

STATE OF MICHIGAN
COURT OF APPEALS

TONI DAVIS,

Plaintiff/Counter-Defendant,

v

DEPARTMENT OF NATURAL RESOURCES,

Defendant/Counter-Plaintiff/
Cross-Defendant-Appellant,

and

J.D. SNYDER,

Defendant/Counter-Plaintiff/
Cross-Plaintiff-Appellee.

UNPUBLISHED

January 31, 1997

No. 180676

Ingham Circuit Court
LC No. 92-73575-NZ

Before: Smolenski, P.J., and Holbrook, Jr., and F.D. Brouillette,* JJ.

PER CURIAM.

Cross-defendant Department of Natural Resources (DNR) appeals as of right from a final order of the circuit court, which challenged an earlier order granting summary disposition of cross-plaintiff J.D. Snyder's claim for attorney fees. We vacate the challenged order.

Plaintiff Toni Davis brought this action against the DNR, her former employer, and Snyder, her former supervisor, asserting that she had been sexually harassed by Snyder. The DNR refused Snyder's request that the DNR pay his attorney fees in defending the action. Snyder, who was no longer employed by the DNR when the lawsuit arose, did not pursue his administrative remedies regarding this decision, but instead brought a cross-claim against the DNR for payment of his attorney fees. Snyder subsequently moved for summary disposition on his cross-claim pursuant to MCR

* Circuit judge, sitting on the Court of Appeals by assignment.

2.116(C)(10), arguing that, as a member of the classified civil service, the DNR was required to pay his attorney fees pursuant to Civil Service Commission Rule 1-6.1. The DNR moved for dismissal of Snyder's cross-claim on the grounds that he had not exhausted his administrative remedies. The circuit court denied the DNR's motion to dismiss and granted Snyder's motion for summary disposition, finding that no question of fact existed that Snyder had acted in the course of his employment and that a reasonable basis existed for his belief that his conduct was within the scope of his authority. The DNR's motion for reconsideration was denied by the circuit court.

On appeal, we find the circuit court's ruling to be erroneous. The administrative rule upon which Snyder relies for his claim to attorney fees, CSC Rule 1-6.1, is premised on similar principles as those that underlie vicarious liability of an employer for the tortious conduct of an employee. That is, Rule 1-6.1 provides for the payment of the services of an attorney where a civil action is commenced against an employee whose actionable conduct was committed "in the course of employment" and who had "a reasonable basis for believing that the conduct was within the scope of the authority delegated to the employee." Similarly, MCL 691.1407(2); MSA 3.996(107)(2) provides that a governmental agency can be held vicariously liable only when its employee, acting during the course of employment and within the scope of authority, commits a tort while engaged in a nongovernmental or proprietary activity.

Whether a tort was committed within the scope of employment is ordinarily a question of fact; however, it becomes a question of law where the undisputed facts would not support an inference that the employee was acting in the course of and within the scope of his employment. *Bryant v Brannen*, 180 Mich App 87, 100-102; 446 NW2d 847 (1989) (citing 1 Restatement Agency, 2d, §§ 229, 231, 235). Here, plaintiff brought an employment grievance against Snyder, who at that time was her supervisor, alleging that he had sexually harassed her by standing close to her, touching and kissing her, and pressuring her to attend a party with him. The grievance officer determined that plaintiff had been sexually harassed, and Snyder did not appeal that determination. While sexual assaults committed in the workplace are not per se outside the scope of an employee's employment, it is clear in this case that Snyder's conduct was committed for purely personal reasons and it was not alleged in the administrative proceeding that the agency ratified the conduct. See, e.g., *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351; 288 NW2d 424 (1979). Cf. *Bryant, supra* at 108-110 (Holbrook, Jr., J., dissenting). Thus, as a matter of law, Snyder's conduct was not committed in the course of employment and he could not have had a reasonable basis for believing that the conduct was within the scope of authority delegated to him by the DNR. Accordingly, the DNR had no liability under Rule 1-6.1 to pay for an attorney's services in plaintiff's civil action against Snyder.

The circuit court order granting attorney fees to cross-plaintiff Snyder is vacated.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Francis D. Brouillette