STATE OF MICHIGAN

COURT OF APPEALS

SANDRA PEPPERMAN and JOHN PEPPERMAN,

Plaintiffs-Appellants,

v

GENERAL MOTORS CORP.,

Defendant-Appellee.

UNPUBLISHED
November 4, 1997

No. 197097
Oakland Circuit Court
LC No. 95-505857-NO

Before: Saad, P.J., and O'Connell and M. J. Matuzak*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the order of the circuit court granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. We affirm.

Plaintiff Sandra Pepperman (hereinafter plaintiff) was employed by defendant and worked at defendant's Lake Orion Plant. During the time that she worked at the plant, plaintiff had a consensual, sexual relationship with another employee. Plaintiff ended this relationship in 1991 when she decided to marry John Pepperman, her present husband. According to plaintiff, her ex-boyfriend then began sexually harassing her both in the workplace and at her home. Plaintiff reported the alleged harassment to the Labor Relations Department on various occasions. The Supervisor of Labor Relations confronted the harasser and cautioned him to leave plaintiff alone. The supervisor also told the man that any additional contact he had with plaintiff would result in formal discipline, including discharge. The alleged harassment at the workplace ceased after the warning; however, the harassment continued at plaintiff's home and on other occasions when plaintiff was away from the workplace. Plaintiff testified that she received, in the mail, notes, cards, and nude pictures of herself that were taken by the co-worker during their relationship. Her mother-in-law received a videotape suggesting that plaintiff was having an affair with a co-worker. Plaintiff subsequently obtained a permanent restraining order against the co-worker in the Wayne County Circuit Court.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff, joined by her husband, filed this lawsuit against defendant based on negligent supervision, hostile work environment sexual harassment, and loss of consortium.[1] Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted defendant's motion, finding that the majority of the co-worker's conduct occurred off defendant's premises and during non-business hours. The court also concluded that defendant took appropriate action to prevent the misconduct of its employee on the premises by "warn[ing] him to desist or he would be subject to disciplinary action including discharge."

On appeal, plaintiff argues that that the trial court erred in dismissing her sexual harassment claim and that her claim is supported by the Michigan Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. Plaintiff specifically argues that there was a sufficient nexus between defendant and the harassment and that defendant failed to take prompt, remedial action to terminate the harassment. Plaintiff also asserts that the trial court failed to give any attention to the fact that a stalking injunction had been issued against the harasser. We disagree.

A motion under MCR 2.116(C)(10) will be granted where there is no factual support for a claim; the moving party will then be entitled to judgment as a matter of law. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In deciding a motion under MCR 2.116(C)(10), this Court must consider the available pleadings, affidavits, depositions, admissions and other documentary evidence in favor of the non-moving party. *Id.*; MCR 2.116(G)(5). The Court is not permitted to assess credibility or to determine factual issues. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The party seeking summary disposition must identify the issues for which it claims there is no genuine factual dispute. *Id.* at 160. The non-moving party must then respond with affidavits or other evidentiary materials that establish the existence of a factual issue for trial. *Id.* The non-moving party may not simply rely on allegations or denials in the pleadings. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is proper if the opposing party cannot present documentary evidence to establish that a material factual dispute exists. *Id.* at 362-363.

The Michigan Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, recognizes a cause of action in sexual harassment where the conduct in question impermissibly interferes with one's ability to work. The statute provides, in pertinent part:

> (h) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
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> * * *
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> (iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, . . . or creating an intimidating, hostile, or offensive employment . . . environment. [MCL 37.2103(h)(iii); MSA 3.548(103)(h).]

In order to establish a *prima facie* case of hostile work environment sexual harassment, plaintiff must prove the following elements:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of sex; (3) the employee was subjected to unwelcome sexual conduct or communication; (4) the unwelcome sexual 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. [*Radtke, supra* at 382-383 (citing MCL 37.2103[h], 37.2202[1][a]; MSA 3.548[103][h], 3.548[202][1][a]).]

Elements four and five are the primary issues in dispute in this matter.

In *Radtke, supra*, the Supreme Court examined the Civil Rights Act to determine the standard by which courts should evaluate a hostile work environment claim. The Court noted that the purpose of the act "is to combat serious demeaning and degrading conduct based on sex in the workplace, and to allow women the opportunity to fairly compete in the marketplace." *Id.* at 387. However, the Court also noted that to simply adopt all of the plaintiff's subjective findings of harassment, and blindly impose liability on employers, without inquiry as to whether such conduct was merely offensive to this employee or whether the conduct warrants liability, would be contrary to the plain meaning and purpose of the statute. *Id.* The Court concluded that the plain meaning of the statute mandates an objective reasonableness standard, and therefore that courts must examine the totality of the circumstances surrounding the alleged harassment to assess whether a reasonable person would perceive the conduct at issue as creating an "offensive," "hostile," or "intimidating" environment. *Id.* at 386-387, 394.

Initially, we find that summary disposition was proper because plaintiff failed to offer enough evidence to create a genuine issue of material fact as to whether the harassment created a hostile work environment. Not only did plaintiff fail to establish a sufficient nexus between defendant and the harassment to render defendant liable, but plaintiff failed to prove that defendant did not take prompt, remedial action to dispel the alleged harassment. Generally, hostile work environment sexual harassment is "unwelcome sexual conduct *in the workplace* that *unreasonably interferes with an employee's work performance."* *McCallum v Corrections Dep't*, 197 Mich App 589, 596; 496 NW2d 361 (1992) (emphasis added). In this case, plaintiff alleged that her co-worker approached her several times at work in an effort to rekindle an old romance. However, most of the alleged misconduct did not occur at work and could not have contributed to a hostile work environment. Moreover, even if the harassment was disruptive to plaintiff's concentration at times, we do not find that it created a situation where plaintiff was unable to complete her job responsibilities or that she could not come to work in fear of confronting her co-worker. In addition, plaintiff does not allege, nor is there evidence suggesting, that plaintiff was required to submit to her co-worker's advances or tolerate the alleged harassment to maintain her position. In fact, defendant opposed the behavior and immediately expressed its intolerance for the misconduct. Therefore, we hold that plaintiff's allegations, taken as true, were not so pervasive as to alter the conditions of plaintiff's employment. Hence, they did not rise

to the level of severity necessary to sustain an actionable claim against defendant for hostile work environment sexual harassment.

We also find that plaintiff failed to establish the element of respondeat superior. An employer may avoid liability based on sexual harassment at work, "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Radtke, supra* at 396 (quoting *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991)). Prompt, remedial action by the employer will defeat liability if a co-worker or a supervisor is accused of harassment. *Radtke, supra*; *McCalla v Ellis*, 180 Mich App 372, 380; 446 NW2d 904 (1989); *McCarthy v State Farm Ins Co*, 170 Mich App 451, 457; 428 NW2d 692 (1988). Thus, plaintiff must allege facts sufficient for a reasonable trier of facts to conclude that defendant was, in fact, aware of the misconduct, or involved in creating or condoning the harassment, to such an extent that plaintiff was injured as a result of defendant's actions or omissions. *Radtke, supra* at 397; *McCarthy, supra*.

In the instant case, plaintiff admittedly reported the instances of alleged harassment while at work to defendant's Labor Relations Department. Thus, there is no question that defendant was aware that a problem existed. However, defendant can only be held responsible for eliminating problems that occurred at the workplace -- not those that plaintiff encountered elsewhere. Thus, we conclude that when defendant's agents initially confronted the employee regarding the alleged incidents of harassment in an effort to end the problem, it took appropriate measures to terminate the misconduct. In addition, we believe that when defendant's agents confronted the employee a second time and warned him that his behavior was intolerable and he would be disciplined and possibly discharged if it continued, this was a prompt and appropriate response to plaintiff's allegations. Furthermore, we note that plaintiff did not report any additional instances of harassment at work after defendant's admonition. Therefore, because plaintiff has not alleged facts sufficient to prove that defendant was directly responsible for the alleged sexual harassment, or that it failed to take prompt, remedial action to terminate the misconduct, the respondeat superior element has not been satisfied. Hence, plaintiff has failed to establish a claim of hostile work environment.

Finally, plaintiff argues that the trial court erred by failing to consider the stalking injunction issued against the co-worker in granting defendant's motion for summary disposition. We disagree. Initially, we note that the present action names General Motors Corporation as defendant rather than the employee that plaintiff alleged was harassing her. The stalking injunction was issued in response to a claim filed by plaintiff against her co-worker and does not refer to, nor include, defendant as a party or contributor to the culpable conduct. Moreover, the findings of fact made by the circuit court regarding the injunction made absolutely no mention of defendant, nor do they reference any alleged harassment while plaintiff was at work. To the contrary, the order was granted based on explicit findings of "stalking" at plaintiff's home. In this respect, we note that "stalking," by definition, need not have any sexual connotations attached to it to be actionable.[2] In any event, even if the court did consider the stalking injunction in deciding the motion for summary disposition, the basis of the injunction provides no support for plaintiff's theory that defendant should be held liable for hostile work environment sexual

harassment. Defendant was not a party to the injunction, nor was it even mentioned in the court's order.

Therefore, we hold that the trial court did not err by not considering the stalking injunction in evaluating defendant's motion for summary disposition.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak

[1] The trial court dismissed the negligent supervision claim based on the exclusive remedy provision in the Worker's Compensation Act. The negligent supervision and loss of consortium claims are not raised on appeal.

[2] A civil action for stalking requires the plaintiff to prove that the defendant engaged in a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, intimidated, threatened, or molested and that actually causes those feelings. MCL 750.411h; MSA 28.643(8); MCL 600.2954; MSA 27A.2954.