STATE OF MICHIGAN

COURT OF APPEALS

SUSAN BARNES SPINK,

Plaintiff-Appellant,

v

MACSTEEL MICHIGAN and QUANEX CORPORATION,

Defendants-Appellees.

UNPUBLISHED
December 22, 2005

No. 263140
Jackson Circuit Court
LC No. 03-005933-CZ

Before: Fitzgerald, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants in this action alleging hostile work environment sexual harassment, quid pro quo sexual harassment, and unlawful retaliation under the Michigan Civil Rights Act (CRA), MCL 37.2101. We affirm.

Plaintiff first argues that the trial court erred in finding that her quid pro quo sexual harassment claim involving the conduct of her former supervisors, Jerry Williams and Tony Lopez, was time-barred and that the continuing violations doctrine was inapplicable. This Court reviews de novo whether a party's claim is time-barred. *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 436; 684 NW2d 864 (2004).

Plaintiff filed her complaint on September 16, 2003. In support of her quid pro quo claim, she relied on conduct that allegedly began in 1996. The trial court concluded that evidence predating September 6, 2000, would be barred and that the continuing violations doctrine was inapplicable to her claim because even though Williams and Lopez may have visited plaintiff's work station after September 2000, "there's no indication from the Plaintiff that at any time there was any continued sexual harassment by them" and that the actions of Williams and Lopez in visiting plaintiff "were completely different incidents, are of a different nature . . ."[1]

[1] Indeed, there is no dispute that neither Williams nor Lopez were plaintiff's supervisor during (continued…)

An action under the CRA must be brought within three years after the cause of action accrued. MCL 500.5805(10). The continuing violations doctrine permitted recovery for incidents that occurred outside the applicable limitations period, if an individual asserts a series of allegedly discriminatory acts or statements that are so sufficiently related that they constitute a pattern of harassment or discrimination and at least one of the acts alleged occurred within the limitations period. *Sumner v Goodyear Tire & Rubber Company*, 427 Mich 505, 538-539; 398 NW2d 368 (1986), overruled *Garg v Macomb Co Comm Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005).

Nine days after the hearing on the cross-motions for summary disposition, but before plaintiff filed her appeal, our Supreme Court overruled its prior recognition of the continuing violations doctrine. *Garg, supra* at 283-284. Noting the absence of any language or "provision in Michigan law that even implicitly endorses the 'continuing violations' doctrine," the Court ruled that the " 'continuing violations' doctrine is contrary to Michigan law." *Id.* at 283. The Court specifically overruled *Sumner* and held that "a person must file a claim under the Civil Rights Act within three years of the date his or her cause of action accrues, as required by § 5805(10)." *Id.* at 283-284. "An employee is not permitted to bring a lawsuit for employment acts that accrue beyond this period, because the Legislature has determined that such claims should not be permitted." *Id.* at 284. Accordingly, the trial court correctly ruled that any acts alleged by plaintiff to have occurred outside the three-year limitations period may not be considered. Plaintiff's quid pro quo claim with respect to any alleged harassment by Williams and Lopez is time-barred.

Plaintiff next argues that the trial court erred by dismissing her claim for hostile work environment sexual harassment.[2] To establish a claim of hostile environment sexual harassment in the workplace, a plaintiff must demonstrate, by a preponderance of the evidence, that: (1) the employee belonged to a protected group; (2) the employee was subjected to conduct or communication on the basis of sex; (3) it was 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. *Rymal v Baergen*, 262 Mich App 274, 312; 686 NW2d 241 (2004).

Although plaintiff satisfies the first element of the claim, she fails to satisfy the second element of the claim. Plaintiff failed to demonstrate that, but for the fact of her sex, she would not have been the object of harassment. *Radtke v Everett*, 442 Mich 368, 383; 501 NW2d 155 (1993). While some of Cathy Pierce's acts and comments reported by plaintiff could be objectively described as being offensive or derogatory, plaintiff does not submit any evidence

(…continued)

this time period. Quid pro quo sexual harassment "occurs only where an individual is in a position to offer tangible job benefits in exchange for sexual favors or, alternatively, threaten job injury for a failure to submit." *Champion v Nation Wide Security, Inc*, 450 Mich 702, 713; 545 NW2d 596 (1996).

[2] Although plaintiff phrases her question presented to include the retaliation claim, she does not address this claim in her argument and therefore this claim is deemed abandoned. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

that her sex as a female precipitated or caused the remarks. There is no evidence in the record that plaintiff was subjected to the "vulgar language and offensive conduct of Ms. Pierce" *on the basis of sex*. Because the requisite connection between sex and the behavior and comments alleged is lacking, plaintiff has failed to meet the threshold requirement to establish her claim of sexual harassment.

Last, plaintiff argues that this Court should remand this case to the trial court to enable plaintiff to file a motion to amend her complaint and add several individual employee defendants in light of the Supreme Court's ruling in *Elezovic v Ford Motor Company*, 472 Mich 408; 697 NW2d 851 (2005).[3] On July 19, 2005, plaintiff filed a motion to remand with this Court to allow plaintiff to amend her complaint to add individual employee defendants on the basis of *Elezovic*. On August 17, 2005, before plaintiff filed her appellate brief, this Court denied plaintiff's motion on the basis that plaintiff had failed to demonstrate that the issue should initially be decided by the trial court.

In *Elezovic*, the Court held that an agent may be individually sued under § 37.2202(1)(a) of the CRA. Section 37.2202(1)(a) provides:

> An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Cathy Pierce was not plaintiff's supervisor and, consequently, is not an agent of defendants pursuant to the above statutory subsection as she did not have the ability to "hire or recruit, discharge, or otherwise discriminate against" plaintiff "with respect to employment, compensation, or a term, condition, or privilege of employment . . ." Although Williams and Lopez can be considered agents of defendants during the period they supervised plaintiff, as discussed above the quid pro quo claim is time-barred. Consequently, a remand for the purpose of amending the complaint would be futile.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

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[3] *Elezovic* overruled, *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464; 652 NW2d 503 (2002), which had concluded that "a supervisor engaging in activity prohibited by the CRA may not be held individually liable for violating a plaintiff's civil rights."