STATE OF MICHIGAN

COURT OF APPEALS

YVONNE ALTAHER,

Plaintiff-Appellee,

v

AMERICAN TRANS AIR, INC., an Indiana Corporation,

Defendant-Appellant,

and

MICHAEL BRANHAM and GARY SCHMANN, Individually and as Agents and Employees of Defendant American Trans Air, Inc.,

Defendants.

UNPUBLISHED
June 1, 2001

No. 215937
Wayne Circuit Court
LC No. 96-640206-NO

Before: Griffin, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant American Trans Air (ATA) appeals as of right a jury verdict in the amount of $190,000 rendered in favor of plaintiff Yvonne Altaher in this cause of action alleging hostile work environment sexual harassment under the Michigan Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* We reverse.

I

Plaintiff instituted this action in September 1996 against defendant ATA and defendants Branham and Schmann, two flight attendants employed by ATA. In her complaint, plaintiff contended that she was subjected to sexual harassment while employed as a flight attendant for ATA. Plaintiff's complaint included claims of hostile work environment sexual harassment under the Civil Rights Act,[1] negligent supervision,[2] and intentional infliction of emotional

[1] The Michigan Civil Rights Act prohibits employers from discriminating against an individual with respect to employment on the basis of sex or marital status. MCL 37.2202; MSA (continued…)

distress. Plaintiff's claims are based on her alleged exposure to conduct that she found to be offensive and various incidents where remarks allegedly were made about her body odor. Plaintiff averred that the individual defendants and other coworkers undressed in front of her, "mooned" her, made derogatory comments about her body and sexual organs, and made sexually offensive gestures to and about her.

Plaintiff worked for ATA for slightly over one year, from early May 1995 to late May 1996. On June 1, 1996, plaintiff commenced a medical leave, receiving disability benefits until early September 1997. At that time, plaintiff commenced employment with another airline as a flight attendant and resigned her employment with ATA. Plaintiff filed the present suit against defendants in September 1996. The case proceeded to trial by jury and concluded in a verdict assessing damages against ATA in the amount of $190,000 based on a theory of respondeat superior, and against each individual defendant in the amount of $5,000.[3] Defendant ATA now appeals the order of judgment.

II

Defendant ATA argues that the trial court erred in denying its motion for a directed verdict with respect to plaintiff's hostile environment sexual harassment claim. Defendant maintains that pursuant to *Chamber v Trettco, Inc*, 463 Mich 297; 614 NW2d 910 (2000), and *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993), when a claim of hostile work environment sexual harassment is alleged under Michigan's Civil Rights Act, the violation can only be attributed to the employer on a theory of respondeat superior if the employer failed to take prompt and appropriate remedial action after having been put on notice of the harassment. Defendant ATA contends that it maintained a written policy against sexual harassment which included a complaint procedure which plaintiff never pursued, and plaintiff did not provide ATA with adequate notice that sexual harassment was occurring; therefore, defendant's motion for a directed verdict should have been granted. We agree.

(…continued)

3.5548(202). Discrimination because of sex includes sexual harassment, MCL 37.2103(i)(*iii*); MSA 3.548(103)(i)(*iii*), which is specifically defined in pertinent part to include

> . . . unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
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> * * *
>
> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, . . . or creating an intimidating, hostile, or offensive employment. . . environment.

[2] Plaintiff's claim of negligent supervision was dismissed before trial.

[3] Defendants Branham and Schmann have not pursued an appeal.

When evaluating a motion for a directed verdict, a 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). Directed verdicts are appropriate only when no factual question exists on which reasonable minds may differ. *Id*.

In *Radtke, supra* at 382-383, our Supreme Court held that to establish a prima facie claim of hostile environment harassment under our Civil Rights Act, an employee must prove the following elements: (1) the employee belonged to an affected 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 communication or conduct was intended to or in fact substantially interfered with the employee's employment or created an intimidating, hostile, or otherwise offensive work environment; and (5) respondeat superior. With regard to the latter element, the *Radtke* Court explained the underlying basis for requiring proof of vicarious liability:

> "Strict liability is illogical in a pure hostile environment setting. In a hostile environment case, no *quid pro quo* exists. The supervisor does not act as the company; the supervisor acts outside 'the scope of actual or apparent authority to hire, fire, discipline, or promote.' Corporate liability, therefore, exists only through respondeat superior; liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor. [*Steele v Offshore Shipbuilding, Inc*, 876 F2d 1311, 1316 (CA 11, 1989).]" [*Id*. at 396, n 46.]

Consequently, the *Radtke* Court held that

> Under the Michigan Civil Rights Act, an employer may avoid liability "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991) (applying the standard to a Civil Rights Act claim) . . . . Such prompt and appropriate remedial action will permit an employer to avoid liability if the plaintiff accuses either a coworker, . . . or a supervisor of sexual harassment . . . . *An employer, of course, must have notice of alleged harassment before being held liable for not implementing action.* . . . However, if an employer is accused of sexual harassment, then the respondeat superior inquiry is unnecessary because holding an employer liable for personal actions is not unfair. [*Id*. at 396-397, citations and footnotes omitted (emphasis added).]

Recently, in *Chambers, supra*, the Michigan Supreme Court reaffirmed the principles of *Radtke* and reiterated a plaintiff's burden of satisfying the notice requirement where hostile work environment sexual harassment is alleged under the state civil rights act. In so doing, the *Chambers* Court expressly declined to apply a divergent standard of proof articulated in two United States Supreme Court decisions decided after *Radtke* with regard to similar claims brought pursuant to Title VII of the federal Civil Rights Act, 42 USC 2000e-2(a)(1). The *Chambers* Court acknowledged that 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 held that once a plaintiff has established that a supervisor created a hostile working environment, the burden then shifts to the employer to disprove vicarious liability for the supervisor's actions.[4] As the *Chambers* Court noted, however, the *Faragher/Ellerth* affirmative defense would "represent a significant change in our approach to determining employers' vicarious liability for sexual harassment" because it would "shift the burden of proof from the employee to the employer regarding whether the employer should be held vicariously liable" for an actionable hostile environment created by a supervisor. *Id*. at 314. Pointing out significant differences in the language of the state and federal civil rights statutes, the *Chambers* Court therefore chose under the circumstances[5] not to rely on federal case law in interpreting the state statute, because to adopt the principles of *Faragher* and *Ellerth*

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[4] The United States Supreme Court held:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, *a defending employer may raise an affirmative defense to liability or damages*, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer reasonably exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise . . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. [*Faragher, supra* at 807-808; *Ellerth, supra* at 765 (emphasis added).]

[5] The *Chambers* Court explained, *supra* at 313-314:

> We are many times guided in our interpretation of the Michigan Civil Rights Act by federal court interpretations of its counterpart federal statute. See, e.g., *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 525; 398 NW2d 368 (1986). However, we have generally been careful to make it clear that we are not compelled to follow those federal interpretations. See, e.g., *Radtke, supra* at 381-382. Instead, our primary obligation when interpreting Michigan law is always "to ascertain and give effect to the intent of the Legislature, . . . 'as gathered from the act itself.'" *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000). Although there will often be good reasons to look for guidance in federal interpretations of similar laws, particularly where the Legislature has acted to conform Michigan law with the decisions of the federal judiciary, . . . we cannot defer to federal interpretations if doing so would nullify a portion of the Legislature's enactment.

would be inconsistent with our decision in *Radtke*, in which we applied agency principles to hold that it is the plaintiff's burden to prove that the employer failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile environment, even where the harassing conduct is committed by a supervisor.

We find no statutory basis for singling out sexual harassment cases, as opposed to other classes of prohibited discrimination, for the application of a new rule of vicarious liability. For example, in cases brought under the Civil Rights Act alleging disparate treatment on the basis of membership in a protected class, the overall burden of proving the elements of a discrimination claim always remains with the plaintiff (although a framework exists for temporarily placing a burden of production on the defendant). See *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177-178 (Weaver, J., joined by Boyle and Taylor, JJ.), 185 (Brickley, J., concurring); 579 NW2d 906 (1998); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695-696 (Brickley, J., joined by Boyle and Weaver, JJ.), 707 (Riley, J., concurring in relevant part); 568 NW2d 64 (1997). Absent some articulable basis in our statutory law for treating sexual harassment claims differently than other forms of discrimination, we see no justification for imposing upon defendants the burden of affirmatively disproving vicarious liability, or conditioning the success of that defense on factors not necessarily rooted in traditional agency principles. Instead, we adhere to the established principles of Michigan law regarding sexual harassment and agency principles . . . . [*Id.* at 315-316.]

Applying these principles of Michigan law to the facts before it, the *Chambers* Court remanded the plaintiff's hostile work environment claim to the Court of Appeals, stating:

Plaintiff's testimony clearly established the existence of a hostile work environment. The central question to be addressed on remand is whether plaintiff presented sufficient evidence to demonstrate that defendant "failed to rectify a problem after adequate notice." *Radtke, supra* at 395. That is, whether defendant failed to take prompt and appropriate remedial action after receiving adequate notice that Wolshon was sexually harassing plaintiff. As an additional word of clarification, we observed in *Radtke* that a reasonableness inquiry, accomplished by objectively examining the totality of the circumstances, is necessary to fulfill the purposes of the Michigan Civil Rights Act. *Id*. at 386-387. This also holds true for an inquiry into the adequacy of the notice. *Therefore, notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.* [*Id*. at 318-319 (emphasis added).][6]

[6] On remand, this Court concluded that the facts as alleged by the plaintiff did not render the defendant vicariously liable for the conduct of its temporary supervisor. *Chambers v Trettco, Inc (On Remand)*, 244 Mich App 614, 618-619; 624 NW2d 543 (2001)(opinion by O'Connell, J.).

The *Chambers* Court emphasized:

> The bottom line is that, in cases involving a hostile work environment claim, a plaintiff must show some *fault* on the part of the employer. That is the essence of *Radtke's* requirement that a plaintiff prove that the employer failed to take prompt and adequate remedial action upon notice of the creation of a hostile work environment. [*Id*. at 312 (emphasis in original).]

In the instant case, therefore, the pertinent issue to be decided is whether under the totality of the circumstances, viewed from an objective standpoint, a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring. If so, then adequate notice was given by plaintiff of alleged harassment, satisfying the *Chambers* test. Reviewing the proofs, we conclude that defendant ATA did not have adequate notice of the alleged harassment and, therefore, a directed verdict should have been granted in defendant's favor.

The evidence of record indicates that defendant maintained a policy prohibiting sexual harassment, that the policy provided employees who felt victimized with a procedure to bring complaints to management, and that plaintiff received training regarding this policy and had a copy of it in her employee handbook, but she nonetheless did not avail herself of the provided procedures.[7] To the extent that plaintiff did complain, her own deposition testimony shows that she talked with three persons. First, she mentioned the alleged "mooning" incident to a fellow flight attendant, but did not identify the participants and indicated that she was not willing to complain to management. Plaintiff subsequently called and complained to a secretary for defendant ATA in Indianapolis but identified neither herself nor the individuals who engaged in the offensive conduct. The secretary recommended that the caller should lodge a complaint with her base manager, but the caller stated that she did not want to cause trouble for the involved

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[7] This significance of this fact has been explained by the *Chambers* Court, *supra* at 325, as follows:

> [T]he dissent, reasoning that whether plaintiff actually knew of the policy was a significant issue to be resolved by the jury, makes much of the fact that plaintiff testified that she did not actually know of defendant's policy against sexual harassment. As much as anything else, this demonstrates that the dissent misses the point. Whether defendant can be held responsible for acts perpetrated by Wolshon [supervisor] turns on: (1) the nature of defendant's relationship with Wolshon; and (2) any failings on the part of defendant that contributed to Wolshon's success in harassing plaintiff. Hence, it would be relevant to demonstrate that plaintiff was unaware of defendant's policy because of an omission on the part of defendant. However, if defendant had done all that could reasonably be expected in order to make plaintiff aware of its policy, it matters little to the issue of vicarious liability if, for reasons not attributable to defendant, plaintiff was not actually aware of the policy. Hence, absent evidence attributing plaintiff's claimed lack of knowledge to a failing by defendant, the dissent's argument in this regard carries little weight. To the extent that the dissent's arguments are relevant, they pertain primarily to the sufficiency of the evidence issues to be considered on remand.

employees. When plaintiff ultimately did talk to a base supervisor in Detroit, she never mentioned the names of those engaged in the allegedly offensive conduct and did not describe the conduct with specificity, stating only that she had "come off a very stressful flight." Plaintiff admitted that she did not make any complaints to anyone else at ATA management because she "didn't want anybody to get in trouble." According to the testimony of defendant's human resources representative, the first time defendant received a tangible complaint was when plaintiff's attorney sent defendant a letter after plaintiff had left active employment and commenced her medical leave. According to the representative, the allegations of harassment were vague and subsequent correspondence between the parties yielded only a description of the conduct; no perpetrators of such conduct were identified and no specific flights or dates were identified during which such conduct occurred. Defendant initiated an internal investigation, consisting of interviews with other employees identified as "having knowledge" of the alleged misconduct. Each employee denied any improper conduct, and defendant ultimately concluded that plaintiff's claims were without foundation. During this process, plaintiff declined ATA's request to provide a written statement or be interviewed and only provided more specific information regarding the identity of the alleged perpetrators and nature and times of the alleged harassment after the present suit was filed.

Under the totality of the circumstances and pursuant to the test set forth in *Chambers, supra*, the evidence clearly demonstrates that defendant never received adequate notice of the alleged harassment to allow for appropriate remedial action. Plaintiff never made a formal complaint and never identified the employees who allegedly engaged in offensive conduct until after she left active employment and initiated the present suit. Thus, we conclude that plaintiff failed in her burden of proving by a preponderance of the evidence the essential element of respondeat superior necessary to sustain a prima facie case of hostile working environment sexual harassment. *Radtke, supra* at 382-383, 396-397. "Imputing notice of sexual harassment to an employer on the basis of such nebulous implications would have the effect of making an employer an insurer of an employee's personal anguish of which the employer had little or no understanding." *Chambers v Trettco, Inc (On Remand)*, 244 Mich 614, 619; 624 NW2d 543 (2001) (opinion by O'Connell, J.), quoting *Chambers v Trettco, Inc*, 232 Mich App 560, 574; 591 NW2d 413 (1998) (O'Connell, J., dissenting). See also *Schemansky v California Pizza Kitchen, Inc*, 122 F Supp 2d 761, 773 (ED Mich, 2000). Therefore, the trial court erred in denying defendant's motion for a directed verdict on plaintiff's hostile work environment sexual harassment claim, *Meagher, supra*, and the matter is remanded to the trial court with instructions to enter a judgment in favor of defendant ATA. In light of this disposition, the other issues raised by defendant on appeal need not be addressed.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Kathleen Jansen
/s/ Hilda R. Gage