

STATE OF MICHIGAN
COURT OF APPEALS

JUSTINE MALDONADO,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY and DANIEL P.
BENNETT,

Defendants-Appellees.

UNPUBLISHED

April 22, 2004

No. 243763

Wayne Circuit Court

LC No. 00-018619-NO

Before: Borrello, P.J., and White and Smolenski, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree that a circuit court has authority to impose sanctions for misconduct of a party or an attorney. Under the circumstances that no order was violated, no hearing was held regarding the motivations of plaintiff or plaintiff's counsel,¹ and no hearing was held to determine whether the jury pool was in fact tainted, I agree that the circuit court abused its discretion in dismissing the case.²

Because the public statements at issue occurred nearly two years ago, and the requisite record was not made when the case was dismissed, I would not direct that a hearing now be held on remand.

Regarding Bennett's conviction, I agree that it was not an abuse of discretion to exclude it on the basis that it was more prejudicial than probative, MRE 403. However, I do not come to

¹ While the court did not make an express finding to this effect, it appears that the court found that the statements were intended to taint the jury pool. Plaintiff's and counsel's willfulness in publicizing the information is not tantamount to an intent to taint the jury. Plaintiff and her counsel apparently believed that plaintiff's experiences with Bennett, her case, and Bennett's asserted history were matters that should concern the public, and were worthy of publicity. While plaintiff and her counsel were clearly indifferent to the possibility of tainting the jury pool, it does not follow that this was their intent.

² I note that the court did not dismiss the case on the basis of counsel's statements to the press regarding the alleged bias of the Wayne County bench.

this conclusion in reliance on *Elezovic v Ford Motor Co*, 259 Mich App 187; 673 NW2d 776 (2003). While *Elezovic* involved the same alleged harasser and the same conviction, it was a different case with different facts. The conviction is not per se inadmissible, and its admissibility in each case involving Bennett should be assessed based on the facts and issues in that case. While the decision whether to admit the conviction is a matter of discretion on this record, rather than affirm the circuit court's exclusion of Bennett's conviction, I would direct that the matter be reassessed on remand, under the circumstance that both the probative value and the prejudicial impact must be reassessed in light of the additional evidence that will be admitted as a result of this Court's decision—testimony of other female Ford employees that the circuit court had previously excluded.

I agree that the court erred in excluding the testimony of the other female Ford employees and McClements. Plaintiff sought to introduce this testimony for several purposes: to establish that a hostile work environment existed at the Ford Wixom plant, to establish that plaintiff herself was subjected to a hostile work environment, and to establish respondeat superior, i.e., that Ford had or should have had notice of Bennett's sexual harassment, and that Ford failed to take prompt and adequate remedial action. Ford asserted lack of notice.³

In order to demonstrate a claim of hostile environment sexual harassment, an employee must prove that 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. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).

The testimony of the other women is admissible to show the existence of a hostile work environment at the Ford Wixom Plant, and was relevant to establish that plaintiff herself was subjected to a hostile environment by virtue of Bennett's conduct, as plaintiff testified and presented evidence that Bennett harassed her, and that she was aware of Bennett's harassment of several of the other women.

In addition, evidence of Bennett's alleged other acts of harassment was relevant toward establishing respondeat superior liability; his harassment of other women at the plant is probative of whether and to what extent defendant Ford had notice of Bennett's conduct and whether defendant failed to take prompt and adequate remedial action in the face of such notice. See *Chambers v Tretco, Inc*, 463 Mich 297, 316; 614 NW2d 910 (2000) (holding that an employer can be vicariously liable for a hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile work environment.") Further, as the majority notes, the testimony of other female employees is probative of the totality of the circumstances surrounding Maldonado's claims, see *Chambers, supra* at 319 ("notice of sexual harassment is adequate if, by an objective standard, the totality of the

³ While it is unclear from Ford's appellate brief, it may contest further whether the alleged incidents actually happened.

circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring”), as it is to establish what exactly Ford knew about Bennett’s propensities and conduct at the time that Maldonado complained of his harassment, and whether Ford took prompt and adequate remedial action.

I acknowledge that all of the testimony of the other workers may not be admissible as to each issue. On remand, the court should be free to sort this out and exclude specific testimony and give limiting instructions as necessary.

I join in parts IV and V of the majority opinion.

/s/ Helene N. White