

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH TREBILCOTT,

UNPUBLISHED

August 7, 1998

Plaintiff-Appellant,

v

No. 199088

Oakland Circuit Court

LC No. 95-497799-CL

DIGITAL EQUIPMENT CORPORATION
and MICHAEL STAHL,

Defendants-Appellees,

and

ARTHUR HALLBERG,

Defendant.

Before: Holbrook, Jr., P.J., and Young, Jr. and J. M. Batzer*, JJ.

PER CURIAM.

This is a hostile work environment sexual harassment case. Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff settled with defendant Hallberg following mediation. We affirm.

On appeal, plaintiff first argues that the trial court erred in granting summary disposition for defendants because there are genuine issues of material fact as to whether defendants took prompt and adequate action to remedy the sexual harassment. We disagree.

This Court reviews a trial court's grant or denial of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR. 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) challenges whether there is factual support for the claim. *Radtke*

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

v Everett, 442 Mich 368, 374; 501 NW2d 155 (1993). In deciding this motion, a court must consider all of the pleadings, affidavits, admissions and other documentary evidence presented below. *Radtke*, 442 Mich at 374; MCR 2.116(G)(5). All reasonable doubts are to be decided in favor of the non-moving party. *Radtke*, 442 Mich at 374. However, 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 factual support. *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.* If the opposing party cannot present documentary evidence to establish that a material factual dispute exists, summary disposition is proper. *Id.* A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992).

Michigan's Elliott-Larsen Civil Rights Act proscribes sexual harassment where the conduct in question interferes with one's ability to work, even absent actual physical, sexual contact. MCL 37.2103(h)(iii); MSA 3.548(103)(h)(iii). In order to establish a prima facie case of hostile work environment sexual harassment, plaintiff must prove by a preponderance of the evidence that:

(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*, 442 Mich at 382-383; see also MCL 37.2102(h), 37.2202(1)(a); MSA 3.548(103)(h), 3.548(202)(1)(a).]

At issue in this case is the fifth element, respondeat superior. Specifically, we must determine whether plaintiff has alleged sufficient facts to create a factual dispute as to whether defendants took prompt and adequate remedial action to dispel the sexual harassment.

An employer may avoid liability based on sexual harassment, "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Radtke*, 442 Mich 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*, 442 Mich at 396; *McCalla v Ellis*, 180 Mich App 372, 380; 446 NW2d 904 (1989).

First, plaintiff asserts that defendants did not act promptly in responding to her initial complaints that her co-worker, Arthur Hallberg, was sexually harassing her. Plaintiff contends that she complained to the Human Resource Department by memo and in person on two occasions before filing a formal complaint, and that no action was taken until the formal complaint was lodged. We disagree.

After carefully reviewing the record, we find that plaintiff's allegations are misleading and inaccurate regarding defendants' response to her complaint. The evidence clearly indicates that plaintiff

requested that her initial complaints be kept strictly confidential and that no investigation be pursued so that plaintiff could attempt to remedy the situation herself. In fact, although defendants honored her request and did not take any formal action at that time, they insisted that plaintiff return to the Human Resource Department if the harassment continued, or if she wanted additional advice or assistance in handling the matter. Plaintiff did not seek further intervention by defendants until she filed a formal complaint several months later. It is undisputed that, after she filed a complaint, defendants promptly investigated the allegations and disciplined Hallberg in an effort to resolve the problem. For these reasons, we find plaintiff's argument meritless.

Next, plaintiff argues that defendants did not act adequately to end the harassment and the hostile work environment. Plaintiff claims that, although defendants issued Hallberg a formal warning of termination and moved him to a different work unit in a separate building, they did not enforce their remedy and thus permitted the hostile and intimidating environment to persist. Therefore, plaintiff contends, the remedy was neither appropriate nor successful in resolving the problem. We again disagree.

Whether an employer acted promptly and adequately to correct instances of alleged sexual harassment in the work place must be evaluated on a case-by-case basis. *Rabidue v Osceola Refining Co.*, 805 F2d 611 (CA 6, 1986). "[T]he adequacy of an employer's remedy is a question of fact which a court may not dispose of at the summary judgment stage if reasonable minds could differ as to whether the remedial action was reasonably calculated to end the harassment." *Paroline v Unisys Corp.*, 879 F2d 100 (CA 4, 1989), superseded 900 F2d 27 (CA 4, 1990). However, even "where an employer's prompt remedial action is not effective . . . courts may still decide that the action was adequate as a matter of law" if reasonable minds could not differ. *Knabe v Boury Corp.*, 114 F3d 407, 411 n 8 (CA 3, 1997).

In the instant case, plaintiff produced affidavits and other documentary evidence that, although Hallberg stopped physically touching her after the warning, he continued to frequent her workplace, engaging in conduct designed to harass and intimidate her, proving the transfer to be futile. Further, plaintiff was allegedly required to work with Hallberg on several subsequent instances and endure significant discomfort and hostility despite defendants' apparent efforts to remedy the situation. Still, the test is not whether the employer's remedy was effective but rather whether it was reasonably calculated to end the harassment. *Knabe*, 114 F3d at 411 n 8. We are convinced that reasonable minds could not differ in finding that defendants' remedy of warning Hallberg and transferring him to a different work unit was reasonably designed to dispel the sexual harassment, and therefore liability is defeated as a matter of law.

Plaintiff also argues that the trial court erred in granting summary disposition in favor of defendants on the retaliation claim. Plaintiff claims that, after she filed her sexual harassment complaint, defendants made several employment decisions that adversely affected the terms and conditions of her employment, in an effort to punish her for filing the claim. We disagree.

Michigan's Elliott-Larsen Civil Rights Act expressly prohibits employers from retaliating against employees who seek protection under the act. MCL 37.2701; MSA 3.548(701). In order to establish a prima facie case of retaliation, plaintiff must prove that:

(1) plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Polk v Yellow Freight System, Inc*, 876 F2d 527, 531 (CA 6, 1989); see also *Booker v Brown and Williamson Tobacco Co, Inc*, 879 F2d 1304, 1310 (CA 6, 1989).]

The mere fact that an adverse employment decision occurs after a charge of discrimination is not, in itself, sufficient to support a finding of retaliation. *Booker*, 879 F2d at 1314. There must be specific evidence showing that the adverse employment decision was the direct result of engaging in the protected activity. *Id.*

Plaintiff identifies several instances where she was allegedly treated unfairly and denied employment benefits after she filed the sexual harassment complaint. Specifically, plaintiff argues that defendants delayed her promotion for several months, denied her a salary increase to which she was entitled, gave her a low rating in her performance review, and placed her on a list of employees to be laid off, all of which were designed to punish her. We cannot agree. In fact, plaintiff was promoted and received substantial salary increases after the complaint was lodged and thus cannot show that she suffered any adverse impact as a result of asserting her rights under the act. Accordingly, the trial court properly dismissed her retaliation claim.

Finally, plaintiff argues that the trial court erroneously dismissed her claim of intentional infliction of emotional distress because there were genuine issues of material fact as to whether Hallberg's behavior, combined with defendants' conduct in knowingly failing to remedy the harassment, was extreme and outrageous enough to support a cause of action. We once again disagree.

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985); *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 342; 497 NW2d 585 (1993). "Liability for intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Linebaugh*, 198 Mich App at 342. "[L]iability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Linebaugh*, 198 Mich App at 342. "Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995).

Further, this Court has previously held that an employer is vicariously liable in tort only where the conduct in question is within the scope of the actor's employment. *Linebaugh*, 198 Mich App at 342. Intentional torts are generally not considered to be within the scope of one's employment. *Id.* Thus, even if the individual defendant could be found to have intentionally inflicted emotional distress on plaintiff, the corporate defendants could not be held vicariously liable unless she could show that the individual acted within the scope of his employment. *Id.*

In the instant case, we are convinced that reasonable minds could not differ in concluding that, although undoubtedly reprehensible, Hallberg's alleged conduct was not extreme and outrageous enough to give rise to liability. As discussed earlier, defendants took prompt and adequate action to remedy the harassment. Additionally, Hallberg's alleged conduct could not reasonably be considered to have been within the scope of employment and thus cannot be used as a basis for holding defendants vicariously liable. Accordingly, the trial court properly granted summary disposition to defendants on this issue.

Affirmed.

/s/ Donald E. Holbrook, Jr
/s/ Robert P. Young, Jr.
/s/ James M. Batzer