STATE OF MICHIGAN

COURT OF APPEALS

KATHRYN T. ROMANOWSKI,

Plaintiff-Appellant,

v

NEWPORT LUMBER COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED
May 30, 1997

No. 194431
Gogebic Circuit Court
LC No. 95-000078-NO

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. Plaintiff claimed that she was sexually harassed while employed by defendant, that defendant failed to take adequate remedial measures in response to actual and/or constructive notice of a hostile work environment, and that she was subjected to retaliatory treatment after voicing her complaints.

Plaintiff first argues that there is a genuine issue of material fact as to whether proper action was taken by defendant upon receipt of actual notice of the harassment. We disagree. Defendant can avoid liability for any acts of its employees or supervisors that occurred prior to its receipt of notice if it adequately investigated the claim and took prompt and appropriate remedial action. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991). In support of its motion, defendant presented the affidavit of its plant manager stating that he advised the alleged perpetrators that sexual harassment would not be tolerated and cited plaintiff's own testimony that no further sexual harassment occurred after actual notice was given to defendant. The only evidence presented in rebuttal was plaintiff's belief that no actions were being taken based on her plant manager's allegedly insensitive reaction to her complaint, his failure to inform her of his conversation with the perpetrators, and her assumption that he failed to inform the company's owner of her complaint. These actions, if true, may be insensitive and potentially unwise, but they do not necessarily imply that the conversation with the perpetrators never occurred. Mere speculation that a jury could reject the plant manager's uncontradicted statement that he spoke to the perpetrators is insufficient to create a genuine issue of fact

for trial. *Libralter Plastics v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Therefore, the trial court properly held that there was no genuine issue of material fact as to whether proper action was taken by defendant upon receipt of actual notice from plaintiff, because plaintiff failed to present sufficient evidence to contradict the plant manager's assertion that he spoke to the alleged perpetrators or to substantiate the existence of any continued harassment or retaliation.

Plaintiff next argues that there is a genuine issue of material fact as to whether defendant "knew or should have known" that harassment was occurring and therefore should have taken remedial action prior to receiving actual notice. We disagree. An employer cannot avoid liability for the acts of its employees where it had constructive notice of harassment, but failed to investigate and take remedial action. *Eide v Kelsey-Hayes Co*, 154 Mich App 142, 152; 397 NW2d 532 (1986), modified 431 Mich 26; 427 NW2d 488 (1988). Plaintiff claims that such constructive notice was based on the pervasive nature of and/or the active involvement of management personnel in the harassment.

Defendant denied the existence of pervasive harassment and cited plaintiff's own admissions that there were no witnesses or reports to management regarding the alleged harassment until she gave actual notice. Plaintiff failed to set forth any specific facts evidencing pervasive harassment and failed to cite any legal holding that there was constructive notice under conditions similar to those affecting plaintiff. Plaintiff's statements regarding the letter of a former employee were inadmissible hearsay. MRE 801. As inadmissible evidence, this testimony could not be used to create an issue of fact. *Cox v Dearborn Heights*, 210 Mich App 389, 397-398; 534 NW2d 135 (1995). Speculation that the letter exists and mere conclusory statements that the facts indicate pervasive harassment were insufficient to overcome defendant's motion for summary disposition. *Quinto v Cross & Peters Co*, 451 Mich 358, 372; 547 NW2d 314 (1996); *Libralter Plastics*, *supra* at 486.

With regard to the active involvement of management in the alleged harassment, defendant argued that the comments by the plant manager and plaintiff's supervisor did not constitute sexual harassment and that, even if the supervisor's comments did, his supervisory responsibilities were not significant enough to automatically impute his behavior to defendant's management. The plant manager's comments about the district attorney candidate and condoms were apparently related to a political issue in the campaign. No specifics are provided with regard to his alleged references to "girlie shows." Plaintiff, therefore, has not presented sufficient evidence to demonstrate a factual dispute regarding the plant manager's alleged involvement in substantially interfering with her employment or creating a hostile environment. *Quinto*, *supra* at 372.

Plaintiff's supervisor's comments concerning how plaintiff looked without "her tarp" and his offer to give her "a poke" may well have constituted evidence of harassment. It is unclear how much he witnessed of the alleged scuffle between plaintiff and one of her harassers, but it appears that he witnessed plaintiff pinned on her back and struggling to get free. Plaintiff may have submitted sufficient evidence to create an issue of fact as to constructive knowledge based on her supervisor's active involvement and/or his witnessing of the struggle with her coworker. However, such issue of fact is only legally relevant if his knowledge and/or actions can be imputed to the employer. An employer is not necessarily presumed to have notice of harassment by its

supervisors. *McCalla v Ellis*, 180 Mich App 372, 380; 446 NW2d 904 (1989); *Radtke v Everett*, 442 Mich 368, 396-397; 501 NW2d 155 (1993). Neither party provided many details regarding the supervisor's job description, but he was referred to as a foreman, supervisor, or floor manager. Plaintiff testified that his responsibility was to supervise workers and instruct them in the tasks to be accomplished. Albeit with limited evidence, plaintiff's supervisor's position is distinguishable from the position of the employer discussed in *Radtke* who possessed the ability to hire and fire, to control working conditions, paid wages and owned the corporation. *Radtke*, *supra* at 397. Based on the foregoing precedent and the lack of evidence that the supervisor's responsibilities were any more than minimal, there was not sufficient evidence to generate an issue of fact as to constructive notice based on his actions or knowledge. Contrast *Eide v Kelsey-Hayes Co*, 154 Mich App 142, 148, 152-153; 397 NW2d 532 (1986), modified 431 Mich 26; 427 NW2d 488 (1988) (distinguishable because the plaintiff's supervisors were the main perpetrators, there were numerous witnesses, and the plaintiff had complained to numerous company officials); *Champion v Nat'l Wide Security*, 450 Mich 702, 712-714; 545 NW2d 596 (1996) (distinguishable because it was a *quid pro quo* sexual harassment case where a supervisor used his position to put plaintiff in a vulnerable position that allowed him to rape her).

The trial court correctly held that there was no genuine issue of material fact as to constructive notice of harassment, because plaintiff failed to present sufficient evidence of the pervasive nature of the harassment or of the active involvement of management in the harassment. Although sufficient evidence may have existed to create an issue of fact with regard to her supervisor's involvement, his knowledge and actions could not be imputed to the employer as his supervisory responsibilities were legally insignificant.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Stephen J. Markman