STATE OF MICHIGAN

COURT OF APPEALS

MILISSA MCCLEMENTS,

Plaintiff-Appellant,

V

FORD MOTOR COMPANY and DANIEL P. BENNETT,

Defendants-Appellees.

UNPUBLISHED
April 22, 2004

No. 243764
Oakland Circuit Court
LC No. 01-034444-CL

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

PER CURIAM.

Plaintiff appeals as of right from the August 2, 2002, opinion and order of Oakland Circuit Court granting defendants Ford Motor Company and Daniel P. Bennett's joint motion for summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff's claims of hostile work environment and sexual harassment under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., as to both defendants, and negligent retention of Bennett as to defendant Ford only. We reverse the trial court's dismissal of plaintiff's common law claim of negligent retention and affirm the trial court on all other matters presented.

On March 9, 1998, plaintiff began working as a cashier for AVI Food Systems (AVI), a contractor that operates the cafeterias at Ford's Wixom Assembly Plant (the Wixom Plant). AVI paid plaintiff's wages, provided her benefits, and established her hours.

In November 1998, defendant Bennett, then a superintendent in the Pre-Delivery Department at the Wixom Plant, chatted with plaintiff at her cashier station at the Wixom Plant Café on three or four occasions, asking her to meet him after work at a Taco Bell. Plaintiff alleges she declined Bennett's invitations. Thereafter, in late November 1998, Bennett allegedly entered the cafeteria when the cafeteria was closed, and came up from behind plaintiff and kissed her. According to plaintiff, she pushed Bennett away and attempted to keep on working. A few days later, Bennett again entered the cafeteria between break periods and attempted to kiss plaintiff, asking this time where they could go to have sex. When plaintiff said "no" to Bennett's request for sex, he allegedly replied, "you know you want it." Again, plaintiff pushed Bennett away and continued to work. Shortly thereafter, plaintiff changed cafeterias at the Wixom Plant to avoid seeing Bennett. Plaintiff did not complain to AVI or Ford about Bennett because she was afraid to risk her job and hoped to get a job with Ford. According to plaintiff, she only

mentioned that Bennett assaulted her to her union steward, Faith Marquis, and an hourly AVI co-worker.

On October 19, 1998, about six weeks before Bennett allegedly sexually assaulted plaintiff, Justine Maldonado, a Ford production worker at the plant, reported to her uncle, Joe Howard, a production manager at the Wixom Plant, and to her friend, David Ferris, who also worked at the plant, that Bennett had exposed himself, grabbed at her blouse, and otherwise sexually harassed her twice inside the plant and once when he followed her home from work. Maldonado went on to list a number of other sexually explicit acts committed by Bennett against her. A number of other female Ford employees came forward alleging that they too had been sexually harassed by Bennett.

On December 8, 1995, three years before Maldonado complained to Howard and Ferris about Bennett, Bennett was convicted of a misdemeanor offense of indecent exposure. Bennett's indecent exposure conviction arose from events occurring on August 23, 1995, when three high school girls reported to the police that they had observed a "white male masturbating while driving on S/B I-275."

On September 4, 2001, plaintiff filed suit in the Oakland Circuit Court, alleging claims of hostile work environment and sexual harassment as to both defendants Ford and Bennett and negligent retention as to defendant Ford.

Shortly after plaintiff filed suit, Bennett brought a motion to strike reference to his conviction for indecent exposure because the conviction had been expunged. Following a hearing, the trial court issued an opinion and order granting defendant Bennett's motion to strike portions of the complaint that made reference to the expunged conviction and directing plaintiff to file an amended complaint. However, the trial court noted that "at this time, the Court has not ruled that the Plaintiff is precluded from introducing into evidence information regarding that conviction since that issue is not before the Court." As to defendants' joint request that plaintiff be ordered not to make reference to the underlying facts of Bennett's expunged conviction in any future pleadings, the trial court further ruled that while it was "too burdensome to amend every pleading filed in this case," plaintiff's "future pleadings may not refer to the 1995 conviction."

Thereafter, defendants brought a joint motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) regarding plaintiff's claims of hostile work environment, sexual harassment as to both defendants, and her negligent retention claim as to defendant Ford. In an opinion and order entered on August 2, 2002, the trial court denied defendants' motion under MCR 2.116(C)(8), but granted their motion under MCR 2.116(C)(10).

Plaintiff argues that the trial court erred in granting summary disposition to defendant Ford on plaintiff's claim that Ford negligently retained Bennett in his position as superintendent. Plaintiff asserts there was evidence that Ford knew that Bennett had a propensity to sexually assault women, and thus the trial court erred in not submitting the issue to the jury. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition of all or part of a claim or defense may be granted when:

> [E]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School Dist*, 255 Mich App 60, 67; 661 NW2d 586 (2003), lv den 469 Mich 897 (2003). A motion under MCR 2.116(C)(10) must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). We conclude that plaintiff has presented genuine issues of material fact regarding her claim of common-law negligent retention.

Our Supreme Court announced the common law doctrine of negligent retention in *Hersh v Hentfield Builders, Inc*, 385 Mich 410; 189 NW2d 286 (1971). In *Hersh*, the Court stated, '"An employer who knew or should have known of his employee's propensities and criminal record before commission of an intentional tort by employee upon customer who came to employer's place of business would be liable for damages to such customer.'" *Id.* at 412, quoting *Bradley v Stevens*, 329 Mich 556, headnote 2; 46 NW2d 382 (1951). The Court reached its conclusion in reliance on 34 ALR2d 390 § 9, which states:

> As has already been noted, a duty imposed upon an employer who invites the general public to his premises, and whose employees are brought into contact with the members of such public in the course of the master's business, is that of exercising reasonable care for the safety of his customers, patrons, or other invitees. It has been held that in fulfilling such duty, an employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. The employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonesty or querulousness, will lead to such result.

Therefore, our Supreme Court in *Hersh*, *supra*, asks the courts to look at the employer's knowledge of "past acts of impropriety" . . . . when ascertaining whether such a cause of action exists. In this case, plaintiff put forth evidence that Bennett had a criminal record for indecent exposure, and furthermore, that a number of Ford employees came forward with claims of Bennett sexually harassing them. It was therefore a question for the jury to determine, after examining all the evidence, whether Ford knew or should have known of Bennett's sexually derogatory behavior toward female employees. Whether Ford had knowledge of Bennett's propensities based on Maldonado's complaints was a question of fact. Further, we find a genuine issue of fact regarding whether Ford negligently retained Bennett as a supervisor.

The trial court ruled that even if other female Ford employees reported Bennett's sexual assaults, the reporting of those incidents did not "meet the qualifications" of a "high management official" as set forth in *Sheridan v Forest Hills Public Schools*, 247 Mich App 611; 637 NW2d 536 (2001). We find the court's analysis misplaced. There is no authority to support that the

notice requirements held applicable in hostile environment sexual harassment cases in *Sheridan*, *supra*, apply to common law negligent retention claims. However, even if we were to agree with the trial court that *Sheridan* is applicable, there was testimony indicating that Maldonado's complaints were referred to higher management authorities. Additionally, we find that whether Ford had knowledge of female employees who complained of Bennett's behavior was a question of fact. We therefore reverse the decision of the trial court and reinstate plaintiff's claim of common-law negligent retention.

Plaintiff next contends that the trial court erred in dismissing plaintiff's CRA claim against Ford because she is an individual who was subjected to discrimination by Ford, despite the fact that she was not a Ford employee. We disagree.

In *Elezovic v Ford Motor Co*, 259 Mich App 197, 192; 673 NW2d 776 (2003), this Court stated:

> The CRA prohibits an employer from discriminating because of sex, which includes sexual harassment. MCL 37.2202(1); MCL 37.2103(i); *Chambers v Trettco*, 463 Mich 297, 309; 614 NW2d 910 (2000); *Chambers v Trettco, Inc (On Remand)*, 244 Mich App 614, 617; 624 NW2d 543 (2001). MCL 37.2103(i) provides:
>
> "Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment. . . .
>
> (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment. . . .
>
> (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."
>
> When sexual harassment falls under one of the first two subsections, it is commonly referred to as quid pro quo harassment; when it falls under the third subsection, it is commonly labeled hostile environment harassment. *Chambers, supra*, 463 Mich 310.
>
> To establish a claim of hostile environment harassment, an employee must prove the following elements by a preponderance of the evidence:
>
> (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." [*Id*. at 311, quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

To determine whether defendant Ford is plaintiff's employer for purposes of her CRA claim, this Court applies the "economic reality" test. *Ashker v Ford Motor Co*, 245 Mich App 9, 14; 627 NW2d 1 (2001); *Seabrook v Michigan Nat'l Corp*, 206 Mich App 314; 520 NW2d 650 (1994); *McCarthy v State Farm Ins Co*, 170 Mich App 451, 455; 428 NW2d 692 (1988). As stated in *McCarthy, supra*, 170 Mich App at 455:

> The economic reality test looks to the totality of the circumstances surrounding the performed work in relation to the statutory scheme under consideration. While control of the worker's duties is to be considered under the economic reality test, other equally important factors include payment of wages, authority to hire and fire, and the responsibility for the maintenance of discipline. [Citations omitted.]

Contrary to plaintiff's claim, there was no genuine issue of material fact that plaintiff was Ford's employee. In this case, the trial court dismissed plaintiff's CRA claim, stating:

> The Court finds in this case there is no question of fact that the Plaintiff is employed by AVI Food Systems, not Defendant Ford. Thus, because only an employer is subject to liability under the Act, Defendant Ford cannot be liable.

Plaintiff testified that she was hired by AVI on March 9, 1998, that AVI issued her paychecks, that she was covered by a collective bargaining agreement negotiated between AVI and AFL-CIO Local 1064, and that AVI's managers determined which shift she would work and disciplined her. Thus, the trial court did not err in granting summary disposition to defendant Ford on plaintiff's CRA claim because Ford was not plaintiff's employer. We therefore affirm the trial court's order dismissing plaintiff's civil rights action. Having found that Ford is not plaintiff's employer for purposes of her CRA claim, we need not address plaintiff's contention that the trial court erred in granting summary judgment to defendant because Ford ignored notices that Bennett was sexually harassing women.

Plaintiff also alleges that the trial court erred in striking the facts surrounding Bennett's misdemeanor conviction for indecent exposure from plaintiff's complaint because they are part of the totality of the circumstances demonstrating the notice that Ford had of the danger of sexual

harassment posed by Bennett. We disagree. This Court reviews a motion to strike a pleading for an abuse of discretion. *Belle Isle Grille Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003).

In granting defendant Bennett's motion to strike, the trial court ruled, in pertinent part:

> The Court further finds, pursuant to MCL 780.622(1), because an Order has been entered setting aside his conviction, Defendant Bennett is considered not to have been convicted of the offense of indecent exposure.
>
> Finally, the Court finds that the conviction is not relevant to either the Plaintiff's negligent retention or sexual harassment claim. In order for an employer to be subject to liability for sexual harassment, the Plaintiff must show notice of an offensive working environment. Again, Bennett's conviction was the result of behavior which occurred outside of the workplace. Thus that particular behavior could not have caused or have been notice of an offensive working environment.
>
> Finally [sic], the Court finds, based on the fact that Defendant Bennett's conviction has been set aside, that it is not proper for the Plaintiff to include information about his conviction in her Complaint. This does not necessarily preclude the Plaintiff from pursuing her claim of negligent retention. Furthermore, at this time, the Court has not ruled that the Plaintiff is precluded from introducing into evidence information regarding that conviction since that issue is not before the Court.

Pursuant to MCR 2.115(B), "On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or strike all or part of a pleading not drawn in conformity with these rules."

As the trial court noted, pursuant to MCL 780.622(1), on entry of the November 9, 2001, order setting aside the conviction, Bennett, "for purposes of the law, shall be considered not to have been previously convicted." Further, while the expunged conviction was removed from the public record under MCL 780.623, it was accessible as a non-public record to a limited class of individuals for certain public purposes not present in this case. Moreover, MCL 780.623(5) provides:

> Except as provided in subsection (2), a person, other than the applicant, who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both.

Under these circumstances, the trial court did not abuse its discretion in granting defendant Bennett's motion to strike references in plaintiff's complaint to his expunged conviction.

As both defendants correctly point out, the trial court made clear that it was not ruling on the admissibility or exclusion of the facts or evidence underlying Bennett's conviction. Indeed, as defendant Ford notes, the trial court allowed plaintiff to include facts about Bennett's conviction in her response to defendants' joint motion for summary disposition.

Last, plaintiff argues that defendant Bennett should not have been dismissed from this case. However, all parties now agree that pursuant to this Court's opinion in *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 478, 485; 652 NW2d 503 (2002), defendant Bennett should be dismissed from the case with prejudice.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski