STATE OF MICHIGAN

COURT OF APPEALS

ZENOVIA MURRAY,

Plaintiff-Appellant,

v

WHITE CASTLE SYSTEMS, INC., and MARINA JONES,

Defendants-Appellees,

and

DEREK NEWMAN,

Defendant.

UNPUBLISHED
February 2, 1999

No. 203004
Wayne Circuit Court
LC No. 96-604197 CZ

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

In this sexual harassment action, plaintiff appeals as of right from an order granting summary disposition in favor of defendants White Castle Systems, Inc., and Marina Jones pursuant to MCR 2.116(C)(10). Defendant Newman was never served and therefore is not a party to this appeal. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff, a seventeen year old entry-level employee of White Castle, alleged that during her 3:00 p.m. to 11:00 p.m. shift on July 31, 1995, she was attacked by her assistant supervisor, Derek Newman, on three occasions. During each encounter, Newman picked plaintiff up and attempted to kiss her. On the third occasion, however, Newman pulled plaintiff into the manager's office where he sucked on her cheek causing a bruise. Crew manager Jones witnessed some of the events but did not intercede. Plaintiff testified that in the preceding months, Newman had made several remarks to her of a sexual nature and had once touched her buttocks. However, plaintiff did not complain to anyone until

August 1, 1995. At that time, Newman was immediately suspended. Five days later, he was fired. Plaintiff never returned to work after the incident.

Plaintiff first argues that the trial court erred in dismissing her claim of quid pro quo sexual harassment. We agree and find that genuine issues of material fact existed precluding summary disposition.

The Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, specifically outlaws two forms of sexual harassment: hostile work environment and quid pro quo sexual harassment. *Radtke v Everett*, 442 Mich 368, 380-381; 501 NW2d 155 (1993). The act further refines the definition of sexual harassment by setting forth two separate theories under which a party may make out a claim for quid pro quo sexual harassment:

> (i) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
>
> (*i*) Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
>
> (*ii*) Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment, public accommodations or public services, education, or housing. [MCL 37.2103(i); MSA 3.548(103)(i).]

In order to pursue a claim under MCL 37.2103(i)(*ii*); MSA 3.548(103)(i)(*ii*), the plaintiff must establish: "(1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute, and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment." *Champion v Nationwide Security, Inc*, 450 Mich 702, 708-709; 545 NW2d 596 (1996). In this case, we believe that plaintiff has presented evidence of both elements.

It is undisputed that plaintiff was subject to unwelcome sexual advances in the form of suggestive remarks, touching and attempted kisses. Thus, the first prong is satisfied.

Contrary to defendant's arguments, plaintiff has made out a prima facie case under the second prong by evidence that Newman forced himself on her after she refused his advances. In *Champion, supra*, a case involving the rape of an employee by her supervisor, the Supreme Court noted:

> It is this Court's opinion that Mr. Fountain's *decision to rape Ms. Champion constituted the requisite 'decision affecting . . . employment*.' In addition, this was a decision taken in response to Ms. Champion's refusal to voluntarily submit to Mr. Fountain's sexual request. Indeed, lack of consent is the gravamen of a sexual assault. [*champion, supra,* 450 Mich at 709-710 (emphasis added).]

Similarly, Newman's decision to forcibly kiss plaintiff was itself the decision affecting her employment and was similarly triggered by her refusal to submit to his sexual advances. Additionally, the fact that Newman did not discharge plaintiff does not vitiate her claim:

> However, in ruling that the constructive discharge in this case did not result from Ms. Champion's refusal to submit to Mr. Fountain's sexual conduct, the Court of Appeals misapprehends the point when the constructive discharge occurred. The discharge did not occur following the rape, but contemporaneously with it. *The decision to use force, in other words, was the equivalent of a decision to discharge* because Mr. Fountain should have expected that it would lead to Ms. Champion's resignation. This "decision affecting . . . employment" is actionable under . . . because Ms. Champion's refusal to comply with Mr. Fountain's requests for sexual favors led to his decision to use force. [*Champion, supra,* 450 Mich at 711 (emphasis added) (citation omitted).]

We note that Newman was an assistant supervisor and was often, and particularly on July 31, 1995, the only manager on duty. He used his authority over plaintiff and his key to the manager's office to force himself on plaintiff, and no fellow employees came to her aid. We conclude, therefore, that plaintiff has made out a prima facie case of quid pro quo sexual harassment under MCL 37.2103(i)(*ii*); MSA 3.548(103)(i)(*ii*).

With respect to defendants' argument that plaintiff has waived her quid pro quo claim by failing to plead it in her complaint, we find that facts sufficient to support the theory were adequately set forth in plaintiff's complaint.[1] On remand, the trial court is instructed to allow plaintiff to refine her quid pro quo claim as provided by MCR 2.116(I)(5) and MCR 2.118.

Next, plaintiff argues that the trial court erred when it dismissed her sexual harassment claim premised upon hostile work environment. We disagree.

Michigan law holds that an employer can avoid liability for a hostile work environment claim if it adequately investigates and takes prompt remedial action upon notice of the alleged hostile work environment. *Radtke, supra,* 442 Mich at 396; *Downer v Detroit Receiving Hosp,* 191 Mich App 232, 234; 477 NW2d 146 (1991). "An employer, of course, must have notice of the alleged harassment before being held liable for not implementing [corrective] action." *Radtke, supra,* 442 Mich at 395; *Downer, supra* at 235.

Since *Radtke*, the United States Supreme Court has held that, in Title VII cases where "vicarious liability" is sought to be imposed on an employer "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee" and "no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . compris[ing] two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Industries, Inc v Ellerth,* ___ US ___; 118 S Ct 2257, 2270; 141 L Ed 2d 633 (1998). Interestingly, the Supreme Court also stated that "*[n]o*

affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Burlington*, 118 S Ct at 2270.

The *Burlington* decision was recently followed by another panel of this Court in a hostile environment case. See *Chambers v Trettco, Inc*, ___ Mich App ___; ___ NW2d ____; slip op at 2 (Docket No 202151, published 11/20/98). In *Chambers*, however, unlike in the present case, "the jury found that defendant [employer] failed to take prompt remedial action after it knew or should have known that plaintiff had been sexually harassed." *Chambers*, *supra*, slip op at 3. The *Chambers* Court was therefore not faced with the conflict between *Radtke* and *Burlington* concerning whether prompt remedial action is a defense in hostile environment cases.

Further, and also unlike the present case, the plaintiff in *Chambers* did not immediately resign as a consequence of the harassment. *Chambers*, *supra*, slip op at 1-2. Because of that fact, and because plaintiff withdrew her claim of retaliation, this Court "[a]ssum[ed] that plaintiff was not discharged for reporting [her supervisor's] actions" and found "no tangible employment action." *Chambers*, *supra*, slip op at 3. Here, by contrast, it could be argued that, under *Burlington*, there remains a question of fact concerning whether the supervisor's harassment resulted in tangible employment action. See *Burlington*, 118 S Ct at 2270; see also *Champion*, *supra*, 450 Mich at 708-711.We would then be squarely faced with the issue of whether prompt remedial action continues to be a defense in Michigan where a "supervisor's harassment culminates in tangible employment action." We are, however, bound by *Radtke*.

In this case, plaintiff did not complain to anyone at work until August 1, 1995. Newman was immediately suspended, and discharged six days later. Thus, there is no question that, once notified of the problem, White Castle took prompt remedial action.

However, although plaintiff presented evidence that Newman had been admonished for dating co-workers and that he flirted and clowned around with fellow employees, there is no evidence that Newman had ever engaged in the kind of inappropriate behavior to which plaintiff was subjected. Thus, plaintiff has failed to raise a question of fact concerning whether White Castle knew about Newman's behavior prior to August 1, 1995, and therefore, whether it failed to take prompt remedial action prior to that date. Under *Radtke*, the trial court properly granted summary disposition of plaintiff's hostile work environment claim.

Lastly, plaintiff contends that the trial court improperly dismissed her claims against Jones. Plaintiff argues that Jones is liable in this case because she was either an "employer" under the act, or because she aided and abetted Newman in the harassment. We disagree on both counts.

On the supervisory chain, Jones was a crew manager, which placed her above plaintiff, but below Newman. There is no evidence that she had authority to make personnel decisions and, therefore, she was not an "agent" in this context.[2] *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 799-800; 369 NW2d 223 (1985). Similarly, the evidence shows that Jones was merely present during the events and did nothing. There is no indication that Jones supported, encouraged or incited the harassment. Therefore, plaintiff has failed to create a

question of fact regarding Jones' liability under the aiding and abetting provision of the act. See MCL 37.2701(b); MSA 3.548(701)(b).

Affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey

[1] It is unclear from the trial court's terse bench decision whether it granted summary disposition on the quid pro quo claim on the basis of prompt remedial action. We find that, to the extent it did so, the trial court erred because prompt remedial action is not a defense to a quid pro quo sexual harassment claim. See *Radtke, supra*, 442 Mich at 396 n 46; *McCalla v Ellis*, 180 Mich App 372, 380; 446 NW2d 904 (1989), lv den 434 Mich 893 (1990); see also *Blankenship v Parke Care Centers, Inc*,, 123 F3d 868, 872-873 (CA 6, 1997), cert den 522 US ___; 118 S Ct 1039; 140 L Ed 2d 105 (1998); 29 CFR § 1604.11(c)-(e); see generally *Davis v McNea*, 108 F3d 1376; 1997 WL 123745, **4 (Unpublished) (CA 6, 1997).

[2] Jones testified in deposition that, if a fight broke out, a crew manager could send the involved employees "home to come back and talk to a supervisor, but we can't actually fire them." We do not consider this part of the deposition because it was not made part of the record below. However, even if it had been included below, it fails to show the requisite authority to make personnel decisions.