STATE OF MICHIGAN

COURT OF APPEALS

MARGARET FULLER,

Plaintiff-Appellant,

v

MCPHERSON HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
April 14, 1998

No. 186762
Livingston Circuit Court
LC No. 93-012911 CZ

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's entry of judgment in favor of defendant. Plaintiff argues that she established prima facie cases of hostile work environment sexual harassment and quid pro quo sexual harassment and that the trial court erred by granting defendant's motion for a directed verdict. We reverse and remand for a new trial.

We review the trial court's grant of a directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). Generally, directed verdicts are viewed with disfavor. *Berryman v Kmart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992). We must view the evidence, and all legitimate inferences drawn therefrom, in a light most favorable to plaintiff, and determine whether a prima facie case was established. *Id*. When the evidence could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury and must deny the motion. *Id*.

To establish a prima facie hostile work environment sexual harassment case, a plaintiff must show: (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 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). In this case, the focus is on element (5), respondeat superior.

An employer only has a duty to investigate and take prompt, remedial action regarding claims of harassment if it has actual or constructive notice of the offensive environment. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234-235; 477 NW2d 146 (1991). The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management, 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).

In the case at bar, plaintiff testified that offensive comments and conduct by her supervisor were regularly witnessed by the director of the laboratory, and occasionally witnessed by her supervisor's boss and the CEO of the hospital. Plaintiff also testified that the laboratory director frequently asked her if her supervisor's conduct had improved and that after she resigned, the laboratory director told plaintiff that he thought she had been sexually harassed. Plaintiff also stated that in addition to her supervisor, on occasion the laboratory director and the vice-president of human resources would make offensive remarks or touch her in an offensive manner.

While defendant's proofs may have contradicted or somewhat discredited plaintiff's claim, it is for the jury to compare and weigh the evidence and decide the credibility of the witnesses, *Clery v Sherwood*, 151 Mich App 55, 64; 390 NW2d 682 (1986), even if plaintiff's case may seem improbable, *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). In looking at the above testimony in a light most favorable to plaintiff, we conclude that a reasonable juror could find that although plaintiff did not formally complain about sexual harassment, higher management actually or constructively knew of plaintiff's supervisor's conduct and failed to take prompt, remedial action. In addition, we do not think that it would be unreasonable for a juror to conclude that the harassment was pervasive. This case was a credibility contest and, as a result, the trial court should not have taken plaintiff's claim from the jury.

Plaintiff also claims that she established a prima facie case of quid pro quo sexual harassment. Defendant claims that plaintiff never raised such a claim below, and may not do so on appeal. We agree with defendant. Plaintiff did specifically mention a hostile work environment sexual harassment claim in her complaint, but did not mention a quid pro quo claim or make any allegations which can be construed as such. Further, plaintiff did not clearly establish an intent to pursue such a claim before or during trial. Plaintiff may not raise an issue for the first time on appeal. See *Auto Club Ins Assoc v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh