# STATE OF MICHIGAN

# COURT OF APPEALS

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KIMBERLY YOST,

Plaintiff-Appellant,

v

PAYCHEX, INC. and KENT WEHNER,

Defendants-Appellees.

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UNPUBLISHED
September 29, 1998

No. 199135
Oakland Circuit Court
LC No. 95-503415 CL

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Plaintiff Kimberly Yost appeals as of right a final order granting summary disposition in favor of defendant Paychex, Inc., and defendant Kent Wehner. We affirm in part, reverse in part and remand.

Because this case was decided below by summary disposition, we will recite the facts in a light most favorable to plaintiff. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The documentary evidence, primarily plaintiff's deposition testimony, indicates that in August, 1988, plaintiff began working for Paychex. In Fall, 1989, plaintiff became a sales representative in Paychex's Detroit office. In February, 1990, Wehner became plaintiff's supervisor. Plaintiff and Wehner worked together without incident from February, 1990, until they attended a Paychex conference held at a Florida hotel in October, 1991. On the first night of the conference Wehner allegedly raped plaintiff in the hotel's hot tub.[1] Plaintiff did not report this incident to Paychex at this time. Plaintiff voluntarily resigned from Paychex in February, 1993, and began working for another company. Sometime between the October, 1991, alleged rape and plaintiff's February, 1993, resignation, Wehner touched plaintiff twice during working hours at Paychex, once pressing himself up against her back and once putting his hands on her shoulders, touching her hair and running his hands down her back. Plaintiff could not recall specifically when these incidents occurred, only that they probably occurred close in time to when she left Paychex in February, 1993. Plaintiff did not report these incidents to Paychex at this time

In August, 1994, plaintiff voluntarily resigned her other employment and voluntarily returned to Paychex knowing that Wehner would again be her supervisor. Approximately one week after plaintiff returned to Paychex, Wehner commented in front of plaintiff and another Paychex employee that he (Wehner) "was going to request a hot tub be put in" while certain offices were being remodeled. In December, 1994, Wehner allegedly made unwelcome sexual remarks to plaintiff while the two of them were in a bar after working hours and then allegedly sexually assaulted her, including kissing her and touching her breasts, after following her to her vehicle.[2] Plaintiff did not report this incident to Paychex at this time.

In late May, 1995, several incidents occurred at Paychex that caused plaintiff to believe that Wehner was retaliating against her. On Friday, May 26, 1995, plaintiff left work at noon. Over the weekend, plaintiff knew that she could never return to Paychex while Wehner was there. By the following Tuesday plaintiff had decided to quit Paychex. On Friday, June 2, 1995, plaintiff told Suzanne Teich, a Paychex corporate human resources employee, about Wehner's October, 1991, alleged rape and December, 1994, alleged assault. Teich conducted an investigation and ultimately told plaintiff that she (Teich) had found nothing to substantiate plaintiff's claims. Teich told plaintiff that if plaintiff returned to Paychex plaintiff would not have to report to Wehner, but rather could report to another Paychex employee. Plaintiff did not return to Paychex. Plaintiff testified that she would only come back to Paychex if Wehner was gone. On approximately June 21, 1995, plaintiff sent a letter of resignation to Paychex. On approximately June 26, 1995, plaintiff opened a certified letter she had received from Paychex on approximately June 20, 1995. The letter was dated June 16, 1995, and stated that Paychex would consider plaintiff to have voluntarily resigned from her employment if she did not contact Paychex with three days of her receipt of the letter.

On August, 30, 1995, plaintiff initiated the present suit against Paychex and Wehner. In May, 1996, plaintiff filed a first amended complaint containing four counts. Count one alleged two theories: first, that Paychex, through the actions of its employees and agents, including Wehner, sexually harassed plaintiff in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*, and second, that plaintiff was constructively discharged by Paychex as a result of the sexual harassment. During subsequent proceedings below, it became clear that plaintiff's sexual harassment claim was premised on a theory of hostile work environment. Count two of the complaint alleged that plaintiff was constructively discharged by Paychex in retaliation for opposing civil rights violations. Count three alleged that Wehner assaulted and battered plaintiff in October, 1991, and December, 1994, and that Paychex was also vicariously liable for this conduct. Count four alleged that defendants were liable for intentional infliction of emotional distress.

Wehner and Paychex each individually moved for summary disposition of all claims on various grounds pursuant to MCR 2.116(C)(7), (8) and (10). Following oral argument on the motions, the trial court granted summary disposition pursuant to MCR 2.116(C)(7) with respect to the allegations in all four counts concerning the October, 1991, alleged rape on the ground that these allegations were barred by the statute of limitation applicable to each claim. The trial court granted summary disposition pursuant to MCR 2.116(C)(8) and (10) with respect to plaintiff's remaining allegations.

We begin by stating the applicable standard of review. In granting summary disposition of plaintiff's claims, the trial court clearly considered documentary evidence outside the pleadings.

Thus, we will treat the motions as having been granted pursuant to MCR 2.116(C)(7) and (10). *Atkinson v Detroit*, 222 Mich App 7, 9, 12; 564 NW2d 473 (1997). This Court reviews de novo a circuit court's grant of summary disposition. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340; 573 NW2d 637 (1997). A motion for summary disposition under MCR 2.116(C)(7) may be granted when a claim is barred. *Atkinson, supra*. Whether a cause of action is barred by a statute of limitation is a question of law that is likewise reviewed de novo. *Ins Comm'r, supra*. Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition under MCR 2.116(C)(7) is inappropriate. *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 340; 568 NW2d 847 (1997). To determine whether a genuine issue of material fact exists, this Court construes plaintiff's well-pleaded allegations in plaintiff's favor and considers the pleadings and documentary evidence submitted by the parties. *Id*. Where no material facts are in dispute, this Court may decide the question as a matter of law. *Id*.

A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. *Radtke, supra* at 368. Summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Id*. (quoting MCR 2.116[C](10]). The reviewing court must consider the documentary evidence in favor of and grant the benefit of any reasonable doubt to the opposing party. *Radtke, supra*.

We now turn to the issues raised by plaintiff with respect to the dismissal of her hostile work environment claim. We first address plaintiff's argument that the trial court erred in ruling that the allegations concerning the October, 1991, alleged rape were barred by the applicable statute of limitation for purposes of her hostile work environment claim.

In this case, plaintiff filed her original complaint on August 30, 1995. The general rule is that an action alleging employment discrimination under the ELCRA must be brought within three years after the cause of action accrued. *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343; 483 NW2d 407 (1992) (citing MCL 600.5805[8]; MSA 27A.5805[8]). Under this rule, the October, 1991, alleged rape clearly predates the filing of plaintiff's complaint by more than three years and is therefore untimely.

However, plaintiff argues that the October, 1991, alleged rape is closely connected to Wehner's other timely acts of sexual harassment, i.e., the December, 1994, alleged assault, the "hot tub" comment, and the two touchings.[3] Plaintiff contends that therefore the continuing violation doctrine enunciated in *Sumner v The Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), applies in this case such that she may base her hostile work environment claim on all of Wehner's acts of sexual harassment. The trial court rejected this argument below, stating:

> Plaintiff offers no case law or legal authority as precedents for the argument that [the connectedness of the acts] is sufficient to constitute a continuing violation where, as here, the Plaintiff has voluntarily resigned her employment and then subsequently initiates her rehire over one year later. This Court cannot ignore that Plaintiff Yost was under no obligation to return to work at Paychex. It is significant that Plaintiff returned for a

> second period of employment with the knowledge that she would again be supervised by Defendant Wehner. . . . This Court therefore finds that there was no continuing violation . . . .

In *Sumner*, our Supreme Court held that under certain circumstances the continuing violation doctrine permits a plaintiff proceeding under the ELCRA to recover for acts of discrimination that are otherwise untimely. *Id*. at 525; see also *Phinney v Perlmutter*, 222 Mich App 513, 545; 564 NW2d 532 (1997); *Meek, supra* at 343-344. The *Sumner* Court explained the rationale behind the continuing violation doctrine as follows:

> The doctrine was developed by the federal courts in the context of Title VII of the federal Civil Rights Act, and continues to play an important role in federal discrimination law. . . . .
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> * * *
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> In the late 1960's, federal courts began to refuse to automatically dismiss cases where the complaint had not been filed in a timely fashion. These courts expressed concern with a number of factors which they felt militated against a strict application of the limitation requirement. First, Title VII is a remedial statute whose purpose is to root out discrimination and make injured parties whole. Second, employees are generally lay people, who do not know that they must act quickly or risk losing their cause of action. An employee may fear reprisal by the employer, or may refer the matter to a union, which may not take any action within the limitation period. Employees may also delay their complaints in the hope of internal resolution or simply to give the employer a second chance. Third, and most importantly, many discriminatory acts occur in such a manner that it is difficult to precisely define when they took place. One might say they unfold rather than occur. [*Id*.]

This case involves that aspect of the continuing violation doctrine known as the "continuing course of conduct" subtheory. *Id*. at 528; *Phinney, supra* at 546.[4] This subtheory is "relevant where an employee challenges a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern, only one of which occurred within the limitation period." *Sumner, supra*. In *Sumner*, our Supreme Court noted that in *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983), the Fifth Circuit Court of Appeals

> aptly described the factors to be considered in determining whether a continuing course of discriminatory conduct exists:
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> "The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (*e.g.*, a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of

> permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?" [*Sumner, supra* at 538 (quoting *Berry, supra*).]

The continuing violation doctrine makes damages available for the entire course of discriminatory conduct. *Sumner, supra* at 543. However, the mere existence of continuing harassment is insufficient to invoke the continuing violation doctrine if none of the relevant conduct occurred within the limitation period. *Id*. at 539. In other words, there must be present violation, i.e., "a discriminatory act within the limitation period." *Id*. at 527.

In this case, there is no question but that plaintiff has alleged discriminatory acts within the limitation period, i.e., the December, 1994, alleged assault, the "hot tub" comment and the two touchings. Thus, we must evaluate the subject matter, frequency and permanence of all of the alleged discriminatory acts to determine whether the continuing course of conduct subtheory applies in this case.

In this case, the alleged acts involve the same subject matter, i.e., sexual conduct or communication directed at plaintiff by Wehner.

With respect to the frequency factor, we note that Wehner's sexual harassment, consisting of approximately five incidents separated by intervals of months or longer over an approximately 3½year period, did not occur regularly like a biweekly paycheck. In *Selan v Kiley*, 969 F2d 560, 567 (CA 7, 1992), the federal court found that a two-year separation between alleged acts of discrimination weighed heavily against finding a continuing violation. However, *Selan* did not involve a claim of hostile work environment. In *Waltman v International Paper Co*, 875 F2d 468 (CA 5, 1989), the federal court cautioned against placing too much weight on the lapse of time between specific instances of harassment in a hostile environment case:

> It is noteworthy that since this court's decision in *Berry*, the Supreme Court decided [*Meritor Savings Bank v Vinson*, 477 US 57; 106 S Ct 2399; 91 L Ed 2d 49 (1986)], which established that a plaintiff can bring a claim for sexual harassment based on acts that created a "hostile environment." The *Meritor Savings Bank* decision is relevant to the continuing violation theory because a hostile environment claim usually involves a continuing violation. In a hostile environment, an individual feels constantly threatened even in the absence of constant harassment. Thus, in looking at the frequency of harassment, the focus should not be a mechanical calculation. Rather, in light of *Meritor Savings Bank*, the court should review the pattern and frequency of the harassment and determine whether a reasonable person would feel that the environment was hostile throughout the period that formed the basis of the plaintiff's claim. [*Waltman, supra* at 476 (emphasis supplied).]

We will assume, without deciding, for purposes of our analysis of the continuing violation doctrine, that a reasonable person would feel that plaintiff's work environment at Paychex was hostile throughout the period that forms that basis of plaintiff's hostile work environment claim.

With respect to the permanence factor, many courts take the view that, unlike a discrete instance of discriminatory conduct such as a discharge, a pattern of harassment does not so easily put an employee on notice that his rights have been violated. *Huckabay v Moore*, 142 F3d 233, 239 (CA 5, 1998). For instance, the court in *Waltman* explained as follows:

> Acts of harassment that create an offensive or hostile environment generally do not have the same degree of permanence as, for example, the loss of promotion. If the person harassing a plaintiff leaves his job, the harassment ends; the harassment is dependent on a continuing intent to harass. In contrast, when a person who denies a plaintiff a promotion leaves, the plaintiff is still without a promotion even though there is no longer any intent to discriminate. In this latter example, there is an element of permanence to the discriminatory action, which should, in most cases, alert a plaintiff that her rights have been violated.

See also *Sumner, supra* at 538-539; *Phinney, supra* at 548; *Meek, supra* at 345.

However, where the evidence establishes that the employee was aware of but simply failed to assert his rights, the courts will not apply the continuing violation doctrine in even a harassment case. For example, in *Bell v Chesapeake & O R Co*, 929 F2d 220 (CA 6, 1991), a case involving a claim of racial harassment, the federal court stated as follows:

> Finally, with respect to the third element of the *Sumner* doctrine, the court held that each of the acts [plaintiff] complained of should have made him aware that he had suffered injury, thereby imposing on him the duty to bring his action within the limitation period. For example, the 1982 incident involving the KKK poster was plainly an act of racial hostility. It is inconceivable that [plaintiff] did not know that he was a victim of racial harassment at that time, since he complained about it to his superiors. [Plaintiff] maintains that he took no other action—including legal action—at that time because he had decided that the best way to handle racial hostility encountered at work was to keep a low profile. If so, his failure to bring timely suit was a result of his own decisions, not a failure to apprehend injury. [*Id*. at 225.]

See also *Williams v Enterprise Leasing Co of Norfolk/Richmond*, 911 F Supp 988 (ED Va, 1995).

Finally, we consider a sexual harassment case that, like this case, involves application of the continuing violation doctrine to an untimely allegation of rape. In *Martin v Nannie and the Newborns, Inc*, 3 F3d 1410, 1412 (CA 10, 1993), the female plaintiff was employed by the defendant, Larry Gudgel, and served in various capacities in companies owned by Gudgel. Throughout her employment the plaintiff was continuously subject to acts of sexual harassment by Gudgel and several of Gudgel's employees. *Id*. at 1412-1413. In particular, plaintiff alleged that at one point she was raped by Gudgel. *Id*. at 1413. When plaintiff finally filed suit alleging, in part, sexual harassment under Title VII, many of the acts of sexual harassment were untimely, including the alleged rape. *Id*. at 1413-1414. The federal district court therefore granted the defendants' motion for summary judgment on the ground

that the plaintiff's sexual harassment claim was time barred. *Id*. Plaintiff appealed, arguing that the continuing course of conduct subtheory applied to her claim. *Id*. at 1414-1415.

The Tenth Circuit Court of Appeals held that for purposes of summary judgment a question of fact existed concerning the existence of a continuing violation. *Id*. at 1416. In reaching this holding, the court applied the *Berry* factors, reasoning as follows:

> First, all the incidents alleged by the plaintiff involved sexual harassment. Second, the incidents are alleged to have occurred consistently and frequently over the course of her employment. [Plaintiff's] complaint asserts that she was harassed from the beginning of her employment until she was fired and her deposition describes a fairly continuing pattern of sexual harassment. She claims that her employers allowed an atmosphere of sexual harassment to exist even after they had notice. She also claims that as a result of the harassment, and her rejection of unwelcome sexual advances, she was given unsatisfactory job reviews and was ultimately terminated. Finally, she asserts that the harassment constitutes a "continuous course of conduct." . . . The third factor of permanence is more difficult for [plaintiff]. Certainly, some of the events, including the alleged rape, should have been reported at the time they occurred. She allowed this sexual harassment to continue for a long time before she filed a complaint with the EEOC. However, given the analysis under the first two factors, we believe that [plaintiff] has shown enough to avoid summary disposition on the statute of limitations issue. The district court will, of course, be free to evaluate these factors in light of the evidence as it develops at trial. [*Martin, supra* at 1415-1416.]

We believe that a rape has a degree of permanence that is more akin to a discrete act of discrimination like the loss of a promotion, such that a plaintiff will be alerted to the fact that her rights have been violated. Like *Martin*, the alleged rape in this case should have been reported. However, we believe that *Martin* gives too little weight to the permanency factor, which is the most important factor in the analysis. See *Sumner, supra* at 427 (quoting *Berry, supra* at 981); see also *Williams, supra*. Indeed, the continuing violation doctrine is premised on the equitable notion that a statute of limitation should not begin to run until a reasonable person would be aware that his or her rights have been violated. *Martin, supra* at 1415, n 6; *Hicks v Big Brothers/Big Sisters of America*, 944 F Supp 405, 407 (ED Pa, 1996).

In this case, even viewing plaintiff's well-pleaded allegations and the documentary evidence submitted by the parties in plaintiff's favor, we conclude that there is no factual dispute but that at the time of the October, 1991, alleged rape plaintiff was aware this act constituted a violation of her rights but she declined to assert these rights for various reasons, all of which were unrelated to a failure to apprehend injury.[5] Accordingly, we conclude as a matter of law that the continuing violation doctrine is inapplicable in this case. *Traver Lakes, supra*. We conclude that the trial court did not err in granting summary disposition pursuant to MCR 2.116(C)(7) of that portion of plaintiff's hostile work environment claim premised on the October, 1991, alleged rape because these allegations are time barred.

Next, plaintiff argues that the trial court erred in granting summary disposition of her hostile work environment claim premised on Wehner's timely alleged acts of sexual harassment.

In *Radtke, supra* at 382, our Supreme Court stated that a prima facie case of a hostile work environment consists of the following five elements:

> (1) the employee belonged to a protected group;
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> (2) the employee was subjected to communication or conduct on the basis of sex;
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> (3) the employee was subjected to unwelcome sexual conduct or communication;
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> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
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> (5) respondeat superior.

In this case, the trial court found that plaintiff had established the first and second elements but had not established the third and fourth elements of her prima facie case. With respect to the third element, the court noted that there was insufficient evidence that plaintiff had been subjected to unwelcome sexual conduct or communication during Wehner's December, 1994, alleged assault. With respect to the fourth element, the court noted that there was no evidence that the December, 1994, alleged assault, which had occurred outside of the workplace, was ever tied into plaintiff's work environment. The court also noted that the remaining incidents of harassment, even if offensive to plaintiff, did not rise to the level of an intimidating, hostile or offensive work environment under a reasonable person standard. The court did not address the fifth element of respondeat superior. On appeal, plaintiff argues that the trial court's rulings with respect to the third and fourth elements were error. Plaintiff also contends that she can establish the element of respondeat superior.

With respect to the third element of plaintiff's prima facie case, the threshold for determining that conduct is unwelcome is that the employee did not solicit or incite the conduct and regarded the conduct as undesirable. *Id*. at 384. In this case, there is no evidence indicating that plaintiff solicited or incited Wehner's "hot tub" comment or his two acts of touching. Plaintiff testified that she considered Wehner's touchings to be offensive or unwelcome sexual acts.

With respect to the December, 1994, alleged assault, plaintiff testified that she went to a bar with some coworkers after working hours and that Wehner unexpectedly arrived at the bar sometime later. Plaintiff testified that eventually only plaintiff, Wehner and another woman remained and that Wehner insisted that he buy the women a drink. Plaintiff testified that after the drink she told the woman to wait for her while she went to the restroom. Plaintiff testified that she wanted the woman to wait so that she could leave with this woman. Plaintiff testified that when she returned from the restroom, the woman had already left to go home. Plaintiff testified that she wanted to leave but that Wehner insisted

she stay because he wanted plaintiff to tell him why her relationship with another Paychex employee, Mary Ann Kerr, had deteriorated. Plaintiff testified that she explained to Wehner that Kerr had gotten angry because she (plaintiff) had gone on a date with one of Kerr's boyfriends. Plaintiff testified that she and Wehner had a conversation about plaintiff dating this man, and that she told Wehner that when this man had wanted the relationship to get "physical" and had made "advances" while she was in this man's apartment she had gotten up and left the apartment because she had no interest in this man.

Plaintiff testified that at this point Wehner stated that "he was really sexually excited" and that "he wanted to have sex with [plaintiff]." Plaintiff testified that when she told Wehner that she would not have sex with him Wehner stated "'well, let's just go back to my house and get each other on.'" Plaintiff testified that she told him "no" and that she asked him about his wife. Plaintiff testified that Wehner stated that his wife was out of town. Plaintiff testified that Wehner repeated "a couple of times how sexually attracted he had been to me," that he stated he had not had an opportunity to enjoy "what he considered to be our sexual encounter back in '91," and that he stated he thought "it would be better this time." Plaintiff testified she then observed a former Paychex employee in the bar, and that she walked over and began talking to this person. Plaintiff testified that she waited for Wehner to leave the bar and that she then left.

Plaintiff testified that the bar's entrance consisted to two sets of doors, and that when she went through the first set of doors Wehner was "waiting in the doorway behind the door." Plaintiff testified that Wehner stated that he wanted to walk her to her vehicle, that she kept walking and did not say anything to him, and that he followed her to her vehicle. Plaintiff testified that she did not remember Wehner's exact words as they were walking to her vehicle but that Wehner continued to ask her to go to his house. Plaintiff testified that her vehicle was locked and that she clicked her remote to unlock her vehicle. Plaintiff testified that she then turned around and put her back against the driver's side door. Plaintiff testified that she was not wearing a coat and that she had on a blouse and double breasted suit jacket. Plaintiff testified that Wehner pressed her up against the vehicle and began trying to pull open her lapels. Plaintiff testified that she believed Wehner was trying to touch her breasts. Plaintiff testified that Wehner did not touch her breasts and that she pushed him away. Plaintiff testified that Wehner looked "absolutely furious," and that she "thought he was going to fire [her] right on the spot."

Plaintiff testified that it started to rain or snow and that she told Wehner she would give him a ride to his vehicle if he promised to keep his hands off her. Plaintiff testified that Wehner stated "'I won't touch you." Plaintiff testified that she drove Wehner to his vehicle and put her vehicle in park. Plaintiff testified that Wehner pulled her toward him, kissed her on the mouth and touched her breasts. Plaintiff testified that she pushed him away and told him that she was divorced and vulnerable, that "being single [she] could fall in love with him again,"[6] and that she "didn't want to destroy his family." Plaintiff testified that at this point she "wanted out of that situation," and that she "would have said anything to get him out of that vehicle without having him be angry with me." Plaintiff testified that she made her comments to Wehner to "kind of put the idea of a fatal attraction in his head" with the hope that it would "frighten him enough to get him to the point where he would leave without being angry with me." Plaintiff testified that Wehner then left her vehicle.

Viewing this evidence in a light most favorable to plaintiff, *id*. at 374, it appears that plaintiff repeatedly attempted to rebuff Wehner's persistent and escalating sexual comments and conduct, first by refusing his sexual requests in the bar, second by trying to leave his presence in the bar and then by physically pushing him away outside her vehicle. Plaintiff may have made a poor choice in then allowing Wehner into her vehicle, but she did so only after she perceived him as becoming so angry that she believed he was going to fire her and then only when he promised that he would not touch her. Once inside the vehicle, plaintiff again pushed Wehner away and finally lied to him in order to frighten him. We conclude that the evidence raises questions of fact concerning whether plaintiff solicited or incited any of Wehner's alleged acts of harassment and whether she regarded his conduct as undesirable. The trial court thus erred in ruling that plaintiff had not satisfied the third element of her prima facie case of hostile work environment.

With respect to the fourth element of a prima facie case of hostile work environment, the *Radtke* Court explained:

> The essence of a hostile work environment action is that "one or more supervisors or co-workers create an atmosphere so infused with hostility toward members of one sex that they alter the conditions of employment for them." . . . Hence, "a loss of a tangible job benefit is not necessary since the harassment itself affects the terms or conditions of employment." . . . This is so because "[t]he employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a 'condition' of her employment." [*Id*. at 385 (citations omitted).]

Whether a hostile work environment existed is determined by whether a reasonable person, in the totality of the circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile or offensive work environment. *Id*. at 394. The totality of the circumstances may include the frequency of the conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with the employee's work performance. *Quinto v Cross & Peters Co*, 451 Mich 358, 370, n 9; 547 NW2d 314 (1996).

Plaintiff is correct in asserting that a single incident of sexual harassment may create a hostile environment. *Radtke, supra* at 395. However, as further explained in *Radtke*, such incidents are rare and must constitute an extremely traumatic experience such as alleged rape or violent sexual assault. *Id*. Accordingly,

> [b]ecause a single incident, unless extreme, will not create an offensive, hostile or intimidating work environment . . . . a plaintiff usually must prove that (1) the employer failed to rectify a problem after adequate notice,[7] and (2) a continuous or periodic problem existed or a repetition of an episode was likely to occur. [*Id*.]

In this case, evidence was submitted that plaintiff's work performance dropped during her second period of employment to the extent that she was placed on a performance review.

Wehner's timely alleged acts of sexual harassment were somewhat sporadic. Certainly some severity attaches to the December, 1994, alleged assault where it was both physically and sexually threatening. However, this assault arguably was not that rare traumatic experience that could, alone, create an offensive or hostile work environment. But, Wehner's hot tub comment, when taken in context of the October, 1991, alleged rape, certainly takes on a sinister significance. Moreover, the evidence of all of the incidents of alleged harassment, including the October, 1991, alleged rape, arguably reveal a pattern of major episodes of physical and sexual assault with intervening minor episodes of sexual conduct or communication arguably intended to evoke the major episodes. This evidence raises the inference both that a continuous or periodic problem existed and that a repetition of a major episode was likely to occur.

However, we have already ruled that allegations concerning the October, 1991, alleged rape are time barred. However, evidence that is inadmissible for one purpose may be admissible for another purpose. MRE 105. In *Sumner*, our Supreme Court noted that "untimely acts 'may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue . . . .'" *Id*. at 527 (quoting *Evan, supra* at 558.). In the constructive discharge case of *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 325, n 15; 577 NW2d 881 (1998), our Supreme Court stated that numerous discriminatory acts outside the limitation period were relevant to determining the reasonableness of an employee's resignation that occurred within the limitation period. Here, in order to establish the fourth element of her prima facie case of hostile work environment, plaintiff must create a question of fact concerning whether a reasonable person, in the totality of the circumstances, would have perceived the conduct at issue as substantially interfering with plaintiff's employment or having the purpose or effect of creating an intimidating, hostile or offensive work environment. *Radtke, supra* at 394. We believe that evidence of the October, 1991, alleged rape is relevant[8] to this element of plaintiff's prima facie case because it puts the "hot tub" comment in a more sinister context and, together with the evidence of Wehner's timely acts of harassment, tends to indicate that a continuous or periodic problem existed or that a repetition of a major episode was likely to occur. *Radtke, supra* at 394. In viewing the totality of the circumstances in a light most favorable to plaintiff, we conclude that a question of fact exists on the fourth element of plaintiff's prima facie case. *Id*. at 374. The trial court erred in ruling otherwise.

Finally, plaintiff contends that she can establish the element of respondeat superior, i.e., that Paychex had either actual or constructive notice of Wehner's conduct. Conversely, Paychex argues that the facts do not support a finding of respondeat superior. However, as indicated previously, although raised below, the trial court did not rule on this issue[9] and we decline to do so because we are unable to conclude that all the necessary facts for resolution of this issue are before this Court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

In summary, we reverse the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) of that portion of plaintiff's hostile work environment claim premised on Wehner's timely alleged acts of sexual harassment. We remand this claim for further proceedings consistent with this opinion.[10]

Next, plaintiff claims that the trial court erred in granting summary disposition of her constructive discharge claim.

As explained in *Champion v Nation Wide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996):

> [T]he law does not differentiate between employees who are actually discharged and those who are constructively discharged. In other words, once individuals establish their constructive discharge, they are treated as if their employer had actually fired them. . . . The decision to terminate in a constructive discharge case, therefore, is imputed to the employer.

A constructive discharge "occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign. *Id*.

Constructive discharge is not, itself, a cause of action, but rather a defense to the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). Thus, in *Vagts*, *supra*, this Court stated that "an underlying cause of action is needed where it is asserted that a plaintiff did not voluntarily resign but instead was constructively discharged." In *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 796; 369 NW2d 223 (1985), this Court stated that a plaintiff "can make a jury-submissible case for constructive discharge by showing discrimination plus aggravating circumstances." And, in *Radtke*, our Supreme Court stated as follows in response to the plaintiff's argument that in addition to alleging a prima facie case of hostile work environment, she had also alleged that she had been constructively discharged by the defendants' sexual harassment:

> Plaintiff also alleged that she was constructively discharged by defendants' conduct. Because a finding of sexual harassment is a necessary predicate in the instant case to such a claim, we need not consider count II of her complaint at this time. Plaintiff must first establish the requisite statutory sexual harassment before a claim of additional aggravating circumstances is considered. [*Id*. at 372, n 1.]

As indicated previously in this opinion, plaintiff's theory of constructive discharge is that Wehner's sexual harassment, by itself or in combination with defendants' retaliation against plaintiff, rendered plaintiff's working conditions so intolerable that she was forced to resign. The trial court granted summary disposition of plaintiff's constructive discharge claim on the ground that there was insufficient evidence that plaintiff had been forced to resign as a result of either Wehner's sexual harassment or defendants' retaliation. The court also found that plaintiff had failed to show any causal connection between her departure from Paychex and the acts she complained of.

We first turn to the question whether plaintiff has established a claim of retaliation. To establish a prima facie case of unlawful retaliation under the ELCRA, a plaintiff must show

> (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. [*DeFlavis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

With respect to retaliation by Wehner, plaintiff contends that she opposed a violation of the ELCRA, and therefore engaged in a protected activity,[11] when she refused Wehner's advances during the December, 1994, assault. We will assume plaintiff is correct in this regard for the purpose of our analysis only. Plaintiff contends that Wehner thereafter retaliated against her by (1) giving and then taking away leads; (2) speaking to her in a disrespectful and degrading manner; (3) cutting her sales territory; (4) slamming the door in her face when she attempted to discuss with him the cut of her territory; (5) threatening her with termination if she did not return to work, and (6) giving the sales territory of another Paychex employee who was moving elsewhere to a new employee rather than plaintiff. Plaintiff claims that these adverse employment actions compelled her to resign.

However, the incident where Wehner allegedly gave and then took leads away from plaintiff occurred in August, 1994, before she opposed his advances in December, 1994. We thus find no causal connection between plaintiff's protected activity and the alleged adverse employment action.

Plaintiff testified that between August, 1994, and June, 1995, Wehner spoke to her in a disrespectful and degrading manner usually when she and he were in a one-on-one meeting. Plaintiff testified that after she returned to Paychex in August, 1994, she had less than five one-on-one meetings with Wehner and that these meetings lasted anywhere from thirty seconds to ten minutes. Where it appears that Wehner spoke to plaintiff in a degrading and disrespectful manner both before and after she opposed his advances in December, 1994, we conclude that plaintiff has failed to establish a causal connection between plaintiff's protected activity and the alleged adverse employment action.

Although Wehner apparently gave a territory to a new Paychex employee, this incident occurred after plaintiff obtained her desired Southfield territory in February, 1993. Accordingly, we find no causal connection between plaintiff's protected activity and the alleged adverse employment decision.

The incidents where Wehner allegedly cut plaintiff's sales territory, slammed a door in her face and threatened her with termination occurred some five months after she opposed his December, 1994, advances. Moreover, there is no direct evidence that Wehner cut plaintiff's sales territory in May, 1995. Rather, plaintiff infers that Wehner cut her territory at that time from a statement by Wehner's secretary that plaintiff was getting "shafted" with respect to a new territory she was to receive effective June 1, 1995 because of a realignment of territories at the end of the fiscal year. However, as previously indicated, after plaintiff opposed Wehner's advances in December, 1994, plaintiff obtained her desired Southfield territory. In addition, Wehner's alleged threat of termination occurred after plaintiff left Paychex and subsequently left Wehner a message falsely indicating that she was going Florida for three days. Plaintiff knew that it was unacceptable for her to take three days off when she

was under her sales quota.[12] We conclude that plaintiff has failed to establish a causal connection between her protected activity and any of these alleged adverse employment actions.

Thus, even viewing the evidence in a light most favorable to plaintiff, we conclude that plaintiff has failed to establish a causal connection between her protected activity and any of Wehner's alleged adverse employment actions. Accordingly, we conclude plaintiff has failed to establish a prima facie case of retaliation by Wehner.

With respect to retaliation by Paychex, plaintiff argues that after she complained to Suzanne Teich about Wehner's conduct Paychex retaliated against her by offering to have her report to another employee who would in turn report to Wehner, thus leaving her in such an intolerable situation that she had no choice but to resign. However, plaintiff's deposition testimony indicates that Teich told plaintiff that if plaintiff came back to Paychex plaintiff could have a "more fair" territory and report not to Wehner but to another Paychex employee who was a field sales manager. Plaintiff testified that, in general, field sales managers at Paychex would report to Wehner. However, plaintiff admitted that she did not inquire concerning whether the field sales manager to whom she would report would report to Wehner or some other person or office. Even viewed in a light most favorable to plaintiff, we simply cannot conclude that Paychex' offer to plaintiff was an adverse employment action. Accordingly, we conclude that plaintiff has failed to establish a prima facie case of retaliation by Paychex.

Because plaintiff has failed to establish a prima facie case of retaliation by either Wehner or Paychex, we conclude that the trial court did not err in granting summary disposition pursuant to MCR 2.116(C)(10) of that portion of plaintiff's constructive discharge claim premised on a theory of retaliation. *Radtke, supra* at 372, n 1.

However, we are remanding that portion of plaintiff's hostile work environment claim premised on Wehner's timely alleged acts of sexual harassment for further proceedings consistent with this opinion. Should plaintiff be able to establish the requisite statutory sexual harassment and additional aggravating circumstances, plaintiff may be able to establish that a reasonable person in plaintiff's position would have felt compelled to resign. Thus, we believe it is also appropriate to reverse that portion of plaintiff's constructive discharge claim premised on the underlying theory of sexual harassment. We remand this portion of plaintiff's constructive discharge claim for further proceedings consistent with this opinion

Next, plaintiff argues that the trial court erred in granting summary disposition in favor of defendants with respect to her assault and battery claim arising out of Wehner's December, 1994, alleged assault. We agree.

In this case, plaintiff's first amended complaint alleged, in relevant part, as follows with respect to her assault and battery claim:

> 7. On or about January, 1995,[13] defendant Wehner wrongfully, illegally and indecently assaulted and battered plaintiff and laid his hands upon her.

> 8. Defendant Wehner put plaintiff in imminent apprehension of bodily harm by and through his supervision of plaintiff's employment matters.
>
> 9. The stated actions of defendant Wehner were intentional, willful, wanton, malicious, reckless and caused injury to plaintiff by way of assault and battery.
>
> 10. At all times, defendant Wehner acted during the course of his employment with defendant Paychex and within the scope of his employment with defendant Paychex.
>
> 8.[sic] Defendant Paychex is therefore also vicariously liable for defendant Wehner's wrongful actions.

Taking the position below that it was not a party to plaintiff's assault and battery claim, Paychex did not seek summary disposition of this claim. However, Paychex did assert in its written motion for summary disposition of plaintiff's other claims that it was adopting any arguments made by Wehner to the extent that these arguments were also applicable to Paychex. At oral argument Paychex simply argued that as a matter of law it could not be vicariously liable for Wehner's intentional tort and "[t]o the extent that this matter goes to trial, we would preserve our discussion as it relates to scope of employment."

Wehner moved for summary disposition of plaintiff's assault and battery claim premised on the December, 1994, assault on the specific ground that he could be personally liable for this act only where he acted beyond the scope of his agency or for his own personal interests and in this case plaintiff's complaint alleged that he had at all times been acting during the course and within the scope of his employment with Paychex.

Following oral argument on defendants' motions for summary disposition, the trial court granted summary disposition of plaintiff's assault and battery claim premised on the December, 1994, assault, reasoning as follows:

> Plaintiff's remaining claim that Defendants' Wehner and Paychex should be held liable for her assault and battery claim in Count III for the alleged December, 28, 1994, sexual assault, is based upon the theory that Defendant acted within the scope of his authority as agent for employer Defendant Paychex. Since this Court has found that there is insufficient evidence of sexual harassment in connection with employment, this claim is also found to be without merit.

On appeal, plaintiff first argues, in essence, that whether sexual harassment occurred in this case is irrelevant to whether an assault and battery occurred. We agree. Plaintiff's sexual harassment claim was based on a theory of hostile work environment. There is no question but that an assault and battery could occur but nevertheless be insufficient to establish a hostile work environment. See *id*. at 394-395. Accordingly, the trial court erred in granting summary disposition of plaintiff's assault and battery claim on this ground.

Plaintiff also argues on appeal that Wehner can be held personally liable for his assault and battery because it is well settled that an agent, whether acting within on his own behalf or on his company's behalf, is personally liable for torts in which he actively participates. Wehner, however, relies on his argument below, i.e., that he cannot be personally liable for assault and battery in this case because plaintiff has alleged that at all times he was acting during the course and within the scope of his employment. Although raised below, the trial court did not rule on this issue. Previously in this opinion we have declined to address issues raised before but not decided by the court below. However, this issue is one of law and no factual development is necessary. Thus, we will address it. *Miller, supra*.

Contrary to Wehner's interpretation of the complaint, our review indicates that plaintiff alleged that Wehner was acting during the course and within the scope of his employment not for the purpose of establishing Wehner's liability but for the purpose of imposing vicarious liability on Paychex. In any event, black letter law provides that a corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless whether he was acting on his own behalf or on behalf of the corporation and even though the corporation is also liable for the tort. *Joy Mangement Co v Detroit*, 183 Mich App 334, 340; 455 NW2d 55 (1990); *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986); *Trail Clinic, PC v Bloch*, 114 Mich App 700, 709; 319 NW2d 638 (1982); *Baranowski v Strating*, 72 Mich App 548, 560; 250 NW2d 744 (1976); *Warren Tool Co v Stephenson*, 11 Mich App 274, 300; 161 NW2d 133 (1968). Accordingly, we reject Wehner's argument.

Wehner argues in the alternative that dismissal of the assault and battery claim against him was proper because the same facts preventing plaintiff from establishing that Wehner's conduct during the December, 1994, alleged assault were unwelcome for purposes of the hostile environment claim also establish that plaintiff impliedly consented to any touching that occurred during this incident. We decline to address this issue, raised as it is for the first time on appeal. *Vander Bossche v Valley Pub*, 203 Mich App 632, 641; 513 NW2d 225 (1994).[14]

Paychex argues in the alternative that summary disposition of the assault and battery claim in its favor was proper because (1) this claim is barred by the exclusive remedy provision of the Workers' Disability Compensation Act (WDCA), MCL 418.131(1); MSA 27.237(131)(1), or (2) there is no question of fact but that Wehner was not acting during the course and within the scope of his employment at the time of the assault. Again, we decline to address these issues, raised as they are for the first time on appeal. *Vander Bossche, supra*.

In summary, with respect to both Wehner and Paychex, we reverse the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) of that portion of plaintiff's assault and battery claim arising out of Wehner's December, 1994, alleged assault. We remand this claim for further proceedings consistent with this opinion.

Finally, plaintiff argues that the trial court erred in granting summary disposition of plaintiff's claim against each defendant for IIED. Specifically, plaintiff contends that all of Wehner's actions throughout her employment with Paychex, including the alleged rape, assault, and other incidents of sexual harassment and retaliation, are sufficient to constitute IIED. Plaintiff also claims that a jury could

find Paychex liable for IIED where Paychex told plaintiff that there was no information to substantiate her claim of sexual harassment and then asked her to continue to report indirectly to Wehner.

However, as with plaintiff's hostile work environment claim, the trial court found for purposes of plaintiff's IIED claim that plaintiff's allegations concerning Wehner's October, 1991, alleged rape were barred by the applicable statute of limitation pursuant to the continuing violation doctrine. Plaintiff does not contest this ruling on appeal with respect to her IIED claim. Accordingly, in determining whether the trial court erred in granting summary disposition of plaintiff's IIED claim, we will exclude from our consideration Wehner's October, 1991, alleged rape.

The elements of a claim for intentional infliction of emotional distress are (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985). The element of extreme and outrageous conduct does not encompass "'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" *Id*. at 603 (quoting requirement of Restatement Torts, 2d, § 46, comment d, pp 72-73). Moreover,

> "[i]t has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'" [*Roberts, supra* at 602-603 (quoting Restatement, § 46, pp 72-73).]

In reviewing a claim for IIED, it is initially for the court to determine whether the defendants' conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995). However, where reasonable persons may differ, it is for the factfinder, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. *Id*.

In this case, the trial court found that plaintiff's factual allegations did not rise to the level of extreme and outrageous conduct. We agree. Even viewing the evidence in a light most favorable to plaintiff, we conclude that the alleged acts of retaliation by Wehner and Paychex constitute, at most, mere petty indignities, threats and annoyances. Although Wehner's December, 1994, alleged assault was criminal, his two acts of touching arguably tortious, and his hot tub comment arguably intended to inflict emotional distress, we conclude that reasonable persons could not find that this conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable." Accordingly, with respect to both Wehner and Paychex, we conclude that the trial court did not err in granting summary disposition pursuant to MCR 2.116(C)(10) of plaintiff's IIED claim.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction, No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

[1] Wehner denies that any rape occurred.

[2] Wehner denies that any assault occurred.

[3] Although plaintiff could not specifically state when the two touchings occurred, we assume, as have apparently the parties, that these incidents occurred within the limitation period.

[4] The other subtheories are the "policy of discrimination" subtheory and the "present effects of past discrimination" subtheory. *Sumner, supra* at 528; *Phinney, supra*. However, the "present effects of past discrimination" subtheory is no longer actionable. See *Sumner, supra* at 528. In other words, a person may not maintain a civil rights claim where the person suffers only timely effects or injury from a past untimely act of discrimination. *Id*. at 527.

[5] Specifically, plaintiff testified that after she was allegedly raped by Wehner but while they were still in the hot tub she and Wehner had a conversation about how they were going to continue to work together. Plaintiff testified that she, while crying, told Wehner that she had just gotten married and that she was not on the "pill." Plaintiff testified that Wehner responded by saying, in part, that he was "sorry" and that he "didn't want to lose his position at Paychex." Plaintiff testified that she told Wehner

> that we could never talk about it again, and I didn't want it to ever happen again, and I didn't ever want him to think about it in the office when we were there. I just wanted him to bury it.

Plaintiff testified that the conference that she and Wehner attended at the time of the alleged rape was also attended by most of Paychex's corporate human resources personnel. Plaintiff testified that at the time of the alleged rape she was aware of Paychex's open door policy, i.e., that she could make a complaint and that it would be investigated. Plaintiff testified that she did not tell any of the human resources personnel at the conference about the alleged rape because she was

> [a]fraid no one would believe me, afraid people would criticize me and ridicule me. The next day after the [alleged rape], Anita Hill headlines were in the paper, and we were all out by the pool, and the guys were all sitting around just making terrible comments about any woman that would file sexual harassment charges, that she probably asked for it. They were going on and on and on about their opinions on the Anita Hill case and just reinforced my fear.

However, plaintiff could not specifically identify who the "guys" were who were making these comments. Plaintiff admitted that Paychex's Chicago district sales manager was present during but did not join in these remarks. Plaintiff also testified that she did not tell anyone of the alleged rape because

she knew that Wehner's wife was approximately eight months pregnant and she did not want to put Wehner's wife or the baby in "jeopardy."

[6] When questioned about this specific remark, plaintiff testified that she did not recall saying "[she] could fall in love with him again," and that she had never fallen in love with Wehner before December, 1994.

[7] That a plaintiff must prove that "the employer failed to rectify a problem after adequate notice" goes to the element of respondeat superior. *Id*. at 395-396.

[8] However, simply because evidence is relevant does not mean that such evidence is automatically admissible at trial. See, e.g. MRE 403. Rather, the admissibility of evidence is committed to the trial court's discretion.

[9] We note that defendant Paychex argues that the trial court did rule against plaintiff on the issue of respondeat superior. However, we find no such ruling in the record.

[10] In his supplemental authority filed pursuant to MCR 7.212(F), Wehner argues that he cannot have personal liability under the ELCRA. In response, we note that in counts one and two of her complaint plaintiff alleged (1) that *Paychex*, through the actions of its employees and agents, including Wehner, sexually harassed plaintiff; (2) that plaintiff was constructively discharged by *Paychex* as a result of the sexual harassment, and (3) that plaintiff was constructively discharged by *Paychex* in retaliation for opposing civil rights violations. Thus, although we do not decide this issue, it would appear that in her complaint plaintiff sought to impose liability under the ELCRA on only Paychex. Although Wehner raised this issue below in a reply brief, the parties primarily focused their attention on other issues during the motion proceedings and the trial court did not decide this issue. We believe that we need not decide this issue at this time. To the extent that on remand plaintiff attempts to assert that Wehner is personally liable under the ELCRA, we believe the trial court can resolve this issue.

[11] See MCL 37.2701(a); MSA 3.548(701)(a).

[12] The fact that an employee has engaged in a protected activity does not give the plaintiff the right to miss work, fail to perform assigned work or leave work without notice. *Booker v Brown & Williamson Tobacco Co*, 879 F2d 1304, 1312 (CA 6, 1989).

[13] In her complaint, plaintiff alleged that Wehner's assault and battery occurred in January, 1995. However, plaintiff subsequently corrected this assertion and contended that this assault and battery occurred in December, 1994.

[14] However, we do note that we have previously held in this opinion that for purposes of plaintiff's hostile work environment claim a question of fact exists concerning whether Wehner's sexual advances were unwelcome.