

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UNPUBLISHED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.

MacKENZIE, P.J. (*dissenting*).

I respectfully dissent. I would affirm the trial court's denial of defendants' motion for directed verdict with regard to plaintiff's claim of sexual harassment by Robert Gullage.

When evaluating a motion for directed verdict, a court must consider the evidence in a 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). Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ. *Id.*

In *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993), our Supreme Court set forth the five necessary elements to establish a prima facie case of a hostile work environment: (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. A single incident of sexual harassment may establish a hostile work environment, provided the incident is sufficiently extreme. *Id.*, pp 394-396.

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

The majority concludes that, as a matter of law, Gullage's conduct was not sufficiently severe to create a hostile work environment. I disagree with that conclusion. There is no question that the conduct in this case did not rise to the level of rape or violent sexual assault, two scenarios used by the *Radtke* Court to illustrate severe single incidents of misconduct. 442 Mich 395. Nevertheless, viewing the evidence in a light most favorable to plaintiff, I am of the opinion that reasonable minds could differ as to whether Gullage's conduct toward plaintiff was sufficiently severe to create a hostile work environment. Within a matter of a few hours, Gullage repeatedly arranged to be alone with plaintiff, insisted that he drive her to the hotel although she wanted to go with her coworkers, insisted that plaintiff ride in the hotel elevator with him although she wanted to take the stairs, persistently touched her and her clothing after being asked not to, suggested that she go swimming in her underwear, attempted to open her jacket, and suggested that they spend the night together. Even outside plaintiff's presence, he continued to pursue her, telephoning her in the early morning hours. Plaintiff was not in a position to escape Gullage's behavior since he was her supervisor for this work assignment, they were staying at the same hotel, plaintiff had no transportation, and she was not familiar with the Dearborn area.

Giving the benefit of reasonable doubt to plaintiff, as it was obligated to do, the trial court denied defendant's motion for directed verdict. In my opinion, this was correct. As characterized by the majority, Gullage's conduct was "unquestionably reprehensible" and "despicable." Whether that predatory conduct was severe enough to create an intimidating, hostile, or offensive work environment was for the jury – not the trial judge or this Court – to decide.

The majority emphasizes that the defendant in this case is plaintiff's employer and not Gullage. That, in my estimation, goes to the question whether defendant has an affirmative defense rather than the question whether plaintiff's case should have gone to the jury in the first instance. In *Radtke, supra*, pp 396-397, the Court observed that an employer may avoid liability for an employee's conduct if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment. More recently, in *Faragher v City of Boca Raton*, 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998) and *Burlington Industries, Inc v Ellerth*, 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998), the United States Supreme Court examined claims of sexual harassment by supervisors in violation of title VII of the Civil Rights Act of 1964. See 42 USC § 2000e-2(a)(1). There, the Court held that where an employee is subjected to an actionable hostile work environment created by a supervisor, the employer is vicariously liable for the hostile environment unless the employer can prove as an affirmative defense that (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm. *Faragher, supra*, 118 S Ct 2275, 2292-2293; *Burlington, supra*, 118 S Ct 2257, 2270.

In my view, rather than granting a directed verdict, the proper approach was to let the jury decide whether Gullage's conduct amounted to creating a hostile work environment, and if so, whether defendant's response was adequate under *Radtke, Faragher* and *Burlington, supra*, to avoid liability. The jury made that decision and this Court should not interfere with its verdict. Accordingly, I would affirm.

/s/ Barbara B. MacKenzie