

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY YOST,

UNPUBLISHED

Plaintiff-Appellant,

v

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

PAYCHEX, INC. and KENT WEHNER,

Defendants-Appellees.

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

O'CONNELL, P.J. (concurring in part and dissenting in part).

I agree with the majority that Wehner's potential liability to plaintiff for assault and battery does not depend on sexual harassment having occurred, and that plaintiff's allegation in her complaint that Wehner was acting strictly in the course of his employment does not by itself insulate Wehner from personal liability. Accordingly, I join with the majority in reversing the trial court and remanding on that ground. I further agree with the majority in affirming the trial court's rejection of plaintiff's claims for retaliatory discharge and intentional infliction of emotional distress, and of plaintiff's assertion that the alleged rape from 1991 remains actionable under the continuing violation doctrine. However, I respectfully dissent from the majority's reversal of the trial court's dismissal of plaintiff's sexual harassment claim.

Although the majority concludes that the record is not sufficiently developed to reach a conclusion regarding whether plaintiff has offered evidence that could establish the respondeat superior element of her hostile environment claim, *Radtke v Everett*, 442 Mich 368, 383; 501 NW2d 155 (1993), I am satisfied that plaintiff's allegations, accepted as true, fail as a matter of law to satisfy that requirement. An employer normally must have notice, actual or constructive, of alleged harassment before being held liable for failure to take action. *Id.* at 395. Plaintiff contends that Paychex had notice of Wehner's harassing conduct as the result of plaintiff's telling a coworker in 1994 about the alleged rape in 1991. However, this notice would go to the alleged rape, which is time barred from consideration in this case, and not to the subsequent incidents. Further, this coworker was not plaintiff's supervisor in 1994. In fact, plaintiff has offered no evidence that anyone with supervisory authority over Wehner had notice of plaintiff's complaint until after plaintiff left Paychex. Plaintiff's last day with

Paychex was May 26, 1995, and she did not inform Paychex of her allegations of harassment until June 2, 1995, a week after she left Paychex and six months after the most recent incident of which she complains. Upon receiving this notice, Paychex offered plaintiff a position with a different supervisor, but plaintiff declined the offer. Plaintiff's representations, considered in the light most favorable to her, indicate that Paychex had no timely notice that plaintiff was suffering from harassment. Accordingly, I would affirm the trial court's granting of Paychex's motion for summary disposition under MCR 2.116(C)(10) in this regard.

/s/ Peter D. O'Connell