

Circuit Court for Harford County
Case No. C-12-CV-20-000374

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1225

September Term, 2021

ERNEST DUPREE

v.

A.F. WHITSITT CENTER, ET AL.

Wells, C.J.,
Berger,
Leahy,

JJ.

Opinion by Berger, J.

Filed: July 25, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises from the Circuit Court for Harford County’s dismissal of Appellant Ernest Dupree’s complaint for sexual harassment and assault. Mr. Dupree alleges that he was sexually harassed and assaulted when he was voluntarily admitted to A.F. Whitsitt Center (“Whitsitt Center”) for in-patient drug abuse treatment. Mr. Dupree brought an action against Whitsitt Center for sexual harassment and assault and alleged that a certified nursing assistant, Charles W. Rider, Jr., forced him “to display his sexual and intimate areas” during a pre-admittance screening and personal search.

Mr. Dupree presents two questions for our review,¹ which we have rephrased, for clarity, as follows:

- I. Whether the circuit court erred in dismissing Mr. Dupree’s claim for sexual harassment.
- II. Whether the circuit court erred in dismissing Mr. Dupree’s claim for assault.

For the reasons explained herein, we shall hold that the circuit court did not err in dismissing Mr. Dupree’s claim for sexual harassment because Maryland does not recognize a cause of action sounding in tort for sexual harassment. Furthermore, we shall hold that the circuit court did not err in dismissing Mr. Dupree’s claim for assault.

¹ Mr. Dupree’s original questions presented are as follows:

1. Does Maryland Law Recognize a Tort of Sexual Harassment?
2. Does Appellant’s Amended Complaint state a cause of action?

FACTS AND PROCEDURAL HISTORY

Whitsitt Center is a licensed drug rehabilitation facility located in Chestertown, Maryland. On or about February 26, 2019, Mr. Dupree voluntarily admitted himself to Whitsitt Center's in-patient substance abuse treatment program. When Mr. Dupree arrived, he was met by Charles W. Rider Jr., a certified nursing assistant employed by Whitsitt Center. Mr. Rider directed Mr. Dupree into a medical examination room and conducted a pre-admittance screening and search of his person to determine if Mr. Dupree was in possession of any drugs or other contraband.

Mr. Dupree alleges that during the screening, Mr. Rider asked him to remove his outer clothes and "told him to remove his underwear, lift his genitals and spread his cheeks." At this point, Mr. Dupree asserts that Mr. Rider "was staring at [his] anal and genital area the whole time" and that he felt "progressively more uncomfortable as the staring at his private parts continued[.]" Mr. Dupree perceived Mr. Rider's conduct as "an intrusive act" committed for his own sexual gratification and not a professional or official search procedure. At a later date following this incident, Mr. Dupree alleges that Mr. Rider intruded on his privacy when he peered into his private bedroom when he was changing clothes. Mr. Dupree alleges that Mr. Rider's visit was not part of any regular routine and was not justified for any foreseeable reason other than to invade his privacy.

Mr. Dupree asserts that he was traumatized by the strip search incident and by Mr. Rider's intrusion into his private bedroom. Mr. Dupree complained to Whitsitt Center management and received a letter from the registered nurse manager expressing regret for

the “humiliation” he experienced during the strip search, as well as a commitment to take subsequent measures to clarify the “inconsistency” regarding Whitsitt Center’s pre-admittance search policy.

On May 15, 2020, Mr. Dupree filed suit against Whitsitt Center in the Circuit Court for Harford County.² Mr. Dupree’s initial complaint alleged violations of the Maryland Declaration of Rights, sexual harassment, sexual assault, and negligent hiring. The circuit court dismissed all of Mr. Dupree’s claims, except the count for sexual assault. The circuit court granted Mr. Dupree fifteen days to file an amended complaint, opining that Mr. Dupree’s sexual assault claim could be considered a claim for assault if properly amended.

Mr. Dupree filed an amended complaint and again brought the same claim for sexual harassment and a new amended claim for assault. Whitsitt Center moved to dismiss the amended complaint. The circuit court issued a thorough opinion granting Whitsitt Center’s motion to dismiss. Regarding Mr. Dupree’s sexual harassment claim, the circuit court determined that the statutory provisions cited by Mr. Dupree did not give rise to a cause of action in tort for sexual harassment, and further, that Mr. Dupree’s allegations did not meet his supplied definition of sexual harassment. Regarding the assault claim, the circuit court found that Mr. Dupree failed to sufficiently state a claim for assault because he made no allegation that Mr. Rider “made any overt or implied threats toward the Plaintiff that signaled any intent to commit any unwanted touching, nor is it alleged that [Mr. Rider] had the present ability to carry out any threat.” Mr. Dupree filed this timely appeal.

² Mr. Rider was not served as a party in this lawsuit.

DISCUSSION

Standard of Review

We review the grant of a motion to dismiss to determine whether the trial court’s decision was “legally correct.” *Blackstone v. Sharma*, 461 Md. 87, 110 (2018) (quoting *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 284 (2018)). We conduct our review *de novo*, and “will affirm the circuit court’s judgment on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.” *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 74 (2015), *cert. denied*, *Sutton v. FedFirst Fin.*, 446 Md. 293 (2016) (internal quotation marks and citations omitted).

I. The circuit court did not err in dismissing Mr. Dupree’s sexual harassment claim.

Maryland does not recognize an intentional tort for sexual harassment. Mr. Dupree argues, however, that the circuit court erred in dismissing his claim because several provisions of the Code of Maryland Regulations (“COMAR”) establish a statutory basis for the intentional tort of sexual harassment. In support, Mr. Dupree relies on *Meritor Savings Bank, FSB v. Vinson* in which the United States Supreme Court held that a claim of hostile work environment premised on sexual harassment is actionable under Title VII as a form of sex discrimination. *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986). Mr. Dupree urges us to hold “[a]long the lines in *Meritor*” that there can be a cause of

action sounding in tort for sexual harassment when certain provisions of COMAR are violated which generally prohibit sexual harassment by healthcare professionals.³

Whitsitt Center argues that the COMAR provisions cited by Mr. Dupree do not apply because he is not a member of the class of persons that the provisions were designed to protect, and the provisions were not designed to prevent the alleged injury that occurred. Whitsitt Center relies on *Blackburn Ltd. P'ship v. Paul* in which the Court of Appeals affirmed the “Statute or Ordinance Rule” which allows a plaintiff to establish duty and breach -- in a cause of action for negligence -- if it is alleged that the defendant violated a regulation that was designed to protect the plaintiff and prevent the particular injury. *Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 110–15 (2014). In our view, both Mr. Dupree and Whitsitt Center have misinterpreted the law on this issue. Nevertheless, the circuit court did not err in dismissing Mr. Dupree’s claim for sexual harassment.

First, Mr. Dupree’s reliance on *Meritor* is misplaced. The Supreme Court’s holding in *Meritor* was limited to an interpretation of the provisions of Title VII concerning hostile work environments and workplace sex discrimination. Critically, the Supreme Court’s holding in *Meritor* did not establish a tort for sexual harassment. Rather, the Court in

³ Mr. Dupree relies on COMAR provisions prohibiting sexual harassment by physicians, social workers, and therapists/counselors. Mr. Dupree’s reliance on these sections of COMAR is misplaced because Mr. Rider is neither a physician, social worker, nor a therapist/counselor. Mr. Dupree also relies on COMAR 10.47.01.00 *et seq.* which governs the certification of alcohol and drug treatment facilities including a requirement that the facility implement policies and procedures to prevent sexual harassment of patients. COMAR 10.47.01.03 (b)(iv). Mr. Dupree did not allege, however, that Whitsitt Center failed to comply with the required policies and procedures set forth in COMAR.

Meritor merely noted that factual circumstances indicating sexual harassment based on gender are sufficient to state a claim for workplace discrimination under Title VII. *Meritor Sav. Bank, supra*, 477 U.S. at 66–67. There is nothing about Mr. Dupree’s case that is “[a]long the lines in *Meritor*” that persuades us to hold that a plaintiff can bring a claim for sexual harassment in tort when various provisions of COMAR are allegedly violated.

Second, Whitsitt Center’s argument that Mr. Dupree cannot rely on the cited COMAR provisions to establish a tort of sexual harassment is correct, but for the wrong reasons. Whitsitt Center correctly states the law regarding the “Statute or Ordinance Rule” from *Blackburn*.⁴ Whitsitt Center fails to recognize, however, that the “Statute or Ordinance Rule” only applies when a plaintiff is seeking to establish evidence of duty and breach in a cause of action for negligence, not an intentional tort.

Although Mr. Dupree did not specify in his amended complaint whether he was alleging sexual harassment under a theory of negligence or intentional tort, his brief clearly requests that we find “an Intentional Tort of Sexual Harassment when COMAR is violated[.]” Accordingly, the “Statute or Ordinance Rule” from *Blackburn* is inapplicable

⁴ The Statute or Ordinance Rule requires the regulation to “set forth mandatory acts clearly for the protection of a *particular class* of persons rather than the public as a whole.” *Gourdine v. Crews*, 405 Md. 722, 755 (2008) (internal quotation marks omitted) (emphasis in original); *See also Blackburn Ltd. P’ship, supra*, 438 Md. at 103 (“[I]n some instances, the duty of care in a negligence action may arise from statute or regulation.”).

to Whitsitt Center’s defense -- as well as Mr. Dupree’s request -- because the Statute or Ordinance Rule only applies to causes of action based in negligence, not intentional torts.⁵

Nevertheless, we will affirm the circuit court’s dismissal of Mr. Dupree’s count for sexual harassment because the allegations in the complaint -- which we accept as true -- do not satisfy even Mr. Dupree’s own definition of sexual harassment. Mr. Dupree defines sexual harassment pursuant to COMAR as “an unwelcome sexual advance, request for sexual favor, or other verbal or physical conduct of a sexual nature.” COMAR 10.32.17.02 (B). Mr. Dupree’s amended complaint fails to allege that Mr. Rider engaged in conduct that could be reasonably construed as unwanted verbal or physical conduct of a sexual nature. Although Mr. Rider requested Mr. Dupree to remove his clothes and expose his private areas as part of the pre-admittance screening, this request -- at most -- was merely a violation of Whitsitt Center’s pre-admittance search policy, not an unwelcome sexual

⁵ Mr. Dupree’s request that the circuit court find a cause of action in tort for sexual harassment when COMAR is violated was analyzed by Whitsitt Center and the circuit court under *Blackburn* which is limited to causes of action for negligence. *Blackburn Ltd. P’ship, supra*, 438 Md. at 103. Because Mr. Dupree is seeking to establish a cause of action sounding in intentional tort, the *Blackburn* analysis is not applicable. Nevertheless, there is another potential analysis under the law concerning an implied private right of action. A plaintiff may have an implied private right of action stemming from statute when that selfsame statute indicates that the legislature intended to create a remedy for the plaintiff via a private cause of action. *California v. Sierra Club*, 451 U.S. 287 (1981). Critically, however, the claimant must still “ha[ve] adequately alleged a violation” in order for us to determine whether the legislature intended to create an implied private right of action. *Aleti v. Metro. Balt., LLC*, 251 Md. App. 482, 502 (2021) (quoting *Scull v. Groover, Christie & Merritt, P.C.*, 435 Md. 112, 121 (2013)), *cert. granted*, 476 Md. 263 (2021). As we set forth in this opinion, Mr. Dupree’s amended complaint did not adequately allege a violation of any of the COMAR provisions that he relies on to support his request.

advance prohibited by COMAR.⁶ There simply is no allegation in the amended complaint that Mr. Rider attempted to make unwanted sexual-physical contact with Mr. Dupree, or that Mr. Rider made any comments to Mr. Dupree indicating an intent to make sexual-physical contact with him.

Maryland does not recognize an intentional tort for sexual harassment. We, therefore, affirm the circuit court’s dismissal of Mr. Dupree’s sexual harassment claim. Furthermore, the allegations in the complaint do not allege sexual harassment as defined by any of the COMAR regulations on which Mr. Dupree would have us rely.

II. The circuit court did not err in dismissing Mr. Dupree’s assault claim.

To properly state a claim for civil assault, the plaintiff “must prove that he was threatened by a defendant who possessed the apparent present ability to carry out that threat[,]” and also that the defendant’s actions “raised in the plaintiff’s mind an apprehension of imminent bodily harm.” *Lee v. Pfeifer*, 916 F. Supp. 501, 505-06 (D. Md. 1996). “[T]he first element is measured by a standard of reasonableness, [and] the second element is measured by an entirely subjective standard.” *Lee, supra*, 916 F. Supp. at 506.

Mr. Dupree alleges that Mr. Rider “misused his power, detained Plaintiff and forced him to display his genitals and other private parts[.]” Mr. Dupree does not allege that Mr. Rider made any overt or implied threats to him during the course of the pre-admittance

⁶ Whitsitt Center’s policy regarding admission explicitly mandates a “personal search” of the patient and is defined as “a physical search/inspection of the concealed portions of a consumer’s person and/or attire.”

screening. There is no allegation that Mr. Rider said anything to him that could be reasonable construed as a threat, or that he took any actions that could be characterized as a threat to cause physical harm or unwanted sexual touching. In our view, Mr. Dupree has failed to present any factual allegation that Mr. Rider threatened him. Mr. Dupree may have perceived that Mr. Rider was threatening him. That subjective perception, however, does not meet an objective reasonableness standard that there was actually a “threat[] by a defendant who possessed the apparent present ability to carry out that threat.” *Lee, supra*, 916 F. Supp. at 506.

Mr. Dupree further alleges that during the course of the screening that he felt the “reasonable fear of being subjected to an unwanted touching[.]” Although this element of assault is “measured by an entirely subjective standard[.]” Mr. Dupree fails to allege that his subjective fear stemmed from anything else except for the uncomfortable circumstances surrounding the search. *Lee, supra*, 916 F. Supp. at 506. Mr. Dupree may have felt uncomfortable and even feared an unwanted touching by Mr. Rider. That apprehension, however, did not stem from any physical or verbal conduct by Mr. Rider. Mr. Dupree’s complaint merely makes the legal conclusion that he was in reasonable fear of assault from Mr. Rider -- without any underlying factual support that there was a threat.

Because Mr. Dupree has failed to allege sufficient facts for a claim of assault, we hold, therefore, that the circuit court did not err in dismissing his claim.

**JUDGMENT OF THE CIRCUIT COURT
FOR HARFORD COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**