STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH ELEZOVIC,

Plaintiff,

and

LULA ELEZOVIC,

Plaintiff-Appellant/Cross-Appellee,

v

FORD MOTOR COMPANY and DANIEL P. BENNETT,

Defendants-Appellees/Cross-Appellants.

FOR PUBLICATION
October 23, 2003
9:10 a.m.

No. 236749
Wayne Circuit Court
LC No. 99-934515-NO

Updated Copy
December 30, 2003

Before: Jansen, P.J., and Neff and Kelly, JJ.

KELLY, J. *(concurring).*

I respectfully disagree with the majority's conclusion that *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 478; 652 NW2d 503 (2002), was wrongfully decided. Accordingly, I would affirm the trial court's grant of a directed verdict in favor of Bennett on plaintiff's hostile environment claim, MCL 37.2103(i)(iii), on the basis of *Jager* not because I am bound by court rule to follow it, but because it was correctly decided. I concur with the majority in all other respects.

As noted by the majority, the CRA prohibits an employer from discriminating because of sex, which includes sexual harassment. MCL 37.2202(1); MCL 37.2103(i); *Chambers v Trettco, Inc*, 463 Mich 297, 309; 614 NW2d 910 (2000); *Chambers v Trettco, Inc (On Remand)*, 244 Mich App 614, 617; 624 NW2d 543 (2001). The CRA clearly expresses the Legislature's intent that sexual harassment be strictly prohibited in this state's work environment, including the workplace of the smallest employer. MCL 37.2201(a).

The statute defines "employer" as including an agent of that employer. MCL 37.2201(a). However, the simple fact that MCL 37.2201(a) defines "employer" as including an "agent of that [employer]" does not, in and of itself, authorize a CRA claim against such an agent.[1] Rather, I read the statute as meaning that an employing entity may be held liable for the individual and collective acts of it agents. This reading is supported by *Chambers*, wherein our Supreme Court stated:

> Because the Civil Rights Act expressly defines "employer" to include agents, we rely on common-law agency principles in determining when an employer is liable for sexual harassment committed by its employees. . . .
>
> . . . The bottom line is that, in cases involving a hostile work environment claim, a plaintiff must show some *fault* on the part of the employer. That is the essence of *Radtke*'s requirement that a plaintiff prove that the employer failed to take prompt and adequate remedial action upon notice of the creation of a hostile work environment.
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> Therefore, under current Michigan law . . . the question is always whether it can be fairly said that the employer committed the violation—*either directly or through an agent*. The fact that the answer to that question may differ depending on whether the harassment is of the quid pro quo or hostile environment type is not a result of arbitrary rulemaking, but, rather, is firmly rooted in traditional agency principles. [*Chambers, supra*, 463 Mich 311-312 (emphasis added).]

Applying agency principles, a principal is responsible for the acts of its agents done within the scope of the agent's authority, "even though acting contrary to instructions." *Dick Loehr's, Inc v Secretary of State*, 180 Mich App 165, 168; 446 NW2d 624 (1989). This is because, in part, an agency relationship arises where the principal has the right to control the conduct of the agent. *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n,* 458 Mich 540, 558 n 18; 581 NW2d 707 (1998) (citations omitted). The employer is also liable for the torts of his employee if "'the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation,'" *McCann v Michigan*, 398 Mich 65, 71; 247 NW2d 521 (1976), quoting Restatement of Agency, 2d § 219(2)(d), p 481; see also *Champion v Nation Wide Security, Inc*, 450 Mich 702, 704, 712; 545 NW2d 596 (1996), citing Restatement of Agency, 2d § 219(2)(d), p 481 ("the master is liable for the tort of his servant if the servant 'was aided in accomplishing the tort by the existence of the agency relation'"). In *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 409; 605 NW2d 690 (1999), this Court stated:

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[1] This is not to say, of course, that no action at all can lie against an actor individually. Traditional tort actions, when warranted, could still be asserted against an agent in his or her individual capacity. Thus, I agree with the majority that "an agent is generally liable to a third person for misfeasance and for his own tortious acts." But, this is not the same as saying the actor is individually liable for violations of the CRA.

> The term "authority" is defined by Black's Law Dictionary to include "the power delegated by a principal to an agent." Black's Law Dictionary (7th ed), p 127. "Scope of authority" is defined in the following manner: "The reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." *Id*. at 1348.

Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Draprop Corp v Ann Arbor*, 247 Mich App 410, 415; 636 NW2d 787 (2001). As stated previously, the purpose of the CRA was to strictly prohibit discrimination in the workplace committed directly by the employer or through its agents. I agree that "the language in the definition of 'employer' concerning an 'agent' of the employer was meant merely to denote respondeat superior, rather than individual liability." *Jager, supra* at 484. This is consistent with our Supreme Court's holding in *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993), that a plaintiff must necessarily prove the element of respondeat superior in a claim of hostile environment harassment. Bringing a CRA claim against an agent of the employer in an individual capacity would render this requirement superfluous and do nothing to forward the purposes of the act. Thus, I concur in the *Jager* Court's conclusion that the inclusion of "agent" within the definition of "employer" "does not signal an intent by the Legislature to make individuals as well as employers liable under the act." *Jager, supra* at 483-484.

Accordingly, I disagree with the majority that *Jager* was wrongly decided and I would affirm the trial court's grant of a directed verdict in favor of Bennet.

/s/ Kirsten Frank Kelly