STATE OF MICHIGAN

COURT OF APPEALS

CAROL CARLISLE-BRADFORD, Plaintiff-Appellant,	UNPUBLISHED February 24, 2004
v	No. 244250 Jackson Circuit Court
DEPARTMENT OF CORRECTIONS, Defendant-Appellee.	LC No. 98-090597-CL

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant on plaintiff's sexual harassment claim under the Civil Rights Act (CRA), MCL 37.2101 *et seq*. We affirm.

Plaintiff filed a complaint on October 9, 1998, alleging that she had been subjected to hostile work environment sexual harassment. Following a hearing, the trial court granted defendant's motion for summary disposition. In pertinent part, the trial court found that plaintiff had failed to establish a hostile work environment due to the sporadic nature of her contact with her fellow employees. The court also noted that employers are only liable when they "knew or should have known of the problem and fail[ed] to take prompt, appropriate remedial action." The trial court then found that defendant did not have notice of the alleged offense until plaintiff filed a formal complaint on October 17, 1995, and that defendant responded to the complaint in a prompt and adequate manner.

Plaintiff appealed, and this Court reversed the order granting summary disposition in favor of defendant and remanded the matter to the trial court "for further proceedings consistent with this opinion."[1] In its opinion, this Court noted that a prima facie claim of hostile work environment harassment requires a plaintiff to prove five elements by a preponderance of the evidence:

[1] *Carlisle-Bradford v Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued 9/28/01 (Docket No. 223041).

(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 did in fact substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and

(5) respondeat superior. [*Id.,* quoting *Radtke v Everett,* 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

This Court then stated:

> At issue in the present case is whether the conduct "created an intimidating, hostile, or offense work environment" as contemplated by § 103 of the CRA.

It is clear from the above statement that only the fourth element of a prima facie case of hostile work environment, i.e., whether the conduct created an intimidating, hostile, or offensive work environment, was at issue in the prior appeal.

Following remand to the trial court, defendant filed a second motion for summary disposition, asserting that this Court's decision only concerned whether plaintiff had established the fourth element of a prima facie case of hostile work environment sexual harassment. Defendant claimed that the doctrine of law of the case did not prevent the trial court from granting summary disposition on the ground that plaintiff failed to establish the fifth element of a prima facie claim of hostile work environment, i.e., respondeat superior. The trial court agreed and again granted summary disposition in favor of defendant, finding that plaintiff failed to establish that defendant had notice of the offensive conduct prior to plaintiff's filing of a formal complaint on October 17 and that defendant took prompt and remedial action once it was made aware of the formal complaint.

Plaintiff now argues that the trial court erred in determining that the law of the case did not bind it. Whether the doctrine of law of the case applies is a question of law subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Under the doctrine of law of the case, a ruling by an appellate court on a legal question binds the appellate court and all lower tribunals and the question may not be differently determined in the same case where the facts remain materially the same. *Grievance Adm'r v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000). This doctrine applies only to those questions determined by an appellate court's prior decision and to those questions that are necessary to the court's determination. *Poirier v Gd Blanc Twp (After Remand),* 192 Mich App 539, 546; 481 NW2d 762 (1992). This Court did not address the element of respondeat superior in its prior opinion because this element was not challenged in the prior appeal. Thus, the trial court properly determined that the doctrine of law of the case doctrine did not apply.

Plaintiff also argues that the trial court erred by finding that plaintiff "had not and will not" establish respondeat superior liability on the part of defendant. We disagree.

To establish the element of respondeat superior, a plaintiff must present evidence showing that the employer had notice of the hostile work environment and failed to take prompt and remedial action. *Chambers v Trettco*, 463 Mich 297, 319; 614 NW2d 910 (2000). Respondent superior liability ordinarily requires a showing that either a recurring problem existed or a repetition of an offending incident was likely and that the employer failed to rectify the problem on adequate notice.

In a written opinion, the trial court analyzed the facts and concluded that there was no genuine issue of fact that plaintiff never gave proper and adequate notice to the Department of Corrections and, therefore, that plaintiff failed to establish the element of respondeat superior. After de novo review of the record, we agree, for the reasons set forth in the trial court's detailed and well-written opinion.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot