STATE OF MICHIGAN

COURT OF APPEALS

SHEILA DEAN and DERRICK DEAN,

Plaintiffs-Appellees,

v

CITY WASTE SYSTEMS, INC., CITY MANAGEMENT CORPORATION, BOB BARRETT, LARRY RUSSETTE, BRIAN KOET, MIKE BOLAND, BILL WINN, and RUSS PAINTER,

Defendants-Appellants.

UNPUBLISHED
March 12, 1999

No. 204053
Wayne Circuit Court
LC No. 95-508285 CZ

Before: Young, Jr., P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Plaintiff Sheila Dean (Dean) claimed that she was unlawfully discharged on the basis of her gender and sexually harassed in violation of Michigan's Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. Plaintiff also claimed that she was improperly denied payment of commissions on various accounts that she serviced while employed by defendant City Waste Systems. Following a jury trial, Dean was awarded a general verdict for $260,000. Defendants appeal as of right. We affirm.

Defendants contend that the trial court erred in denying its motions for a directed verdict and judgment notwithstanding the verdict (JNOV), or in the alternative, a new trial. The standard of review for JNOV requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995); *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). Only if the evidence, so viewed, fails to establish a claim as a matter of law, should a motion for JNOV be granted. *Orzel*, *supra* at 558. Similarly, in deciding a motion for a directed verdict, the trial court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). This Court reviews a trial court's decision to grant or deny a directed verdict de novo. *Id*. A directed verdict is appropriate only when no factual questions exist upon which reasonable minds may differ. *Id*. Finally,

with respect to a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Severn*, *supra* at 412. This Court's function is to determine whether the trial court abused its discretion in making such a finding. *Id*. This Court gives substantial deference to the trial court's conclusion that a verdict was not against the great weight of the evidence. *Id*.

Defendants first argue that Dean failed to establish a prima facie case of gender discrimination in violation of the CRA. Specifically, defendants contend that Dean did not demonstrate that gender was a factor in City Waste Systems' decision to terminate Dean's employment. We disagree.

In order to establish a claim of gender discrimination in violation of the CRA, a plaintiff must show that (1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) she was discharged under circumstances giving rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Once the plaintiff has established a claim of gender discrimination, the burden then shifts to the defendant to prove a legitimate, nondiscriminatory reason for the adverse employment decision. *Id*. at 173. If the defendant is successful in establishing a nondiscriminatory reason for the discharge, the burden shifts back to the plaintiff to establish that the proffered nondiscriminatory reason for the adverse employment decision was merely a pretext for discrimination. *Id*. at 174. This three-part framework does not require that proof be presented in any specific order but, rather, is merely a means for analyzing the allocation of proof. *Id*. at 173 n 19.

Our review of the record reveals that Dean presented sufficient evidence to give rise to an inference of unlawful gender discrimination because Dean, a female, was terminated and replaced by a male. Because at this point in the analysis it is not necessary to scrutinize the reasons for Dean's discharge, i.e., whether City Waste Systems had a legitimate, nondiscriminatory reason for terminating Dean's employment, a permissible inference of unlawful gender discrimination arises from City Waste Systems' decision to replace Dean with a male. Although defendants contend that City Waste Systems first offered Dean's position to two females, who each, in turn, declined to accept the position, after which City Waste Systems finally offered the job to a male, we conclude that this evidence, although potentially weakening the inference of gender discrimination, did not render the inference illegitimate. It is for the jury, not the court, to compare and weigh the evidence. *Clery v Sherwood*, 151 Mich App 55, 64; 390 NW2d 682 (1986). Accordingly, Dean satisfied her burden of establishing a prima facie case of gender discrimination in violation of the CRA. See *Feick v Monroe Co*, 229 Mich App 335, 338; 582 NW2d 207 (1998), citing *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986) ["Absent direct evidence of discrimination, a plaintiff may establish a prima facie case of employment discrimination by showing (1) that the plaintiff was a member of a protected class, (2) that an adverse employment action was taken against the plaintiff, (3) that the plaintiff was qualified for the position, and (4) *that the plaintiff was replaced by one who was not a member of the protected class*." (emphasis supplied.)]

Defendants also argue that, assuming Dean did establish a prima facie case of gender discrimination, City Waste Systems satisfied its burden of showing a legitimate, nondiscriminatory

reason for the discharge and that Dean failed to establish that the proffered reason was merely a pretext for unlawful discrimination.

During trial, defendants presented evidence that City Waste Systems terminated Dean from her position because of her failure to comply with company rules, as well as her erratic and often disruptive behavior. We agree with defendants that this evidence was sufficient to satisfy defendants' burden of articulating a legitimate, nondiscriminatory reason for City Waste Systems' decision to discharge Dean from her position with the company. Thus, the burden shifted back to Dean to establish that the proffered nondiscriminatory reason for the adverse employment decision was merely a pretext for discrimination. *Lytle*, *supra* at 174. To this end, Dean submitted evidence to show that she did not behave erratically or disruptively and that she was a professional and successful salesperson. Several witnesses testified on Dean's behalf that she conducted herself in a professional and businesslike manner while employed with City Waste Systems. Further, Dean, herself, testified that she was meticulous in how she handled paperwork and specifically refuted City Waste Systems' proffered reasons for terminating her from her position. Dean also offered evidence that she received positive written performance appraisals from her immediate supervisor during the two years preceding her termination from her position.

The question presented, then, is whether Dean, with this evidence, was able to rebut defendants' evidence that showed that City Waste Systems terminated Dean for a legitimate, nondiscriminatory reason; that is, whether Dean established that the proffered reason for her discharge was merely a pretext for discrimination. In engaging in this analysis, our Supreme Court has held that "evidence sufficient to discredit a defendant's proffered nondiscriminatory reasons for its actions, taken together with the plaintiff's prima facie case, [may be] sufficient to support [but not compel] a finding of discrimination." *Combs v Plantation Patterns*, 106 F2d F3d 1519, 1535 (CA 11, 1997). In viewing the evidence in the light most favorable to Dean, we conclude that Dean presented sufficient evidence to withstand defendants' motions for a directed verdict, a JNOV, and a new trial.

Defendants next argue that Dean failed to establish a claim of sexual harassment based on hostile work environment. We disagree. In order to prove a prima facie case of discrimination based on hostile work environment, an employee must establish the following elements: (1) that she belonged to a protected group; (2) that she was subject to conduct or communication on the basis of her protected status; (3) that the conduct or communication was unwelcome; (4) that the unwelcome conduct was intended to or did in fact interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996); MCL 37.2103(i); MSA 3.548(103)(i); MCL 37.2202(1)(a); MSA 3.548 (202)(1)(a).

In this case, defendants specifically argue that the conduct that Dean contends constituted unlawful sexual harassment was not, in fact, based upon Dean's gender. This contention goes to the second element of the prima facie case of sexual harassment. However, in order to prove the second element, Dean was only required to show that "'but for the fact of her sex, she would not have been the object of harassment.'" *Radke v Everett*, 442 Mich 368, 383; 501 NW2d 155 (1993), quoting *Henson v Dundee*, 682 F2d 897, 904 (CA 11, 1982).

Dean presented evidence that Don Collova, City Management Corporation's then director of sales, asked her "to perform sexual duties" to keep her job. Dean also stated that Collova rubbed her from behind, whispered "stuff" in her ear, and referred to her "rear end." Dean further testified that Bob Barrett, City Waste Systems' general manager, told her that women were only good for "spending their husband's money and spreading their legs." Moreover, Dean described an incident when her car had broken down while on business, forcing her to walk along Eight Mile Road for assistance. According to Dean, Barrett derided her for months following this incident with inappropriate questions such as whether Dean was "soliciting other things besides business accounts while [she] was on Eight Mile Road." Dean also stated that Barrett called her "a dike" because she had short hair.

In addition, Dean presented testimony that, on several occasions, Bill Winn, an accounting manager at City Waste Systems, asked Dean and another female employee to have sex with him. Dean also claimed that Winn, on several occasions, rubbed his groin in front of her. Dean also testified that, on several occasions, Larry Russette, a sales manager at City Waste Systems, made comments to Dean such as, if she were "going to do a man's job that [she] needed to learn how to play with the big boys." According to Dean, Brian Koet, another salesperson, told her that if she wanted to get ahead, she would have to "give a little head." She also said that Koet would grab his groin and yell "schwang" whenever Dean or another female employee would walk by him. Dean also claimed that Koet left a vulgar business card on her desk.

We conclude that the testimony described above was sufficient to satisfy Dean's burden of showing that but for her gender, she would not have been the object of harassment.

Defendants also claim that Dean failed to show that she was subject to severe or pervasive sexual harassment. This contention goes to element four of the prima facie case for sexual harassment. In *Radke, supra* at 385, quoting *Lipsett v Univ of Puerto Rico*, 864 F2d 881, 897 (CA 1, 1988), our Supreme Court stated that "[t]he essence of a hostile work environment action is that 'one or more supervisors or co-workers create an atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment.'" Whether the conduct in question rises to a level constituting a hostile work environment is measured under a standard of objective reasonableness. *Radke, supra* at 386. We conclude that in viewing the evidence described above in the light most favorable to Dean, a reasonable person could conclude that Dean's work environment was "so infused with hostility toward members of one sex" that the conditions of her employment were altered. *Id*.

Defendants also argue that there can be no liability for sexual harassment because Dean failed to notify City Waste Systems of the sexual harassment. This contention goes to element five of Dean's prima facie case of sexual harassment. In order for an employer to be found liable for sexual harassment, the plaintiff must establish that "'the employer had actual or constructive knowledge of the existence of a sexually hostile work environment and took no prompt and adequate remedial action.'" *Radke, supra* at 395 n 41, quoting *Katz v Dole*, 709 F2d 251, 255 (CA 4, 1983). Our review of the record reveals that Dean did provide sufficient notice to City Waste Systems of her claims of sexual harassment. For example, the evidence revealed that

plaintiff complained to her supervisor, Boland, about derogatory and demeaning remarks concerning her gender. Plaintiff testified that she made several complaints to Barrett, as well as Russette and Boland, about Koet's inappropriate behavior. Also, Russette testified that plaintiff complained to him about how she was being treated. These complaints to various supervisors and managers of City Waste Systems were sufficient to put City Waste Systems on notice of a hostile work environment. Further, the evidence does not support defendants' contention that City Waste Systems took prompt and sufficient remedial action in response to Dean's complaints.

In sum, the trial court did not err in denying defendants' motions for a directed verdict, JNOV, and new trial with respect to Dean's claim of sexual harassment based on a hostile work environment.

Defendants also contend that Dean submitted insufficient evidence to support her claim that she was improperly denied commission payments. In response to defendants' claim for a directed verdict on the commissions claim, the trial court ruled that any "commission claims for anything for which there was no evidence presented as to specific accounts cannot be considered." Accordingly, we must decide whether Dean did, in fact, present evidence that City Waste Systems improperly withheld commission payments from Dean on specific accounts. Our review of the record reveals extensive evidence in Dean's case-in-chief that City Waste Systems improperly withheld commission payments to Dean. Accordingly, the trial court did not err in denying defendants' motions to remove the commissions claim from the jury's consideration.

Defendants next argue that the trial court erred in allowing Dean to admit evidence of incidents of sexual harassment involving other employees of City Waste Systems. However, a careful review of the record reveals that defendants failed to preserve this issue for review. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *Westphal v American Honda Motor Co, Inc*, 186 Mich App 68, 70; 463 NW2d 127 (1990). Objections to the admission of evidence may not be raised for the first time on appeal absent manifest injustice. *Phinney v Perlmutter*, 225 Mich App 513, 558; 564 NW2d 532 (1998). We conclude that manifest injustice will not result if we decline to review this issue.

Nonetheless, as a general rule, the testimony of other employees about their treatment by a defendant-employer is relevant to the issue of the employer's discriminatory intent. See, e.g., *Hunter v Allis-Chalmers Corp*, 797 F2d 1417, 1423-24 (CA 7, 1986) (Title VII), abrogated on other grounds by *Malhotra v Cotter & Co*, 885 F2d 1305 (CA 7, 1989); *Stumph v Thomas & Skinner, Inc*, 770 F2d 93, 97 (CA 7, 1985) (ADEA); *Phillips v Smalley Maintenance Services, Inc*, 711 F2d 1524, 1532 (CA 11, 1983) (Title VII); *Harpring v Continental Oil Co*, 628 F2d 406, 409 (1980) (ADEA), cert den 454 US 819; 102 S Ct 100; 70 L Ed 2d 90 (1981). Further, our review of a trial court's decision to admit evidence is limited to whether the trial court abused its discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). Thus, for the reasons stated in the above-cited cases, we conclude that the admission of the now-challenged evidence did not constitute error.

Defendants next argue that the trial court erred in precluding the admission of evidence that Dean continued her pattern of poor performance at her new job with Browning Ferris Industries following her termination from City Waste Systems. Defendants' only argument concerning this claim is that the excluded evidence was relevant to establish that defendant did not comply with company rules and procedures. However, except for citing MRE 402, defendants have failed to offer any authority to support their contention, nor have they accurately identified where in the record the evidence was offered and rejected by the trial court. Nonetheless, because we review evidentiary decisions pertaining to relevance for an abuse of discretion, *Dickerson v Raphael*, 222 Mich App 185, 201; 564 NW2d 85 (1997), and because an abuse of discretion will be found in a civil case only upon a showing that the decision is so violative of fact and logic that it evidences a defiance of judgment and the exercise of passion or bias, *Dacon v Transue*, 441 Mich. 315, 329; 490 NW2d 369 (1992), we cannot say that the trial court's decision to exclude the evidence constituted an abuse of discretion.

Defendants finally argue that the trial court erred in not dismissing the claims against the individual defendants Barrett and Russette. Defendants specifically contend that an individual may not be held personally liable under the CRA unless he qualifies as an "employer" in some way other than as an employer's agent, where MCL 37.2201(a); MSA 3.548(201)(a) defines employer as "a person who has 1 or more employees, and includes an agent of that person." Dean's claim against Russette was for unlawful termination in violation of the CRA, while Dean's claim against Barrett was premised upon Barrett's contribution to the creation of a hostile work environment. The remaining individual defendants were dismissed from the action.

With respect to Dean's claim of unlawful termination against Russette, defendants conceded below that the jury was permitted to hear the claim. Accordingly, the contention regarding Russette is unpreserved. However, defendants specifically objected to the trial court's decision to submit the sexual harassment claim against Barrett to the jury. Defendants argued below that there was no evidence that Barrett exercised significant control over Dean's firing, hiring, or conditions of employment so as to give rise to an agency relation sufficient for the imposition of liability under the CRA. On appeal, defendants again raise this argument; however, defendants primarily argue that personal liability is not authorized under the CRA irrespective of the existence of an agency relationship. However, because defendants did not raise this argument below, this contention is unpreserved, and we decline to address it for the first time on appeal. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

Further, we disagree with defendants' contention that Barrett did not exercise adequate control over Dean's firing, hiring, or conditions of employment so as to give rise to an agency relationship sufficient for the imposition of liability under the CRA. Dean's claim against Barrett was for creating a hostile work environment, not for unlawful termination. Therefore, the fact that Barrett played no role in City Waste System's decision to terminate Dean is of little import where Dean has not alleged that Barrett was responsible for her termination. Rather, Dean's claim against Barrett was based on his own contribution to the hostile work environment. Further, while Barrett was participating in the creation of a hostile work environment, he served as City Waste Systems' general manager. Accordingly, we conclude that at the time that Barrett

was personally participating in the sexual harassment of Dean, he had the ability to hire and fire her, control her working conditions, pay her wages, and maintain her discipline. Accordingly, the trial court did not err in submitting the hostile work environment claim against Barrett to the jury.

In light of our resolution of this case, we need not reach defendants' final issue on appeal.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ William B. Murphy
/s/ Joel P. Hoekstra