STATE OF MICHIGAN

COURT OF APPEALS

LEIGHANN STARNES,

Plaintiff-Appellant,

v

JLQ AUTOMOTIVE SERVICES COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 8, 2005

No. 255056
Oakland Circuit Court
LC No. 2003-048375-CD

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition of plaintiff's claims for hostile work environment based on sexual harassment by her supervisor, Tom Nanney, and retaliatory action by defendant when plaintiff voiced her complaint, contrary to the Civil Rights Act (CRA), MCL 37.2101 *et seq*. We affirm in part, reverse in part, and remand.

We review a trial court's decision on a motion for summary disposition de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). The trial court granted summary disposition pursuant to MCR 2.116(C)(10). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. *Corley*, *supra* at 278. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

I. Hostile Work Environment

To establish a prima facie case of sexually hostile work environment, plaintiff was required to demonstrate: (1) that she belonged to a protected group; (2) that she was subjected to communication or conduct on the basis of sex; (3) that she was subjected to unwelcome sexual conduct or communication; (4) that the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with her employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. See *Radke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993). Plaintiff argues that the trial court erred in determining

that she failed to meet her burden regarding the third requirement, i.e., that she was subjected to "unwelcome" sexual conduct or communication. We agree.

In its opinion, the trial court acknowledged that Nanney's alleged comments were "rude, offensive, and intolerable in a civilized society." Yet, the trial court granted summary disposition because it found that plaintiff failed to meet her burden of showing that she did not solicit or incite Nanney's comments, presumably relying on plaintiff's deposition testimony that she regularly used vulgar language and engaged in sexual conversations with some co-workers. However, while plaintiff's conduct in this regard was relevant, this Court has stated that a "plaintiff's participation in sexual behavior or comments, standing alone, does not necessarily defeat a claim of hostile work environment. To the contrary, it is merely a factor to consider when determining whether the conduct or comments at issue were 'unwelcome.'" *Grow v W A Thomas Co*, 236 Mich App 696, 706; 601 NW2d 426 (1999); see also *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 305; 660 NW2d 351 (2003). Indeed, whether a work environment is illegally hostile must be gauged by a reasonable person standard viewing the "totality of circumstances." *Radke*, *supra* at 394. Thus, as this Court observed in *Peña*, *supra* at 307-308, the relevancy of evidence of a plaintiff's vulgar and profane language in the workplace depends on the language's content, context, and frequency.

Utilizing these guidelines, we conclude that reasonable minds could differ regarding whether plaintiff welcomed Nanney's comments and conduct. Plaintiff admits that she used profanity in her everyday language at the store. However, it is not disputed that the oil shop where plaintiff worked was a male-dominated work environment where such language was considered to be merely "shoptalk." Although plaintiff also admitted discussing sexual topics at work, she claimed that she only discussed such topics with those co-workers who were also her friends outside of work. Moreover, despite these admissions, there is no testimony that any of plaintiff's sexually charged comments or conduct were directed at or were intended to be heard by Nanney, save for the phrase "suck my dick," which plaintiff claims was said in anger, not as a sexual reference. Viewed most favorably to plaintiff, the evidence disclosed a distinct difference in the content and context of plaintiff's and Nanney's comments, i.e., between discussing sex on the one hand, and using sexually charged language and sexually objectifying a person on the other hand. Plaintiff also admitted discussing her own sex life and some sexual topics in general with some co-workers, but no one testified that she commented *on other employees'* body parts or directed any sexual innuendoes at them. The sexual comments Nanney made, which were corroborated by other employees, were specifically directed at plaintiff and involved visualizing plaintiff in a sexual manner. Considered in this context, reasonable minds could differ whether plaintiff's language simply fit with that generally used in the male-dominated shop and merely involved talking about sexual topics with co-worker friends, or whether her demeanor meant that she welcomed Nanney's comments and conduct. Accordingly, we find that the trial court erred in concluding that there was no genuine issue of material fact regarding whether Nanney's sexual conduct and communications were unwelcome by plaintiff.

Nonetheless, this Court may affirm a trial court's decision where it has reached the right result, albeit for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). As noted above, plaintiff was required to also show that the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with her employment or created an intimidating, hostile, or offensive work environment, and respondeat superior. *Radke*,

supra at 382. With regard to the latter of these requirements, our Supreme Court has stated that "strict imposition of vicarious liability on an employer is illogical in a pure hostile work environment setting because, generally, in such a case, the supervisor acts outside the scope of actual or apparent authority . . . ." *Chambers v Trettco*, 463 Mich 297, 311; 614 NW2d 910 (2000), quoting *Radtke*, *supra* at 396 n 46 (citations and internal quotation marks omitted). Thus, to hold an employer vicariously liable for a sexually hostile work environment, a plaintiff must show that the defendant had notice of the unwelcome sexual conduct or communication and failed to take prompt and adequate remedial action. *Chambers*, *supra* at 312-313. Here, we find that, even when viewed in a light most favorable to plaintiff, plaintiff has failed to meet this burden.

To establish notice of a sexually hostile work environment, a plaintiff must demonstrate that "higher management" was notified about the allegedly inappropriate conduct, or that the employer should have known about the harassment because of its pervasiveness. See *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001). Here, plaintiff acknowledged during deposition that she did not report the alleged incidents of unwelcome sexual communication to the appropriate supervisory or management personnel. Although plaintiff indicated that she several times complained of Nanney's sexually charged comments to the shop's assistant manager, "higher management" for purposes of notifying a defendant employer of an alleged hostile work environment is defined as "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." *Id*. at 622. It is not disputed that the assistant manager to which plaintiff complained reported directly to Nanney, and had no authority to himself discipline Nanney or otherwise remedy the situation.

Moreover, plaintiff acknowledged that she knew to contact district manager Steve Matthews regarding her concerns over Nanney's conduct, and had in fact contacted both Matthews and the shop's owner, Ron Davis, to complain of hours and other "problems" at the shop. Plaintiff admitted, however, that despite contacting these individuals to voice complaints regarding Nanney, she never told either of the alleged harassment. Plaintiff also agreed that, by not telling these individuals of the harassment, she deprived them of the "opportunity to fix the situation." Although plaintiff further testified that Matthews was present when Nanney discussed opening a "topless" oil shop and commented that plaintiff could improve her appearance by wearing makeup, we do not find these isolated incidents to be so pervasive as to, under the totality of the circumstances, place a reasonable employer on notice of a "substantial probability that sexual harassment was occurring." *Chambers*, *supra* at 319. Indeed, Matthews testified at deposition that it was not until being informed of Nanney's conduct by plaintiff's co-worker that defendant was made aware of the harassment alleged to have routinely occurred over the previous year, at which time it acted swiftly to remedy the situation by transferring plaintiff to another store pending investigation into the matter. Given plaintiff's failure to inform defendant of Nanney's alleged conduct over the previous year of her employment, and defendant's attempt to promptly remedy the situation upon discovering the harassment, we simply cannot conclude on the facts of this case that respondeat superior has been established such that summary disposition was not appropriate. *Id*. at 311. Accordingly, we find that the trial court did not err in granting summary disposition of plaintiff's claim for hostile work environment sexual harassment. *Taylor*, *supra*.

II. Retaliation

The CRA also prohibits retaliation against a person for having "oppos[ed] a violation of the act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding or hearing under th[e] act." MCL 37.2701(a). To establish a prima facie case of retaliation under the CRA, a plaintiff must prove: (1) that she was engaged in a protected activity; (2) that this was known by defendant; (3) that defendant took an employment action adverse to plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Peña*, *supra* at 310-311. Here, plaintiff argues that the transfer that resulted from her complaint of sexual harassment was materially adverse, and that the trial court erred in concluding otherwise and dismissing her claim for retaliation. We agree.

With respect to employment-related action sufficient to be considered materially adverse, this Court has explained that:

> [a]lthough there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as "a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." In determining the existence of an adverse employment action, courts must keep in mind the fact that "[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." [*Id*. at 312 (citations omitted).]

The trial court determined that because plaintiff's wage and title did not change, she suffered no materially adverse employment action. However, plaintiff also asserted that as a result of the transfer, (1) she lost her seniority, which resulted in her being the first person sent home when the store was overstaffed, thereby decreasing her net pay; (2) her commute was actually longer and more difficult; (3) the new store was significantly dirtier; (4) she felt isolated and not welcomed by the new store's employees, who were aware of her allegations against Nanney; and (5) even if there was no corresponding change in her job title, her job duties were limited to log-ins, whereas before she performed every task in the store, thus resulting in a significant decrease in responsibility. Plaintiff's assertions in these regards exceed mere "displeas[ure]" with the transfer. *Id*. Because defendant presented no evidence to counter plaintiff's assertions regarding her constructive decrease in pay and job duties, the question whether plaintiff's job transfer rises to the level of a material adverse employment action is a question of fact for the jury. Accordingly, the trial court erred in dismissing this claim.

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

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder