STATE OF MICHIGAN

COURT OF APPEALS

ROBYN CHAMBERS,

Plaintiff-Appellee,

v

TRETTCO, INC., a Michigan Corporation, d/b/a HDS,

Defendant-Appellant.

FOR PUBLICATION
February 16, 2001
9:05 a.m.

No. 202151
Washtenaw Circuit Court
LC No. 96-002654 NZ

ON REMAND
Updated Copy
March 30, 2001

Before: Jansen, P.J., and Markey and O'Connell, JJ.

O'CONNELL, J.

This case returns to this Court on remand from our Supreme Court. Because the facts are set forth in detail in our earlier opinion, *Chambers v Trettco, Inc*, 232 Mich App 560, 562-564; 591 NW2d 413 (1998) (*Chambers I*), and in the Supreme Court's decision that vacated our prior opinion and remanded the matter, *Chambers v Trettco, Inc*, 463 Mich 297, 303-306; 614 NW2d 910 (2000) (*Chambers II*), we will repeat them here only as necessary to bring the issues into focus.

Plaintiff brought a claim of sexual harassment against defendant, her employer, under the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., alleging both quid pro quo harassment and hostile workplace harassment. The jury accepted both theories and awarded damages. A divided panel of this Court, relying heavily on recent federal cases construing title VII of the federal Civil Rights Act, 42 USC 2000e *et seq.,* affirmed. Our Supreme Court in turn

held that this Court's reliance on the federal case law was misplaced, *Chambers II*, *supra* at 313-316, dismissed plaintiff's claim of quid pro quo harassment, and vacated our prior opinion and remanded the case to this Court for resolution of the hostile environment harassment claim in accordance with Michigan precedents. *Id*. at 326. We reverse and remand.

Plaintiff alleged that a temporary supervisor, assigned to her work station for four days while her regular supervisor was on vacation, engaged in a pattern of seriously suggestive and offensive behavior, and did so over plaintiff's clear objections. Plaintiff complained to co-workers about wishing to leave her job, but she did not initiate the proceedings for sexual harassment complaints set forth in defendant's employee handbook. However, plaintiff happened to answer the telephone when defendant's regional director of operations telephoned. The latter sensed that something was wrong, but plaintiff chose not to explain the problem, apparently because the offender was nearby. The director indicated that he would talk to plaintiff later, but no meeting between plaintiff and the director followed. Plaintiff did complain to her regular supervisor when the latter returned from vacation. The record does not indicate what action, if any, defendant took against the offender in response, but the offender never confronted plaintiff at work again.

Section 202 of our Civil Rights Act provides that an employer may not "discharge, or otherwise discriminate against an individual with respect to employment, . . . because of . . . sex, . . . or marital status." MCL 37.2202; MSA 3.548(202). Subsection 103(i) clarifies that "[d]iscrimination because of sex includes sexual harassment," which the subsection defines as "unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct or communication of a sexual nature," under certain circumstances. MCL 37.2103; MSA

3.548(103)(i). Qualifying circumstances include, under subsection 103(i)(*ii*), where the employee's submission to or rejection of sexual overtures "is used as a factor in decisions affecting the individual's employment," and, under subsection 103(i)(*iii*), where "[t]he 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." MCL 37.2103(i)(*ii*) and (*iii*); MSA 3.548(103)(i)(*ii*) and (*iii*).

Our statute thus expressly recognizes sexual harassment as a prohibited form of discrimination and carefully distinguishes between what are commonly labeled "quid pro quo" harassment and "hostile environment" harassment. The federal Civil Rights Act does neither, but merely prohibits discrimination based on sex. *Chambers II*, *supra* at 315, citing 42 USC 2000e-2(a)(1). Further, the United States Supreme Court has concluded that, under the federal Civil Rights Act, once a plaintiff has established that a supervisor created a hostile working environment, the burden shifts to the employer to disprove vicarious liability for the supervisor's actions. *Chambers II*, *supra* at 314-315, citing *Burlington Industries, Inc v Ellerth*, 524 US 742, 765; 118 S Ct 2257; 141 L Ed 2d 633 (1998), and *Faragher v Boca Raton*, 524 US 775, 807; 118 S Ct 2275; 141 L Ed 2d 662 (1998). Conversely, under state law, vicarious liability will be found only where the plaintiff has carried the burden of proving respondeat superior. This ordinarily requires a showing that either a recurring problem existed or a repetition of an offending incident was likely and that the employer failed to rectify the problem on adequate notice. *Radtke v Everett*, 442 Mich 368, 382, 395; 501 NW2d 155 (1993). Notice of sexual harassment sufficient to impute liability to the employer exists where, "by an objective standard,

the totality of the circumstances were such that a reasonable employer would have been aware of the substantial probability that sexual harassment was occurring." *Chambers II*, *supra* at 319.

In light of our Supreme Court's opinion directing us to apply only Michigan precedents, we now conclude that the facts as plaintiff alleged them cannot render defendant in this case vicariously liable for its temporary supervisor's conduct in establishing a hostile working environment. Plaintiff's general indication to defendant's regional director over the telephone that something was wrong did not sufficiently alert him to the problem to the extent that the director, and thus defendant, could reasonably be charged with actual or constructive notice that sexual harassment was taking place. Nor did the evidence otherwise indicate that anyone with supervisory responsibility knew of plaintiff's four-day plight until she spoke with her normal supervisor after the offending temporary supervisor was no longer visiting plaintiff's workplace. As the dissent accompanying our earlier decision in this case stated, "Imputing notice of sexual harassment to an employer on the basis of such nebulous implications would have the effect of making an employer an insurer of an employee's personal anguish of which the employer had little or no understanding." *Chambers I*, *supra* at 574. Again, we are reminded that under our Civil Rights Act, a defendant does not bear the burden of disproving responsibility for a hostile environment. Rather, the plaintiff must prove respondeat superior by a preponderance of the evidence. *Chambers II*, *supra* at 311-313, 316, citing *Radtke*, *supra* at 382-383, 396-397.

For these reasons, we reverse and remand this case to the trial court with instructions to enter a judgment in favor of defendant.

Reversed and remanded. We do not retain jurisdiction.

/s/ Peter D. O'Connell

Markey, J. I concur in the result only.

/s/ Jane E. Markey