

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UNPUBLISHED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.

KELLY, J. (dissenting).

I respectfully dissent.

I believe that there was sufficient evidence presented to defeat summary disposition and that it is a question of fact for the jury whether the harassment complained of here created a hostile environment. The majority agrees that defendant DeAngelis' behavior was harassing and offensive but finds no evidence that it created a hostile work environment. I think plaintiff made ample showing that DeAngelis created a hostile work environment with bullying, severe, abusive and pervasive misconduct. In June, 1996 he tried to kiss plaintiff on the lips. Later that month, DeAngelis gave plaintiff a ride in his truck while she was on the job making a Hungry Howie's bank deposit. He told her to sit next to him and "rub him." He also commented that he cheated on his wife when the opportunity arose. Near the end of July, plaintiff and DeAngelis met to discuss the franchise deal that DeAngelis was dangling in front of her. He told her she was doing a great job and asked her to sit next to him and "fool around." He said he wanted to "get into her pants" but they "didn't have to go all the way." When plaintiff rejected his overtures, DeAngelis began paging and calling plaintiff at home and at work insisting that they meet. When plaintiff avoided him he said "that she was pissing him off." He continued to call after plaintiff made it clear that he was making her miserable. I disagree that these actions did not create a hostile environment. There were never any sexual advances until plaintiff became a Hungry Howie's employee.

The majority concludes that plaintiff failed to prove the fourth element of a prima facie case, i.e., that 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 (majority slip opinion, page 5). The United States Supreme Court has recognized that when the perpetrator is a supervisor or in a sufficiently high position in the management hierarchy, his actions will be imputed automatically to the employer. *Faragher v Boca Raton*, 524 US 775, 789; 118 S Ct 2275; 141 L Ed 2d 662 (1998). DeAngelis was treasurer and director of Hungry Howie's Distributing, Inc., and he owns or co-owns several stores including one of the stores where plaintiff was working. I do not believe plaintiff could have been expected to report DeAngelis' advances to anyone else because she knew no one that was not "below him" in the chain of command. This, I believe, satisfies the fifth element, respondeat superior as to the corporate defendant, and I would therefore, reverse as to both¹.

/s/ Michael J. Kelly

¹ Cf, *Harris v Forklifts Systems, Inc*, 510 US 17, 21-22; 114 S Ct 367; 126 L Ed 2d 295 (1993); *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).