STATE OF MICHIGAN

COURT OF APPEALS

JUDITH ACKLEY,

Plaintiff-Appellee,

v

RALEIGH & RON CORPORATION,

Defendant-Appellant.

UNPUBLISHED
October 5, 2010

No. 292341
Macomb Circuit Court
LC No. 2007-003588-CD

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

In this sexual harassment and retaliation suit, brought pursuant to the Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*, a jury found defendant terminated plaintiff's employment in retaliation for her complaints of sexual harassment in the workplace. The trial court entered a judgment in plaintiff's favor, consistent with the jury's verdict, awarding plaintiff $11,000 in noneconomic damages and $30,250 in attorneys fees and costs. Defendant now appeals by right. We affirm.

I. BASIC FACTS

In October 2006, plaintiff was employed as a cashier at Oak Ridge Market, which is owned by defendant and located in Warren, Michigan. During her employment, plaintiff's co-worker, Jason Felimonik, made sexually suggestive comments and gestures toward plaintiff. Plaintiff reported these incidents to management on numerous occasions. Nothing was done about these incidents until plaintiff sent a written letter to defendant. Subsequently, plaintiff's work hours were reduced and she was told that she would have to work at the store's Hoover location. Plaintiff informed management that she did not have transportation to that location. On December 8, 2006, after plaintiff finished her shift, she received a phone call from a store manager around 9:30 p.m. instructing her to call another store manager, Mark Capri, the next day. Plaintiff did as she was asked and called Capri the next morning. Capri told her that she was already expected to have arrived at the Hoover location that morning. When plaintiff indicated that she did not have enough time to arrange transportation, Capri indicated that if she did not immediately report, she would be considered "a quit." Plaintiff did not make it to the Hoover location and her employment ended.

Plaintiff then brought this lawsuit, alleging in a two count complaint claims of sexual harassment and retaliation. The matter went to trial, during which plaintiff testified, over

defendant's objection, to overhearing a conversation between Felimonik and another man, in which Felimonik made statements of a sexual nature. Plaintiff also testified regarding statements she heard Felimonik make while talking on his cell phone, in which he referenced the size of his genitals and what he wanted to do with them to another woman. Defendant also objected to this testimony, based on lack of notice.

The next day, defendant moved for a mistrial, arguing that plaintiff's testimony regarding the statements Felimonik had made were unforgettable and would undermine the validity of the entire trial. The trial court denied the motion, reasoning that a curative instruction would remedy any prejudice. It instructed the jury:

> You will recall that during the course of plaintiff's testimony last week she indicated that she was subjected to comments that took place in the break room that Jason had made while he was on the telephone. You'll recall that one of those comments dealt with anal sex. It's not the subject matter of this case, and you are to totally disregard anything that the plaintiff heard while he – if she heard it. I'm not saying it occurred or didn't occur, but you are to disregard the statement he made to a third person during the course of that conversation. Is that clear? That is not evidence in this case, and it's a relatively inflammatory statement.

The court then polled the jury members to determine whether each juror could put the testimony out of his or her mind. Thereafter, the jury returned a verdict in plaintiff's favor as to the retaliation claim and in defendant's favor as to the sexual harassment claim.

II. MOTION FOR MISTRIAL

Defendant's sole argument on appeal is that the trial court erred by denying its motion for mistrial. Specifically, defendant complains that it was surprised by plaintiff's testimony at trial and therefore had no opportunity to put forth a valid defense and was otherwise deprived of such a defense. The particular testimony includes plaintiff's assertions regarding derogatory comments made to her by her co-workers and the conversations plaintiff overheard when Felimonik was on his cell phone and when Felimonik was talking to someone else regarding anal sex and fellatio. Whether to grant a mistrial is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999). "A mistrial should be granted only when the error prejudices one of the parties to the extent that the fundamental goals of accuracy and fairness are threatened." *In re Flury Estate*, 249 Mich App 222, 229; 641 NW2d 863 (2002).

Defendant's appeal for relief is unavailing. The complained of surprise testimony is only responsive to plaintiff's claim of sexual harassment,[1] not her claim of retaliation. The jury,

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[1] The elements of hostile work environment sexual harassment based on a theory of respondeat superior require a plaintiff to prove:

(continued…)

however, returned a verdict in defendant's favor on plaintiff's claim of sexual harassment. Thus, the question whether defendant was deprived of a defense, or was prejudiced by the testimony, is moot because defendant prevailed on this count. No prejudice resulted in this regard.

Moreover, had defendant known of this testimony before trial, such notice would not have provided defendant with a defense as to plaintiff's retaliation claim. To establish a prima facie claim of retaliation, a plaintiff must establish: "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005) (citation omitted). Given these elements, we fail to see how knowledge of the complained of testimony would have enabled defendant to fashion a valid defense to plaintiff's retaliation claim. The testimony at trial established that defendant was aware of plaintiff's complaint of sexual harassment, which she made orally many times to defendant's managers. Nothing was done about these complaints until plaintiff submitted a letter to defendant detailing the episodes of alleged harassment. Afterward, plaintiff's hours were reduced and she was given an ultimatum of immediately showing up at a different location or essentially losing her job. Plaintiff's testimony regarding derogatory statements that co-workers made to her and conversations she overheard is simply irrelevant to the retaliation claim and, thus, it had no bearing on defendant's ability to defend itself.

Further, assuming any prejudice occurred, it was nonetheless remedied by the trial court's curative instruction. A day after the complained of testimony was elicited, the trial court instructed the jury to disregard that testimony. Juries are presumed to follow the instructions provided. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Defendant has not provided us with any reason why we should ignore this presumption, other than its allegation that it was deprived of a defense. However, we have already concluded that the allegation that it was deprived of a defense lacks merit. The trial court did not abuse its discretion by denying defendant's motion for a mistrial.

(…continued)

> (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 *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). Respondeat superior liability exists when an employer has adequate notice of the harassment and fails to take appropriate corrective action. [*Elezovic v Bennett*, 274 Mich App 1, 7; 731 NW2d 452 (2007).]

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly