STATE OF MICHIGAN

COURT OF APPEALS

CINDY L. ZIRGIBEL,

Plaintiff-Appellee,

v

LOBDELL-EMERY CORPORATION, d/b/a LOBDELL-EMERY MANUFACTURING CORPORATION,

Defendant-Appellant.

UNPUBLISHED
March 30, 1999

No. 201392
Gratiot Circuit Court
LC No. 95-003662 CL

Before: MacKenzie, P.J., and Whitbeck and G.S. Allen, Jr.*, JJ.

PER CURIAM.

A jury found defendant liable to plaintiff for $50,000 in damages based on claims of sexual harassment in the form of a hostile work environment in violation of the Civil Rights Act. MCL 37.2103(i)(*iii*); MSA 3.548(103)(i)(*iii*). Defendant appeals as of right. We reverse in part and remand for further proceedings.

I. Basic Facts

Plaintiff was employed by defendant, an automotive parts manufacturer. Plaintiff's claims in this case involve distinct acts by two separate employees of defendant. One of these claims alleged offensive conduct by Roger Hitsman, who functioned at the pertinent time as plaintiff's regular and immediate supervisor. The issues before us do not require us to elaborate further on the nature of this claim.

The other claim involved alleged conduct by Robert Gullage. According to plaintiff's trial testimony, in May 1995, she rode with three other employees, including Gullage, to a Ford plant in Dearborn in connection with a special work assignment. While Gullage was recognized as the supervisor in charge during the trip, he was not otherwise Gullage's supervisor. At the Ford plant, Gullage requested plaintiff to go to the back of the plant alone with him. At that location, he put a rag

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

down her shirt once and attempted to do so three more times, although she told him each time not to do this. Later that evening, at the Holiday Inn where the four employees were staying, Gullage made sexually oriented or suggestive remarks to plaintiff and telephoned her in her room at 1:00 a.m. to ask if she wanted to do something. Plaintiff reported the incident to defendant's personnel director who indicated that the allegations could not be substantiated and told plaintiff that "[t]he manager in question will never use his authority for any sexual favors or job promotions again. The bottom line is, Cindy, the guy was just testing the water."

II. Directed Verdict on the Claim Based on Gullage's Conduct

A. Standard of Review

In reviewing the trial court's ruling on a motion for a directed verdict, we examine the evidence and all legitimate inferences that may be drawn from it in the light most favorable to the nonmoving party. See, e.g. *Kubczak v Chemical Bank & Trust Co,* 456 Mich 653, 663; 575 NW2d 745 (1998).

B. Analysis

With regard to the claim involving Gullage, defendant argues that the trial court erred by denying its motion for a directed verdict. We agree.[1]

Plaintiff's testimony about Gullage's conduct toward her describes conduct that is unquestionably reprehensible and to which no person should be subjected. Apart from legal considerations, such conduct warrants stern condemnation. However, it is worth emphasizing that the defendant taken to court in this case was not the alleged perpetrator, but rather the company that employed both that perpetrator and plaintiff.

One necessary element to establishing a hostile work environment sexual harassment claim under the Civil Rights Act is that the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the aggrieved employee's employment or "created an intimidating, hostile, or offensive work environment." *Radtke v Everett,* 442 Mich 368, 382; 501 NW2d 155 (1993). In this regard, the Michigan Supreme Court stated in *Radtke* that only rarely would single incidents support a hostile work environment claim:

> [T]he Michigan Civil Rights Act imposes liability *whenever* sexual harassment creates a hostile work environment. Although rare, single incidents *may* create a hostile environment—rape and violent sexual assault are two possible scenarios. One such extremely traumatic experience may, therefore, fulfill the statutory requirement.
>
> Because a single incident, unless extreme, will not create an offensive, hostile, or intimidating work environment, [*Chamberlin v 101 Realty, Inc,* 915 F2d, 777, 783 (CA 1, 1990)]; [*Highlander v K F C Nat'l Management Co,* 805 F2d 644, 649-650 (CA 6, 1986)], a plaintiff usually must prove that (1) the employer failed to rectify a

> problem after adequate notice, and (2) a continuous or periodic problem existed or a repetition of an episode was likely to occur. [Emphasis in the original.]

The claim at issue, which involves the conduct of an employee who was not plaintiff's ordinary supervisor at the time during a trip away from the general work site, must reasonably be considered as a claim of hostile work environment based on a single incident.

In our view, by using rape and violent sexual assault as examples of circumstances when a single incident could suffice to create a triable question of fact regarding a hostile work environment claim, the Michigan Supreme Court has indicated that such a claim should be limited to highly extreme circumstances. The apparent conduct relative to the claim at issue, while despicable, is not at the level of rape or violent sexual assault, as our dissenting colleague forthrightly agrees. Again, it is undisputed that Gullage was *not* plaintiff's ordinary supervisor and that the incident occurred away from the work site during a special assignment. The alleged conduct at issue here is also far less egregious, both in terms of content and length, than the conduct in *Chambers v Trettco, Inc*, 232 Mich App 560, 562-564; ___ NW2d ___, slip op, pp 1-2 (No. 202151, issued 11/20/98), in which this Court found sufficient evidence to support a jury's verdict in favor of the plaintiff on a claim of hostile work environment sexual harassment. In *Chambers*, there was evidence that the plaintiff's temporary supervisor for a one-week period actually grabbed and rubbed intimate parts of the plaintiff's body, made various sexually suggestive remarks and rubbed whipping cream on the plaintiff's hands and said, "Now tell everybody you were creamed by Paul [the temporary supervisor's first name]." *Id.* at 563. The *Chambers* panel held that this evidence was "clearly sufficient to establish a hostile work environment claim of sexual harassment because it was severe or pervasive." *Id.* at 564. In contrast, the alleged conduct by Gullage, was not comparable to the highly extreme nature of the conduct at issue in *Chambers*. Gullage did not engage in direct contact with intimate parts of plaintiff's body as did the temporary supervisor in *Chambers*. Further, the events in question here occurred during a brief special assignment, not over the course of an entire week. Accordingly, there was no evidence to reasonably support a conclusion that this single incident evinced a continuous or periodic pattern of harassment or that a repetition of this episode was likely to occur, *Radtke, supra* at 395, or that the conduct amounted to the creation of a hostile work environment. Similarly, this incident could not reasonably be considered to have substantially interfered with plaintiff's employment. *Id.* at 382. Viewing the evidence in a light most favorable to plaintiff, *Kubczak, supra*, we conclude that the trial court erred by denying defendant's motion for a directed verdict on the hostile work environment sexual harassment claim based on Gullage's conduct.[2]

III. Alleged Instructional Error

While defendant's brief on appeal could be much clearer on this point, under a fair reading of defendant's argument that the trial court committed instructional error, defendant is only alleging error requiring reversal with regard to the claim involving Gullage. In light of our above conclusion that the trial court should have directed a verdict in defendant's favor on that claim, we need not address this issue.

IV. Conclusion

Defendant has raised no issue in this appeal implicating the finding of *liability* to plaintiff due to Hitsman's conduct. Accordingly, we reverse the judgment at issue in part and remand for the trial court to enter a judgment of no cause of action with regard to plaintiff's claim based on Gullage's conduct without disturbing the finding of liability based on the claim related to Hitsman's conduct. However, because the jury imposed an aggregate award of damages for both claims, there is no reasonable method of determining how much of the damage award was attributable only to the claim involving Hitsman. Thus, we vacate the damages award in the judgment at issue and direct the trial court to conduct a new trial limited solely to the issue of the amount of damages to which plaintiff is entitled on the claim based on Hitsman's conduct. *Cf. Woodruff v USS Great Lakes Fleet, Inc*, 210 Mich App 255, 259; 533 NW2d 356 (1995) (remanding for new trial on damages where no basis established for new trial on liability).

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Glenn S. Allen, Jr.

[1] Defendant also argues that the trial court erred by failing to grant summary disposition in its favor on this claim. However, in light of our analysis of the directed verdict issue, it is unnecessary to reach that question.

[2] In *Champion v Nation Wide Security, Inc*, 450 Mich 702, 705; 545 NW2d 596 (1996), the female plaintiff's male supervisor directed sexually suggestive remarks and conduct toward her and eventually raped her when they were the only two people at the work location. The Court held that an employer was strictly liable for quid pro quo sexual harassment where a supervisor accomplishes the rape of a subordinate employee by use of supervisory power. *Id.* at 712-714. While this case does not involve a quid pro quo sexual harassment claim, we note that this case obviously involves conduct far less egregious than that in *Champion*.