STATE OF MICHIGAN

COURT OF APPEALS

PAMELA PEREZ,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY and DANIEL P. BENNETT,

Defendants-Appellees.

UNPUBLISHED
March 10, 2005

No. 249737
Wayne Circuit Court
LC No. 01-134649-CL

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals by right from the judgment granting defendants Ford Motor Company and Daniel Bennett summary disposition.[1] Plaintiff's claim alleged that Bennett, a supervisor, had sexually harassed her on several occasions in 1999 at Ford's Wixom plant. The lower court held Ford was not vicariously liable for Bennett's harassment of Perez because plaintiff failed to show that Ford had notice of the harassment. It also held that under current law, Bennett could not be individually liable for a sexually hostile work environment. We reverse in part, affirm in part, and remand.

Plaintiff began working at the Wixom plant in December 1990, as an hourly employee. She claims that Bennett sexually harassed her for the first time during the summer of 1999, when he offered her money to buy lingerie to model for him. Later, Bennett made a remark about meeting after work. Then, in August 1999, plaintiff was in Bennett's office. He exposed himself to her and offered her money for a hotel room. Plaintiff did not report these incidents.

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). This Court must review the

[1] Appeals related to this case are *McClements v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, decided April 22, 2004 (Docket No. 243764), lv gtd ___ Mich ___ (12/27/04), *Maldonado v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, decided April 22, 2004 (Docket No. 243763), and *Elezovic v Ford Motor Co*, 259 Mich App 187; 673 NW2d 776 (2004), lv gtd 470 Mich 892 (2004).

record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Ford brought its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, review under (C)(10) is the appropriate basis for review. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

MCL 37.2202(1) prohibits an employer from discriminating because of sex, which includes sexual harassment. Sexual harassment includes a hostile work environment created by unwelcome sexual conduct or communication. MCL 37.2103(i)(*iii*). To maintain a claim of hostile environment harassment, an employee must prove the following 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." [*Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000), quoting *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993).]

Under a hostile work environment claim, an employer can be vicariously liable for sexual harassment of an employee only if it failed to take prompt and adequate remedial action after having been put on notice of the harassment. *Chambers, supra* at 312. The notice can be actual or constructive. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001), citing *McCarthy v State Farm Ins Co*, 170 Mich App 451, 457; 428 NW2d 692 (1988), overruled in part on other grounds *Norris v State Farm Fire & Cas Co*, 229 Mich App 231 (1998). The employee gives the employer actual notice if she complains about the harassment to higher management. *Id.* If the employee never complained to higher management, she can prove the employer had constructive notice "by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Id.* If an objective view of the totality of the circumstances indicates that a reasonable employer would have known there was a substantial probability that sexual harassment was occurring, then notice was adequate. *Chambers, supra* at 319.

Plaintiff admits that by failing to report the incidents, she never gave Ford actual notice of Bennett's harassment. However, she argues that other women's complaints about Bennett gave Ford constructive notice of a hostile work environment at its Wixom plant. Although a complaint of a single coworker may be insufficient to establish notice of a plaintiff's claim of harassment, *Elezovic v Ford Motor Co*, 259 Mich App 187, 196; 673 NW2d 776 (2003), lv gtd 470 Mich 892 (2004), citing *Sheridan, supra* at 627-628, plaintiff provided much more than one complaint. One coworker testified at her deposition that she told a production manager on several occasions that Bennett was sexually harassing her; she also told a superintendent during

the time he was temporarily assigned to labor relations, as well as her UAW committeeperson. Defendant admits that the proper procedure for reporting a sexual harassment claim was to report to the labor relations department or a UAW committeeperson.

Moreover, when the coworker reported Bennett's acts toward herself, she also mentioned that Bennett had harassed another employee as well. The superintendent temporarily assigned to labor relations testified that he mentioned the allegations to Bennett who just laughed and drove away; he then reported the allegations to his supervisor in labor relations, who told him not to get involved. Therefore, plaintiff presented evidence that Ford had *actual* notice with respect to two coworkers' claims against Bennett.[2] In addition to plaintiff's allegations and the allegations of her two coworkers, three other women who worked at the plant testified that Bennett either sexually assaulted them or propositioned them for sex between 1997 and 1999. According to the testimony presented, Bennett sexually harassed six different women during this time.

Furthermore, with respect to general pervasiveness of sexual harassment, plaintiff and two of the women testified that low-level harassment occurred all the time, but they learned to put up with it because they did not think anyone would believe them, and those who complained were bullied. This appears to be corroborated by Ezra Carter, the plant's human resources manager from 1995 to 2001, who acknowledged that eight sexual harassment complaints had been filed by women other than those previously mentioned, against seven different men other than Bennett. He stated that in seven charges, each investigation resulted in a conclusion that there was no basis to the complaint.[3] In addition, the plant manager during the time in question indicated he would need to see corroborating evidence or photographs demonstrating that the allegations were true before taking action, and that Bennett had been sent home with pay to protect Bennett and the plant from further false charges.

The instant case is distinguishable from *Chambers, supra*, and *Sheridan, supra*. First, *Chambers* does not address whether harassment must be against a particular plaintiff to be considered constructive notice. *Sheridan* is a bit more instructive. In *Sheridan*, the plaintiff, a custodian, alleged that a fellow custodian had repeatedly sexually harassed her at the school where they both worked. She did not tell anyone about the harassment until after the fourth incident. *Id.* at 624, 627. Then, less than a month after she first complained, the school district conducted an investigation and fired the alleged harasser. *Id.* at 613. In refusing to hold the district vicariously liable, this Court held that a prior incident of harassment five years earlier was not so pervasive that the district should have known that the defendant was also harassing plaintiff. *Id* at 627-628. That ruling implies that where harassment is not so remote in time and is more pervasive, the harassment of a fellow employee might be sufficient to impute constructive knowledge to an employer.

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[2] The two coworkers who complained testified that they were afraid of losing their jobs for mentioning the incidents. Another woman testified that she witnessed an incident with Bennett and one of the coworkers.

[3] In the remaining charge, the supervisor admitted making the lewd comment and was told not to make such comments in the future; there is no indication he was further disciplined.

After considering this evidence in the light most favorable to the nonmoving party, we conclude that a material factual dispute exists whether Ford should have known that a hostile work environment existed at the Wixom plant. In *Maldonado v Ford Motor Co,* unpublished opinion per curiam of the court of Appeals, decided April 22, 2004 (Docket No. 243763), slip op at 9, this Court recently held that evidence of other acts of harassment was highly probative whether Ford should have known that Bennett was sexually harassing the plaintiff in that case. This Court stated that the testimony of other employees helped show the "totality of the circumstances" known to Ford. *Id.* Therefore, granting Ford summary disposition was improper.

Finally, plaintiff asks that this Court hold Bennett individually liable under her hostile work environment claim. Originally, plaintiff conceded dismissal of Bennett under *Jager v Nationwide Truck Brokers, Inc,* 252 Mich App 464; 652 NW2d 503 (2002). In *Jager*, this Court held that the Civil Rights Act imposes liability only on employers, and not on individual employees of employers, with regard to sexual harassment claims. *Id.* at 484-485. Therefore, the *Jager* Court concluded that a supervisor may not be held individually liable for violating a plaintiff's civil rights. *Id.* Although this Court expressed disfavor of *Jager* in *Elezovic, supra* at 198, a conflict panel was not convened, *id.* at 801. However, in granting leave to appeal, our Supreme Court specifically directed the parties to brief this issue. 470 Mich App 892 (2004). Oral argument was heard December 8, 2004, but the Court has yet to issue an opinion. Therefore, under current law, Bennett cannot be held individually liable.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Donald S. Owens