deputy Haynes testified that he declined plaintiff's invitation to be his workout partner.

That same day, Captain Hill met with Sergeant Behrend to discuss the allegations, review written statements provided by the deputies, and interview plaintiff. In his deposition, Captain Hill described plaintiff's alleged comments to Deputy Haynes as "inappropriate" and "leading." Captain Hill stated that the incident in the classroom when plaintiff stared at Deputy Haynes might not have been perceived as harassment in the moment, but that when considered with the other incidents, it could be viewed as harassment. He also stated that he took seriously the fact that other deputies perceived the staring as crossing the line. Regarding the fingerprinting incident, Captain Hill acknowledged that there was "a little bit" of horseplay happening in the room. Captain Hill identified plaintiff and Deputy Haynes in the video, and noted there was no "overt touching," admitting that plaintiff did not place his head on Deputy Haynes's chest. He nonetheless concluded that there "could have been contact" and that plaintiff's conduct was harassment because he got in Deputy Haynes's "personal space." Captain Hill recommended to his superiors that plaintiff be terminated, stating that the incident in the fingerprinting room, standing alone, violated the sexual harassment policy.

Given defendants' articulation, supported by evidence, of a "legitimate, nondiscriminatory reason for the employment decision, the presumption of discrimination is rebutted, and the burden shifts back to the plaintiff to show that" defendants' reason was "a mere pretext for discrimination." *White*, 334 Mich App at 108 (quotation marks and citation omitted). A plaintiff can establish pretext "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were

factors, by showing that they were jointly insufficient to justify the decision." *Campbell v Human Servs Dep't*, 286 Mich App 230, 241; 780 NW2d 586 (2009) (quotation marks and citation omitted). "[T]hese are not the only ways that a plaintiff can show pretext; these three categories are simply a convenient way of marshaling evidence and focusing it on the ultimate inquiry: did the employer fire the employee for the stated reason or not?" *Miles v South Central Human Resource Agency, Inc*, 946 F3d 883, 888 (CA 6, 2020) (citation modified).

Plaintiff chiefly seeks to establish pretext by showing that the reasons for his termination lacked a factual basis. See *Campbell*, 286 Mich App at 241. Plaintiff denied, in his testimony, that he engaged in any of the misconduct alleged. Captain Hill stated that the fingerprinting room incident by itself was sufficient reason to terminate. Regarding that incident, plaintiff points to fairly significant inconsistencies between the statements of the witnesses and the video evidence, as there is no visual indication that plaintiff put his head on Deputy Haynes's chest or touched him. And, according to plaintiff's expert lip-reader Freeman, plaintiff did not say what he was accused of saying by the witnessing deputies. Further, the video also shows other class participants horsing around, playfully touching each other, and standing in close proximity to each other, including several deputies who flexed their arm muscles at each other in an apparent comparison of strength. Yet only plaintiff was accused of violating the sexual harassment policy for standing too closely to Deputy Haynes.

Plaintiff also questions the soundness of defendants' investigation. That is, plaintiff theorizes that defendants performed a shoddy investigation and did not have evidence to substantiate the sexual harassment claims, so their true reason for his firing was discrimination. The length of the investigation was quite short, taking place in less than one day. Defendants did not look at the video capturing the incident in question until prompted by plaintiff to do so and did not speak with any of the witnesses besides plaintiff after viewing the video. Plaintiff has also presented the affidavit of an expert, Dr. Brian Kleiner, which concludes that defendants "failed to apply appropriate and standard employment practices to investigate possible sexual orientation discrimination." Dr. Kleiner opines that the investigation was "faulty" because defendants should have reinterviewed the witnesses, including having them review their statements and giving them the opportunity to make changes to make them more accurate, and notifying them that credibility assessments will be made by the investigator and that any statements deemed to be the result of dishonesty or sexual orientation discrimination will subject the witness to disciplinary action. After being given another opportunity to correct their statements, Dr. Kleiner states, the witnesses should have been directed to review the video and asked to explain any inconsistencies with their statements. Finally, this process would enable the investigator to write a report with their conclusions and reasoning which reconciles the inconsistencies between the witness statements and video evidence. Dr. Kleiner further opined that "it is more likely than not" that defendants "willfully ignored substantial evidence that contradicted the reports relating to [plaintiff] and were motivated to do so based upon his disclosure of his sexual orientation." And the expert's opinions find support in the evidence, as Captain Hill never spoke to any of the witnesses besides plaintiff before recommending plaintiff's termination and defendants did not question the witnesses to compare their statements to the video evidence, suggesting a lack of critical evaluation.

Plaintiff also impliedly invokes the "cat's paw" theory of liability. Under that theory, "an employer is liable for engaging in a discriminatory, adverse employment action if a subordinate to the decisionmaker performs an act motivated by [discriminatory] animus that is *intended* by the

[subordinate] to cause an adverse employment action, and . . . that act is a proximate cause of the ultimate employment action." *Iweha v Kansas*, 121 F4th 1208, 1227-1228 (CA 10, 2024) (quotation marks and citation omitted, alterations in original). Put differently, " 'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Id.* at 1228 (quotation marks and citation omitted). "When the biased employee, motivated by unlawful discriminatory intent, feeds information to the unbiased decisionmaker with the intention of effecting an adverse employment action, we inquire whether that decisionmaker placed 'uncritical reliance' on that information." *Id.* (quotation marks and citation omitted).

As discussed above, there is evidence that the deputy witnesses were biased or motivated by animus given the lunchtime conversation, behavior in the locker room, and substance of their statements (including the alleged complaint that the way plaintiff crossed his legs when he was sitting was "too feminine"). And as stated, plaintiff has pointed to discrepancies between the witness statements and video evidence, as well as evidence of poor investigatory practices, which support an inference that defendants uncritically relied on the witness statements despite contradictory evidence. Finally, plaintiff raised the possibility that the witnesses had a bone to pick with him because of his sexual orientation when he asked his supervisors during the investigation, "is this because I'm gay?" Yet defendants never followed up with any of the witnesses after viewing the video.

When construed in the light most favorable to plaintiff, this evidence—including evidence that the reasons for his termination lacked a factual basis, evidence that the investigation was deficient, and evidence supporting a "cat's paw" theory—would allow a reasonable factfinder to conclude that defendants' proffered reason for terminating plaintiff was pretextual, and that discrimination based on plaintiff's sexual orientation was a motivating factor for plaintiff's termination. See *White*, 334 Mich App at 109.

In sum, the trial court erred by concluding that, because plaintiff did not present similarly-situated comparator evidence, he did not establish the fourth prong of a prima facie case for sexual orientation discrimination. Applying the entire burden-shifting framework, we conclude that plaintiff has established a prima facie case and has also raised a triable issue that defendant's proffered nondiscriminatory reason for termination was pretextual. Accordingly, the trial court's order granting summary disposition to defendants on plaintiff's sex discrimination claim must be reversed.

B. HOSTILE WORK ENVIRONMENT CLAIM

Plaintiff next contends that the trial court erred by granting summary disposition on his hostile work environment claim. We disagree.

A plaintiff must satisfy five elements to establish a prima facie case of a hostile work environment:

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

> protected status; (4) the unwelcome 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. [*Major*, 316 Mich App at 550 (quotation marks and citation omitted).][4]

"The essence of a hostile work environment action is that one or more supervisors or co-workers create an atmosphere so infused with hostility toward members of one [protected group] that they alter the conditions of employment for them." *Radtke v Everett*, 442 Mich 368, 385; 501 NW2d 155 (1993) (quotation marks and citations omitted).

Plaintiff satisfies the first element because he is a member of a protected group. See *Major*, 316 Mich App at 550. Plaintiff also meets the second and third elements, see *id.*, because he presents evidence that he was subjected to unwelcome conduct or communication on the basis of sex due to his sexual orientation, see *Rouch World*, 510 Mich at 433. Plaintiff testified that he was subjected to communication or conduct on the basis of sex when another deputy asked him if he was gay, to which plaintiff responded affirmatively, which resulted in other deputies becoming silent and leaving the lunch table. The next day, in the locker room of the training facility, other deputies walked away and did not want to be near plaintiff. Plaintiff "didn't change" in the locker room because of the other deputies' behavior. And when the other deputies engaged in physical training, plaintiff did not participate because he was instructed to paint a room by himself. Finally, as previously discussed, there is evidence from which a jury could find that the allegations of sexual harassment that led to his termination were fabricated and fueled by anti-gay animus.[5]

As for the fourth element, "whether the unwelcome . . . conduct or communication was intended to or in fact did substantially interfere with [the] plaintiff's employment or created an intimidating, hostile, or offensive work environment," this element "is determined by whether a reasonable person, in the totality of circumstances, 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." *Radtke*, 442 Mich at 385, 394. Factors in evaluating whether an environment is hostile include the frequency and severity of discriminatory conduct; whether the conduct is physically threatening or humiliating, or merely an offensive utterance; and whether the conduct unreasonably interferes with the employee's work performance. *Quinto*, 451 Mich at 370 n 9. In this case, the facts that plaintiff's coworkers kept

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[4] Defendants frame this inquiry as requiring plaintiff to show that he was subject to unwelcome *sexual* conduct. However, rather than alleging that he was subject to harassment of a sexual nature, plaintiff claims that he was subjected to *sex-based* harassment on account of his sexual orientation. Sex-based harassment includes when someone is harassed on account of their sex, even if the harassment is not sexual in nature. See *Oncale v Sundowner Offshore Servs, Inc*, 523 US 75, 80-82; 118 S Ct 998; 140 L Ed 2d 201 (1998).

[5] Defendants make much of the fact that plaintiff admitted that he was not *sexually* harassed. However, as discussed above, plaintiff claims that he was subjected to a hostile work environment because of his sexual orientation, not that he was subjected to harassment of a sexual nature. Plaintiff thus need not show that he was harassed in a sexual manner to prevail. See *Oncale*, 523 US at 80-82.

their distance from him after he disclosed his sexual orientation and that he missed a physical training session because he was chosen to paint rooms are not severe or frequent enough, on their own, such that a reasonable person would find that they substantially interfered with plaintiff's employment or otherwise rose to the level of creating a hostile work environment. But, viewing the evidence in the light most favorable to plaintiff, these incidents in turn support plaintiff's claim that his coworkers made false sexual harassment accusations against him that stemmed from anti-gay bias and ultimately resulted in his termination. In the totality of the circumstances, a reasonable person would perceive such conduct as meeting the standard for a hostile work environment, as such an environment unreasonably interfered with plaintiff's employment to the point that he was terminated.

Plaintiff's hostile work environment claim ultimately fails, however, because defendants were not put on notice of a hostile work environment to impute liability to them under the fifth element, respondeat superior. See *Major*, 316 Mich App at 550. An employer "may avoid liability if it adequately investigated and took prompt and appropriate action upon notice of the alleged hostile work environment. Thus, an employer must have actual or constructive notice of the alleged harassment before liability will attach to the employer." *Sheridan v Forest Hills Pub Schs*, 247 Mich App 611, 621; 637 NW2d 536 (2001) (quotation marks and citation omitted). "The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment . . . or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Id*. (quotation marks and citation omitted). Notice "is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a *substantial probability* that [sex-based harassment] was occurring." *Id*. at 622 (quotation marks and citation omitted).

Plaintiff argues that his superiors knew of the harassment, as they participated in it by removing him from the class to paint walls for a whole day instead of participating in the physical training course. Plaintiff testified that his superiors knew that he was gay. Indeed, Captain Hill testified that he knew about plaintiff's sexual orientation when the investigation began.[6] But, even construing these facts in the light most favorable to plaintiff and assuming that plaintiff's supervisors directed him to paint a classroom in isolation because he was gay, as discussed above, making an employee paint by themselves for one day is insufficiently frequent or severe treatment to rise to the level of a hostile work environment. See *Quinto*, 451 Mich at 370 n 9.

There is no evidence that defendants knew about the alleged sex-based harassment concerning the deputies' behavior at lunch or in the locker room, or that the deputies were fabricating allegations against plaintiff. Defendants did not possess actual knowledge of these

[6] Plaintiff also states that the trial court failed to acknowledge that "he was asked about his sexual orientation during his background investigation interview." However, plaintiff's evidence for this assertion is the deposition testimony of Sergeant Brian Bovee, which was not included in the lower court record and therefore cannot be considered on appeal. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal.").

incidents because plaintiff did not complain about any of these occurrences to higher management, or "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." *Sheridan*, 247 Mich App at 622. And during his employment, plaintiff never filed a complaint with human resources.

Defendants also lacked constructive knowledge of the alleged misconduct because it was not so substantially pervasive such that defendants can be imputed knowledge about it. See *id*. at 621. The allegations spanned merely a three-day period after plaintiff was reassigned to the corrections division. After Captain Hill informed plaintiff of the sexual harassment allegations against him, plaintiff denied the allegations and pointed out that the video did not show that he touched Deputy Haynes, but did not report any of the sex-based harassment that he alleges was committed by other deputies. Accordingly, there is no evidence that defendants knew about the alleged harassment.

Thus, the trial court did not err by granting summary disposition in defendants' favor on plaintiff's hostile work environment claim.

C. RETALIATION CLAIM

Plaintiff also contends that the trial court erred by granting summary disposition on his retaliation claim. We disagree.

MCL 37.2701(a) prohibits retaliation or discrimination "against a person because the person has opposed a violation of [the ELCRA], or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under [the ELCRA]." A plaintiff must meet the following elements to establish a prima facie case of retaliation: "(1) that [they] engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Major*, 316 Mich App at 552-553 (quotation marks and citation omitted).

Plaintiff's claim fails because even viewing the facts in the light most favorable to him, no reasonable juror could find that plaintiff engaged in protected activity. See *id.* at 552; MCL 37.2701(a). As stated, plaintiff never reported any of the alleged incidents of sexual harassment or filed a complaint during his employment. Plaintiff argues that he engaged in a protected activity by asking Captain Hill if the investigation into allegations of sexual harassment was happening because he was gay. In plaintiff's view, asking this question was protected activity because plaintiff need only "[raise] the spectre of a discrimination complaint." *McLemore v Detroit Receiving Hosp*, 196 Mich App 391, 396; 493 NW2d 441 (1992). But a reasonable juror could not conclude that plaintiff asking this question was "raising the spectre" that plaintiff was poised to report discrimination. See *id.* Viewed in context, plaintiff uttered this question in his defense while he himself was under investigation, and the question does not appear to "communicate a principled opposition" to the alleged misconduct by his coworkers. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 274; 696 NW2d 646 (2005). Nor is there "evidence that, before this lawsuit, plaintiff ever sought to cast" his question "in terms of opposing [harassment] at [his] workplace." *Id.*

Thus, the trial court did not err by granting summary disposition to defendants on plaintiff's retaliation claim.

IV. CONCLUSION

The trial court erred by granting summary disposition in favor of defendants on plaintiff's sex discrimination claim because plaintiff established a prima facie case and presented evidence that defendants' proffered reason for termination was pretextual. But the trial court did not err by dismissing plaintiff's claim of hostile work environment because defendants were not put on notice of a hostile work environment. Nor did the trial court err by dismissing plaintiff's retaliation claim, as plaintiff did not engage in protected activity.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Matthew S. Ackerman
/s/ Stephen L. Borrello
/s/ Daniel S. Korobkin