STATE OF MICHIGAN

COURT OF APPEALS

SHONDA COCKE,

Plaintiff-Appellant,

v

TRECORP ENTERPRISES, INC.
d/b/a BURGER KING,

Defendant-Appellee.

UNPUBLISHED
February 20, 1998

No. 198021
Genesee Circuit Court
LC No. 93-019891-NO

Before: Saad, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing her claims of sexual harassment, assault, and intentional infliction of emotional distress. We reverse in part, affirm in part, and remand for further proceedings in accordance with this opinion.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Marx v Dep't of Commerce*, 220 Mich App 66, 70; 558 NW2d 460 (1996). The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* This Court reviews summary disposition decisions de novo, to determine whether the prevailing party was entitled to judgment as a matter of law. *Id*. On review, this Court must also make all reasonable inferences in the nonmoving party's favor. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant on her hostile environment sexual harassment claim made pursuant to the Michigan Civil Rights Act (CRA), MCL 37.2202; MSA 3.548(202). We agree.

Under the CRA, five elements must be established to allege a prima facie case of sexual harassment:

(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 v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

Plaintiff was a crew member at a Burger King restaurant owned by defendant Trecorp. She was often supervised by defendant Geoff Brownell, a shift manager at the restaurant. Deposition testimony established that, among other things, Brownell touched plaintiff's breasts and buttocks and made sexual and degrading references directly to plaintiff and to other employees about plaintiff. Construing all reasonable inferences in plaintiff's favor, we find that plaintiff established the first four elements of a prima facie hostile work environment claim.

The issue whether plaintiff has met her burden regarding the fifth element, respondeat superior liability, is more difficult to analyze. In *Meritor Savings Bank FSB, v Vinson*, 477 US 57, 72; 106 S Ct 2399; 91 L Ed 2d 49 (1986), the United States Supreme Court considered a "hostile work environment" claim, and, while not announcing a definitive rule on employer liability, held that employers are not "always automatically liable for sexual harassment by their supervisors." Subsequent federal courts have struggled with this issue, deriving the following general rules:

> An employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's coworkers; consequently, . . . the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." [*Kotcher v Rosa & Sullivan Appliance Center, Inc*, 957 F2d 59, 63 (CA 2, 1992).]

Here, because defendant Brownell was a low-level shift manager, we conclude as a matter of law that he was not at a sufficiently high level in Trecorp's hierarchy such that his actions should be automatically imputed to the company. *Id.* at 64.

Where a plaintiff alleges sexual harassment by either a low-level supervisor or a coworker, an employer may avoid liability under the CRA "'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). An employer must, of course, have notice—either actual or constructive—of the alleged harassment before being held liable for not taking remedial action. *Radtke, supra* at 396-397.

> Where . . . the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiff's supervisor or coworker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. 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. [*McCarthy v State Farm Ins Co,* 170 Mich App 451, 457; 428 NW2d 692 (1988), quoting *Henson v City of Dundee*, 682 F2d 897, 905 (CA 11, 1982). Citations omitted.]

The supervisory hierarchy in defendant Trecorp, a franchise of six restaurants in Genesee and Oakland Counties, was, in descending order, Director of Operations Carl Turner, Assistant Director of Operations Carrie Conway, restaurant managers who controlled the day-to-day operation of a particular restaurant, and various shift managers who controlled a particular shift, including supervising the employees working that shift. The offices of the director of operations and assistant director of operations were in Pontiac. At all times during plaintiff's employment (January through April of 1992) at the Dort Highway restaurant, it was without a restaurant manager. Turner testified that the former restaurant manager had quit in December 1991 and, because Turner did not have anyone qualified to take the position, he testified that he had gone to the restaurant "on a very frequent basis to oversee the operations of that restaurant." He subsequently quantified his visits as a minimum of three times a week. Thus, during this period, Turner functioned as the restaurant manager for the Dort Highway restaurant. The shift managers under whom plaintiff worked on various days included defendant Geoff Brownell, Michael Wright, Richard Blom, and Leona Gibbs.

Plaintiff testified at deposition that, soon after Brownell began harassing her, she reported it to Michael Wright, the manager working that shift. Plaintiff did not tell Wright specifically that the harassment was of a sexual nature, and Wright did not ask her for any specifics,[1] but told plaintiff that he would take care of it. When the harassment continued, plaintiff next complained to another shift manager, Richard Blom, who told her that he would talk to Carl Turner about it. A week later, when the harassment continued, plaintiff again spoke to Blom, who assured her that something would be done. Wright eventually became aware of the sexual nature of Brownell's harassment from plaintiff and from other employees, but neither Wright nor Blom investigated or reported the harassment to Turner.

The harassment continued until mid-April, when plaintiff complained to shift manager Leona Gibbs, who asked plaintiff to explain in detail what had occurred. Gibbs immediately contacted Turner, who set up a meeting with plaintiff and Gibbs. At the meeting, plaintiff alleged numerous specific and general instances of harassment by Brownell. Turner apologized to plaintiff and, after discussing the allegations with Brownell, transferred him to another restaurant. A week later, plaintiff resigned to take another job.

The critical issue to be determined is whether defendant Trecorp knew or should have known of the harassment of plaintiff and failed to take prompt remedial action. As outlined above, plaintiff can establish employer notice one of two ways, either by establishing that her repeated complaints to shift managers Wright and Blom constituted actual notice to defendant Trecorp, or by establishing that the harassment was "'so pervasive and so long continuing . . . that the employer must have become conscious of [it].'" *Vinson, supra* at 72, quoting *Taylor v Jones*, 653 F2d 1193, 1197-1199 (CA 8, 1981).

With respect to the question of actual notice, we acknowledge that shift managers Wright and Blom were low-level supervisors, without authority to discipline their supervisory coequal, defendant Brownell. Moreover, Wright and Blom testified that plaintiff did not initially indicate the sexual nature of the harassment. Nonetheless, at the time that plaintiff complained to Wright and Blom, they were her immediate supervisors and certainly had the authority, and arguably the duty, to question her further and determine the specific nature of her allegations and then to report those allegations to Director of Operations Turner. Plaintiff's alternative avenue of redress would have been the restaurant manager, who would have had the authority to investigate and discipline Brownell; however, as Turner testified, at all times during plaintiff's employment at the Dort Highway restaurant, it was without a restaurant manager. Plaintiff also could have gone directly to Turner with her complaint, however, even Wright testified that he chose not to report the allegations because he "just felt [Turner] wouldn't listen, anyway." Viewing all reasonable inferences in plaintiff's favor, we conclude that a genuine issue of fact exists whether defendant Trecorp was on actual notice of plaintiff's allegations and whether it took appropriate remedial action.

Even assuming that plaintiff has not established actual notice, we also conclude that a genuine issue of fact exists whether defendant Trecorp had constructive notice as a consequence of the continuing and pervasive nature of the harassment. The record establishes that plaintiff first complained to Wright in January or February 1992 and that the harassment continued unabated until mid-April 1992, when plaintiff reported the harassment to Gibbs, who immediately contacted Turner. At the meeting between plaintiff and Turner, she set out twelve separate allegations, some of which had been committed repeatedly by Brownell. Turner recorded these allegations in his log. Many of these allegations were corroborated by other employees at the restaurant. Whether the alleged harassment was "so pervasive and so long continuing" that defendant Trecorp must be held to have had constructive knowledge of it is a question of fact to be determined by the trier of fact. *Taylor v Jones, supra*. Accordingly, because genuine issues of fact exist regarding plaintiff's claim of hostile work environment, we reverse the trial court's order granting summary disposition to defendant Trecorp.

Plaintiff also contends on appeal that she was the victim of quid pro quo sexual harassment by Brownell. Given that plaintiff's complaint did not plead a claim of quid pro quo sexual harassment, and plaintiff has never moved for leave to amend her complaint to add such a claim, we decline to review this issue further. See, e.g., *Barbour v Dep't of Social Services,* 198 Mich App 183, 186 n 3; 497 NW2d 216 (1993).

Plaintiff next argues that the trial court erred in granting summary disposition for defendant on the basis that her assault count was barred by the exclusive remedy provision of the Worker's Disability Compensation Act. We disagree.

Whether the facts alleged in a plaintiff's complaint rise to the level of an intentional tort is a question of law for the court. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 154; 551 NW2d 132 (1996) (opinion of Boyle, J). However, whether the factual allegations are in fact true is an issue for the trier of fact. *Id*. The intentional tort exception under MCL 418.131(1); MSA 17.237(131) provides:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

The WDCA was designed to compensate for accidental, not intentional, injuries by employers. *Travis, supra* at 190, citing *Beauchamp v Dow Chemical Co*, 427 Mich 1; 398 NW2d 882 (1986). Where an intentional tort is committed by a coemployee, the coemployee may be held liable in tort for the injury, but generally not the employer, unless the employer specifically intended to cause injury. *Id.* at 154. Thus, an employer should not be able to hide behind the WDCA for intentional torts that it has commanded or expressly authorized. See 2A Larson, Law of Workmen's Compensation (1988), § 68.21. Here, plaintiff has failed to allege sufficient facts that the corporate defendant, as opposed to coemployee Brownell, harbored a specific intent to injure her. Accordingly, the trial court properly granted summary disposition in favor of defendant on plaintiff's assault count.

Plaintiff next argues that the trial court erred in finding that defendant Trecorp was not vicariously liable on her claim of intentional infliction of emotional distress for the actions of Carl Turner. Plaintiff's complaint alleged intentional infliction of emotional distress as a result of the actions of defendant Brownell, not Carl Turner. We refuse to allow plaintiff to expand her cause of action in this manner;[2] therefore, we affirm the trial court's order granting summary disposition in favor of defendant Trecorp on this unpled claim.

Lastly, plaintiff argues that the trial court erred in finding that defendant Trecorp was not vicariously liable for Brownell's assault and intentional infliction of emotional distress upon her. We disagree.

An employer is liable only for the acts of its employee committed within the scope of employment. *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993); *Burch v A & G Associates, Inc*, 122 Mich App 798, 804; 333 NW2d 140 (1983). Whether the employee was acting within the scope or apparent scope of employment is generally a question for the trier of fact; however, summary disposition is appropriate "where it is apparent that the employee is

acting to accomplish a purpose of his own." *Smith v Merrill Lynch Pierce Fenner & Smith*, 155 Mich App 230, 236; 399 NW2d 481 (1986). We find that Brownell's intentional torts were not within the scope of his employment with defendant Trecorp. The record indicates that Brownell knew that touching other employees was against defendant's company policy because he had been previously disciplined for pushing another employee. Brownell had read and signed defendant Trecorp's policy manuals, which prohibited managers from touching other employees and expressly prohibited sexual harassment. Therefore, we conclude as a matter of law that defendant Trecorp was not vicariously liable for Brownell's intentionally tortious conduct toward plaintiff. Summary disposition was properly granted.

The trial court's order granting summary disposition in favor of defendant on plaintiff's hostile work environment claim is reversed, and this matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Dismissal of plaintiff's remaining claims is affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff

[1] The substance of a conversation between Director of Operations Carl Turner and Wright is excerpted below from a log kept by Turner:

> I ask what he [Wright] knew & had S.C. [plaintiff] told him anything about G.B. [defendant Brownell] giving S.C. a hard time.
>
> He told me S.C. had told him G.B. was bothering her & had been harassing her.
>
> I ask him if she was specific & he said no. I ask him if he questioned her any further. He said no. I ask him why. He said he just figured she was mad about something.

[2] Plaintiff testified at deposition that after Brownell was transferred she believed Turner was retaliating against her for consulting with an attorney. Plaintiff specifically alleged that Turner had told her "that he could get a bigger and better lawyer than what I could get and he would beat me in court." While such testimony may be relevant at trial to issues of motive, credibility, and damages, we do not consider it further here because plaintiff has not properly pled a separate claim based on this conduct.