STATE OF MICHIGAN

COURT OF APPEALS

VICKI S. SHERIDAN,

Plaintiff-Appellant,

v

FOREST HILLS PUBLIC SCHOOLS,

Defendant-Appellee,

and

VERN KNAPP and CITIZENS INSURANCE COMPANY OF AMERICA,

Defendants.

FOR PUBLICATION
September 25, 2001
9:25 a.m.

No. 215572
Kent Circuit Court
LC No. 96 002163-CZ

Updated Copy
December 7, 2001

Before: Zahra, P.J., and White and Hoekstra, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent from the majority's determination that there is no genuine issue of material fact whether defendant had actual or constructive notice of a hostile workplace.[1]

[1] The facts viewed in a light most favorable to plaintiff are that plaintiff began employment with defendant in December 1988 as a part-time bus driver, became a permanent bus driver in August 1989, and later applied for and received a position as full-time custodian. In late February 1990, plaintiff became the night custodian at defendant's new swimming pool facility, the Community and Aquatic Center. One of plaintiff's supervisors at the pool was Kathy Knapp, the wife of another custodian defendant employed, Vern Knapp (Knapp). Plaintiff worked alone in the pool building as the night custodian.

In early 1988, before plaintiff began employment with defendant, a female employee of defendant (referred to in the record as Employee "A"), filed a sexual harassment complaint against Knapp, for which Knapp was suspended without pay for five days, transferred, placed on a three-month probation, and told that, should another incident of that nature occur, his

immediate dismissal would be recommended. Plaintiff maintained below that she was unaware of the Employee "A" incident, while defendant maintained that plaintiff learned of the incident while she worked at the pool building.

Plaintiff testified at deposition that Knapp raped her on an elevator at the pool facility in April 1990, but that she did not report the rape to defendant because Knapp's wife was her supervisor and because she was humiliated:

> Had I not worked for his wife and had been new in the building, worried about what people would think, being in a new position, had I known his history also to have something to—you know, there wasn't a witness there. I was ashamed, embarrassed, humiliated by—I didn't know who to tell to be safe and not have it spread through the district, and be embarrassed as I finished working there for the rest of my life until I retired, I hoped. But his wife was my boss, so it was a pretty—it was a pretty awkward situation for me.

Beginning around the summer of 1991, plaintiff and Terri Handlin, defendant's Director of Adult and Community Education, who worked at the pool building, had a number of conversations in which plaintiff said that while she worked alone at the pool at night she heard noises, suspected someone was outside the building, and was afraid. Plaintiff testified at deposition that she complained a lot, including to Kathy Knapp, about wanting security at the pool. Plaintiff was not sure of the source of the noises at the outset, but eventually told Handlin that she had seen Knapp outside the pool building at night, that Knapp had been calling her on her beeper while she was at work, that Knapp had gotten inside the locked pool building, and that she had asked Knapp to leave her alone. Both plaintiff and Handlin testified that plaintiff told Handlin that she wanted to handle the situation herself. Handlin testified that she asked plaintiff if she wanted her to do anything and plaintiff said no. Handlin testified that after several meetings with plaintiff, she notified Linda Schmitt VanderJagt, defendant's assistant superintendent of personnel, and Don Finch, defendant's supervisor of buildings and grounds, that plaintiff was "very excited" about the situation but did not want Handlin to do anything about it.

Finch testified that he recalled Handlin telling him that plaintiff was complaining that Knapp was paging her on her beeper. Finch testified that he thought that Handlin also mentioned that Knapp was hanging around outside the pool building while plaintiff worked. Finch testified that he thought he mentioned both to his supervisor, Paul Northuis, defendant's director of operations, and to VanderJagt, plaintiff's complaint that Knapp was paging her and hanging around outside the pool building. Finch testified that because of concerns regarding Knapp's behavior, he (Finch), VanderJagt, plaintiff, and, he believed, Northuis, and a union representative, had a meeting, that plaintiff was nervous at the meeting, and that plaintiff asked that nothing be done to Knapp. Finch also testified that he, Handlin, and plaintiff had a meeting, but could not recall whether it was before or after the previously discussed meeting.

I

It is undisputed that before plaintiff complained to Handlin about Knapp, Handlin, VanderJagt, and Finch knew of the 1988 sexual harassment complaint Employee "A" had brought against Knapp, and knew that as a result Knapp had been disciplined and warned that there could be no such further incidents.

VanderJagt testified that she met with Knapp after the meeting she had with plaintiff, a union representative, and Paul Northuis, even though plaintiff had been adamant about defendant not getting involved, and had not filed a complaint against Knapp. VanderJagt testified that she told Knapp that she had some concerns or had heard rumors, reminded him of the terms and conditions of his continued employment, and let him know that if another incident of a sexual nature occurred, she would fire him.

In September 1991, defendant transferred plaintiff to a different location, Northern High School, to work the second shift. Soon after, Knapp requested to transfer to Northern High School and was permitted to do so, apparently by Finch. At Northern, plaintiff's work activities were directed by Mark Scoby, the head custodian at Northern, and Pete Cleven, the lead night custodian at Northern. Plaintiff testified that they were both aware of Knapp's harassment of her at her prior assignment. Plaintiff testified that Knapp continually bothered her and that she complained to Scoby. After an incident in which Knapp rubbed up against plaintiff, which plaintiff also reported to Scoby, Cleven acceded to Knapp's request to work with plaintiff on August 23, 1993, and Knapp apparently exposed himself to plaintiff while they were working together near the football field. Plaintiff reported the incident, and an investigation ensued.

On September 3, 1993, during the investigation, another female custodial employee (referred to in the record as Employee "B") communicated with VanderJagt and filed a sexual harassment complaint against Knapp regarding an incident that occurred on the job in 1985. Employee "B" told VanderJagt and testified at deposition that she had attempted to report the incident to Don Finch in 1988, after she heard that another female custodial employee had been assaulted by Knapp, but the conversation did not get very far because Finch did not listen. Employee "B" testified that she told Finch she had had a problem with Knapp, and that Finch "told me ways that we could avoid problems like that," including cutting her hair and gaining weight. She testified that what she thought Finch was telling her was that she should not act so feminine. Defendant's investigation of plaintiff's and Employee B's complaints in September 1993 resulted in Knapp's employment being terminated in October 1993. Except for a brief return to work, plaintiff has not worked since the August 1993 assault.

Plaintiff's response to defendant's motion for summary disposition noted that she was not alleging that defendant was subject to liability for the rape, but, rather, that evidence of defendant's actions and failure to act before 1993 were admissible to prove the extent and nature of damages plaintiff suffered as a result of the August 1993 assault.

Plaintiff concedes that the incidents that led up to the summer 1993 "rubbing up" incident at Northern High School do not impose liability on defendant. She asserts, however, that these incidents should have raised awareness and put defendant on notice of the hostile environment, such that the subsequent August 1993 incident of Knapp exposing himself to plaintiff never should have occurred. I agree.

The pivotal issue is whether Mark Scoby, the head custodian at defendant's Northern High School, and Pete Cleven, the lead night custodian at Northern, were appropriate persons to whom plaintiff could complain. Under the factual circumstances presented here, see n 1, *supra,* including the wording of defendant's own sexual harassment policy, quoted in part in the majority opinion, I conclude that there is a genuine issue of material fact.

Plaintiff testified that Scoby and Cleven were aware of Knapp's prior harassment,[2] and that, nonetheless, Knapp was allowed to transfer to Northern High School and she was assigned to work with him. Plaintiff contends that Scoby and Cleven had control over her day-to-day duties and that she complied with defendant's sexual harassment policy by speaking to them about Knapp. Plaintiff testified that around the time of Knapp's transfer to Northern, Scoby came and talked to her about the transfer, that she told him that she was "pissed off, but that he [Scoby] better keep him the [sic] other side of the building." Plaintiff testified that Scoby told her that there was a meeting with Knapp, that Knapp was told to stay away from her, and that "[w]e'd handle it there in our building; [and that plaintiff] didn't have to go to the supervisors." Plaintiff testified that Scoby made this statement on several occasions.

Plaintiff testified that once Knapp started working at Northern, she complained about Knapp several times to Scoby, including telling Scoby that Knapp was constantly bothering her. Plaintiff testified that Scoby told her he would talk to Knapp and take care of it.

Plaintiff testified that she complained to Scoby immediately after Knapp rubbed up against her in the classroom, and within minutes Scoby put her on another assignment. That Scoby was an appropriate person for plaintiff to complain to is also supported by a letter Handlin

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[2] Plaintiff testified that when she started at Northern, her fellow custodial employees had heard "that something had happened [to plaintiff] at the pool." Plaintiff testified that Scoby asked her specifically what had happened at the pool and she responded that "it was bad." Plaintiff testified that right after she started at Northern, Knapp "was trying to apply for jobs in other parts of the district, and people were talking about it. And I remember saying to Mark [Scoby], 'I, you know, hope that he never comes to this building,'" and that Knapp "better not come on my side of the building," and that Scoby responded that she had nothing to worry about and that if there was any problem "we'll take care of it here." Plaintiff testified that although she did not state that she had been raped or assaulted, she was sure that Scoby "got the picture" and that Scoby "said himself that he knew about Vern's history and he would watch for me. He would watch out for me."

wrote plaintiff when plaintiff was transferred to Northern High School in 1991.[3] That letter states in pertinent part:

> I would like to wish you the best of luck at Northern High School. I believe that you will be happier on a more consistent schedule. *It will be helpful to have someone available to be interacting with you on a supervisory level and above all you will not have to be afraid while you are working.* [Emphasis added.]

Scoby testified at deposition that plaintiff told him that she did not want to work with Knapp once he transferred to Northern. He testified that he had notice of Knapp's transfer to Northern before it occurred, but that he did not recall asking plaintiff what she thought about Knapp transferring. Scoby testified that Knapp's responsibilities at Northern included gathering the trash in the building, which took him through the building, including plaintiff's area. Scoby testified that he recalled that, before the rubbing-up incident, plaintiff had told him something like that Knapp was hanging around her.

Cleven testified that Scoby was his supervisor and that he (Cleven) and Scoby were two of plaintiff's supervisors. He testified that as lead night custodian, he had an area to clean, but also supervised the night crew and assigned work. Cleven testified that Knapp came to him and asked to be assigned with plaintiff at the football field on the day Knapp exposed himself to plaintiff. Cleven testified that at the time he assigned plaintiff and Knapp to work together, he knew that a prior complaint of sexual harassment had been made against Knapp by Employee "A," and that Knapp had been transferred and almost lost his job as a result. Cleven also testified that plaintiff had previously told him that while she worked at the pool Knapp had "come around every now and then and kind of bugged her," that he knew that Knapp was "interested in" plaintiff, and knew that plaintiff was uncomfortable working with Knapp. Cleven testified that he nonetheless assigned plaintiff and Knapp to work together. He testified that he told VanderJagt and Northuis, after plaintiff complained in August 1993, that he thought assigning plaintiff and Knapp was okay because "he didn't think Vern [Knapp] would be that dumb." Cleven testified:

> At the time when Vern asked if Vicki could work with him on the football field, it just didn't occur to me at that time that there would be a problem, and she certainly didn't give any inclination [sic] that she had a problem going down to work with him.

II

In *Chambers v Trettco, Inc*, 463 Mich 297, 319; 614 NW2d 910 (2000), the Supreme Court ruled that "notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a

[3] Plaintiff attached the letter to her response to defendant's motion for summary disposition. The letter is on the letterhead of Forest Hills Community and Aquatic Center.

substantial probability that sexual harassment was occurring."[4] In so holding, the Supreme Court did not require that "higher management" would have been aware of a substantial probability that sexual harassment was occurring. The term "higher management" appears in *McCarthy v State Farm Ins Co*, 170 Mich App 451; 428 NW2d 692 (1988), decided twelve years before *Chambers* was decided.[5] While the nature of the supervisory responsibilities of the person or persons notified of the harassment may be a relevant consideration in evaluating whether the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that harassment was occurring, *Chambers* enunciates the test as one requiring the evaluation of the totality of the circumstances and does not speak of "higher management."

In the instant case, the harassment was by a co-worker. Both plaintiff and the co-worker had the same immediate supervisors. Plaintiff presented evidence that the supervisors were aware of the harassment. It was for the trier of fact to determine whether the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.

The majority's formulation for determining whether notice may be fairly imputed to the employer does not take into account the innumerable variations in workplaces, such as multiple levels of supervisory and managerial personnel; workers being at different locations, perhaps even different cities, or on different shifts than "management employees who have actual authority to effectuate change in the workplace"; and that the employer's sexual harassment policies may neither ask nor require workers to report harassment to persons with such "actual authority" over the harassing employee. Additionally, it is neither reasonable nor workable to require an employee subjected to workplace harassment to determine who in the chain of command has "actual authority to effectuate change in the workplace" of the harassing employee. There is no support for the imposition of such a requirement.

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[4] Regarding determining the adequacy of notice to an employer in a hostile environment sexual harassment claim, the *Chambers* Court stated:

> [W]e observed in *Radtke* [*v Everett*, 442 Mich 368; 501 NW2d 155 (1993)] that *a reasonableness inquiry, accomplished by objectively examining the totality of the circumstances, is necessary to fulfill the purposes of the Michigan Civil Rights Act. Id. at 386-387. This also holds true for an inquiry into the adequacy of notice. Therefore, notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.* See *Perry v Harris Chernin, Inc*, 126 F3d 1010, 1014 (CA 7, 1997) (the law against sexual harassment is not self-enforcing; although an employee has no duty under the law to report discriminating harassment, an employer cannot be expected to correct such harassment unless the employer has reason to know that it is occurring). [*Chambers, supra* at 319 (emphasis added).]

[5] *McCarthy*, does not define "higher management."

III

Defendant's written policy barring sexual harassment states that any employee who has been subject to sexual harassment in the workplace "is requested and encouraged to report the sexual harassment *to an appropriate supervisor* or to the Assistant Superintendent for Personnel and to cooperate in any subsequent investigation." (Emphasis added.) The policy does not define "appropriate supervisor." See *Parkins v Civil Constructors of Illinois, Inc*, 163 F3d 1027, 1035 (CA 7, 1998) (if employer's policy does not clearly specify who can receive complaints, or an identified person is not easily accessible, an employer can receive notice from a department head or someone that plaintiff "reasonably believed was authorized to receive and forward (or respond to) a complaint of harassment.") In the instant case, Scoby (and Cleven) worked at the same location as plaintiff and Knapp, and VanderJagt did not. Scoby told plaintiff that he would handle her complaints against Knapp and that she need not go to a person higher than he was, and testified that his duties included handling problems that arose between custodial personnel. Scoby reassigned plaintiff after Knapp rubbed up against her in 1993, before the incident in August 1993 when Knapp exposed himself to plaintiff. Defendant presented no evidence that, although Scoby was vested with authority to determine the work assignments of the custodial staff, he was not empowered to receive complaints of sexual harassment.[6]

In sum, plaintiff presented evidence that Scoby had the authority to assign her custodial duties, told her to report any problems she had with Knapp to him and that he would take care of them, and reassigned plaintiff when she told him that Knapp had rubbed up against her. Scoby acknowledged that he handled problems that arose between the custodial personnel. Handlin's letter to plaintiff at the time she was transferred to Northern indicates that plaintiff was expected to interact with Scoby as someone on a supervisory level. Further, Scoby told plaintiff that she need not report the problems she had with Knapp to a person higher in the chain of command than he was.

Scoby was Cleven's superior, and it is clear that at Knapp's request, Cleven, in the exercise of his actual authority to supervise the night crew and assign work, assigned Knapp to work with plaintiff at the football field on the day Knapp exposed himself to plaintiff. Under the circumstances, I conclude that there is a genuine issue of material fact whether plaintiff reported the harassment to an appropriate supervisor.

IV

Plaintiff further contends that defendant's knowledge that Knapp had harassed others is relevant to both the issue of notice and whether defendant acted reasonably in transferring Knapp to Northern and assigning him to work with plaintiff. I agree with plaintiff that defendant's knowledge that Knapp had previously harassed others may be considered in deciding whether defendant had notice of Knapp's harassing conduct. See *Dees v Johnson Controls World Services, Inc*, 168 F3d 417, 422-423 (CA 11, 1999), where the court concluded that there were

[6] I do not agree that implicit in Scoby's statement to plaintiff that he would handle any problems in the building and that she need not go to the supervisors is a recognition by Scoby that he was not an appropriate supervisor to whom to report sexual harassment under the policy.

material issues of fact whether the defendant had notice of the harassing conduct before the plaintiff complained, noting that the plaintiff had alleged that a human resources employee had told her that persons in the plaintiff's department were "up to their old tricks again," and that a similar investigation had been conducted several years earlier, and there was an allegation that another employee had complained to the human resources department on the plaintiff's behalf; see also Note, *Notice in hostile environment discrimination law*, 112 Harv L R 1977, 1979 (1999) (stating that "[t]he question whether an employer had actual notice of a hostile environment can be answered by examining whether a legally appropriate representative of the employer was aware of facts—*via any channel of communication*—indicating the possibility of a hostile environment" [emphasis added]).

Defendant's higher management, including VanderJagt, Finch, and Northuis, was aware, before plaintiff raised any concerns regarding Knapp, of Knapp's involvement in the Employee "A" incident, his resultant discipline, and that he had been admonished in writing that his immediate dismissal would be recommended if another incident of that nature occurred. Plaintiff also presented evidence that, after Employee "A" complained about Knapp, Employee "B" attempted to tell Finch that Knapp had sexually harassed her, and that Finch was not receptive.

Having in mind that plaintiff does not seek to impose liability on defendant for incidents that occurred before 1993, this information is pertinent to the issue whether plaintiff's complaints regarding Knapp provided sufficient notice that her complaints were sexual in nature. Plaintiff's pre-1993 complaints included that Knapp paged her continually while she was at work, made noises outside the pool facility at which she worked alone at night, gained entrance to the locked pool facility while plaintiff worked, made plaintiff fearful of being alone in the building, and that plaintiff told him to leave her alone.

The trier of fact could properly conclude that a reasonable employer would have been aware from these complaints, in light of Knapp's history, that there was a substantial probability that plaintiff was being sexually harassed. *Chambers, supra.*

I conclude that there is a genuine issue of material fact whether defendant had adequate notice of a hostile environment.

I would reverse.

/s/ Helene N. White