

STATE OF MICHIGAN
COURT OF APPEALS

DENISE HEIDISCH and JEFFREY HEIDISCH,

Plaintiffs-Appellants,

v

HUNGRY HOWIE'S DISTRIBUTING, INC., and
JOHN DEANGELIS,

Defendants-Appellees.

UNPUBLISHED

April 25, 2000

No. 209094

Macomb Circuit Court

LC No. 97-001037 NZ

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

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting defendants' motion for summary disposition in this sexual harassment case brought under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* We affirm.

Defendant DeAngelis is self-employed and owns several businesses. He owns and physically works at a Primo's pizzeria in Birmingham. At pertinent times, DeAngelis wholly owned one Hungry Howie's franchise (in Troy, Michigan). DeAngelis was also a stockholder, director and treasurer in defendant Hungry Howie's Distributing,¹ a corporation that delivers food to Hungry Howie's franchises, and was part owner in a number of other Hungry Howie's franchises, through Hungry Howie's Properties, a wholly-owned subsidiary of Hungry Howie's Distributing, Inc. Denise Heidisch (plaintiff) and DeAngelis have been acquainted since plaintiff was young; DeAngelis is plaintiff's godfather and is married to her cousin. Plaintiff testified at deposition that she asked DeAngelis to walk her down the aisle when she got married because her father had died when she was young. At the wedding, DeAngelis told plaintiff to contact him if she was ever interested in the pizza business.

Plaintiff testified that she and her husband became interested in running their own business and met with DeAngelis to discuss acquiring a franchise. She testified that DeAngelis agreed to loan them money to do so and that he was interested in being a partner in their venture. DeAngelis advised plaintiff that if she was serious about getting a franchise, she should work in the pizza business and learn it from the ground up. Plaintiff testified at deposition that she decided to do so, and began working at various Hungry Howie's franchises in April 1995, working at about five Hungry Howie's locations

before she quit in August 1996. Plaintiff testified that she spent approximately the first six months going between two Eastpointe Hungry Howie's locations. In March or April 1996 she went to work at a Clinton Township Hungry Howie's franchise and then went to a franchise at Nineteen Mile and Hayes. Plaintiff testified that she worked at the Troy franchise DeAngelis individually owned, but it is not clear from her deposition testimony when or for how long she did so.

While plaintiff learned the pizza business, plaintiff and her husband met with DeAngelis on a number of occasions to discuss various franchise options in different cities. Plaintiff testified that her husband did not attend all the meetings because he was a full-time electrician. She testified that she and DeAngelis met about once a week and that on a number of occasions they visited potential franchise sites, sometimes with her husband.

Plaintiff testified that DeAngelis sexually harassed her from approximately June 1996 until she quit her employment with Hungry Howie's around the second week of August, 1996. Plaintiff testified that she would customarily hug or kiss DeAngelis on the cheek when saying goodbye, and that on one occasion, in June 1996, as she was getting out of his truck and hugged him goodbye, DeAngelis attempted to move her face to kiss her on the mouth. Plaintiff testified that on another occasion, in late June 1996, she and DeAngelis met at a Dunkin Donuts one evening to discuss a lease for a Cleveland franchise she and her husband were interested in acquiring. She testified that she had not made the bank deposit for the Hungry Howie's at which she was working and that, after the meeting, DeAngelis insisted on driving her to the bank. Plaintiff testified that after she made the deposit and got back in DeAngelis' truck, he asked her to come and sit by him and rub him. Plaintiff testified that she told him she was not interested and that DeAngelis took her back to her car.

Plaintiff testified that the next incident occurred about the end of July 1996, while she and DeAngelis were working on a lease renegotiation for the Cleveland franchise plaintiff and her husband were interested in acquiring. She testified that DeAngelis told her that they were a lot alike, that they both wanted success, and that she responded that her husband was her main priority. Plaintiff testified that DeAngelis said, "well, come sit by me, we don't have to sleep together, we can just fool around," and that he would like nothing better than to get in her pants. Plaintiff testified that she told him that she did not want anything to do with him and that if that is what he wanted, they had a problem. She testified that DeAngelis responded that he knew she would not say anything because that would ruin everything and that he was a persistent person. Plaintiff testified that when she got home that night DeAngelis paged her twice and asked to meet with her the next day. She testified that she thought he might have been drinking, so she gave him the benefit of the doubt and met with him the next day next day at a Dunkin Donuts, and they discussed the Cleveland franchise lease, without incident. The following day DeAngelis paged her several times while she was at work, she did not call him, and he then tracked her down and called her at the franchise where she was working. Plaintiff testified that DeAngelis urged her to meet with him, but she refused. She told him that there was nothing for them to meet about and that all he had to do was fax her the final lease offer. Plaintiff testified that DeAngelis told her "It's your business and, you know, if it doesn't go through or you lose it or whatever . . . it won't hurt me at all. It's going to hurt you."

Plaintiff testified that soon after, when she and her husband were driving to Cleveland, she told her husband about the incidents for the first time, and that her husband, who was angry and upset, tried unsuccessfully to contact DeAngelis. Plaintiff testified that her husband then contacted DeAngelis' wife, told her what DeAngelis had done, and conveyed to her that they would not be going into business with DeAngelis. At the time, plaintiff was working at the Nineteen Mile franchise. Plaintiff testified that she did not go back to work at Hungry Howie's after the phone call to DeAngelis' wife, and that had she gone back to work, she would have reported to one of the Eastpointe locations.

We review the circuit court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The circuit court must view the pleadings, depositions, admissions and documentary evidence submitted in the light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence; the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *Smith, supra* at 455. The motion is properly granted if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Id.*

In order to establish a prima facie case of hostile environment sexual harassment,² a plaintiff must establish:

- (1) the employee belonged to a protected group;
- (2) the employee was subjected to communication or conduct on the basis of sex;
- (3) the employee was subjected to unwelcome sexual conduct or communication;
- (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
- (5) respondeat superior. [*Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

Regarding plaintiff's claim against DeAngelis, only the fourth element is in dispute. With regard to Hungry Howie's Distributing, the fourth and fifth elements are disputed.

The purpose of the sexual harassment provisions of the CRA "is to combat serious demeaning and degrading conduct based on sex in the workplace, and to allow women the opportunity to fairly compete in the marketplace." *Id.* at 387. The Supreme Court in *Radtke, supra* at 385, stated:

The crux of the instant case is whether the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with plaintiff's employment or created an intimidating, hostile, or offensive work environment. *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.” [Quoting *Lipsett v Univ of Puerto Rico*, 864 F2d 881,897 (CA 1, 1988). Emphasis added.]

The test for whether a hostile work environment existed is “whether a reasonable person, in the totality of 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 *employment* environment.” *Radtke, supra* at 394. [Emphasis added.]

The alleged incidents, although clearly harassing, did not take place in plaintiff’s workplaces. There is no evidence in the record that DeAngelis was present at any of the franchise locations at which plaintiff worked, including the Troy franchise he wholly owned. DeAngelis testified and plaintiff does not dispute that DeAngelis was not involved in the day-to-day operation of any of the franchises at which she worked. The alleged incidents took place in DeAngelis’ truck and in a Dunkin Donuts restaurant during meetings at which plaintiff’s and her husband’s potential franchise venture was being discussed and furthered. Plaintiff testified that she and DeAngelis also discussed Hungry Howie’s business during these times, but the testimony before us indicates that the purpose of her face-to-face meetings with DeAngelis was the franchise venture she and her husband were pursuing. Apart from testifying that DeAngelis at times paged her frequently at work, asking her to meet with him, and called her at work once, plaintiff did not testify or present evidence from which it could be inferred that as a result of DeAngelis’ harassment, her work environment or performance was affected or interfered with, or that she was, for example, denied advancement or otherwise affected in her employment. In fact, there is no evidence or testimony before us regarding plaintiff’s daily work environment, other than plaintiff’s statements in her affidavit that the prospect of DeAngelis’ continuing to call her at work made her so uncomfortable that she quit. Plaintiff cites no authority to support that such a possibility is sufficient to establish the *prima facie* prong under which she must show substantial interference with her employment or an intimidating hostile or offensive work environment.

Under these circumstances, we conclude that plaintiff did not present evidence from which a reasonable fact-finder could infer that DeAngelis’ actions interfered with plaintiff’s *employment* or created a *work* atmosphere that was intimidating, hostile or offensive. Although harassment occurring outside the workplace might under different circumstances result in a hostile work environment, this is not such a case. While DeAngelis’s alleged behavior was harassing and offensive, there was no evidence that it created a hostile work environment, and therefore the circuit court properly concluded that plaintiff failed to establish the fourth element of a *prima facie* hostile environment claim.

In light of our disposition, we need not reach the question whether the circuit court improperly determined that plaintiff had failed to establish respondeat superior liability.

Affirmed.

/s/ Kathleen Jansen

/s/ Helene N. White

¹ DeAngelis testified that there are two separate companies, Hungry Howie's Inc., a privately held company which sells the franchises, and Hungry Howie's Distributing, Inc., the food corporation that delivers the food to the franchises and was set up around 1985 or 1986. DeAngelis testified that Hungry Howie's Distributing owns a subsidiary, Hungry Howie's Properties, which at pertinent times owned approximately ten to fifteen Hungry Howie's franchises, all in Michigan.

² Plaintiff did not allege *quid pro quo* sexual harassment, only hostile environment harassment.