# STATE OF MICHIGAN

# COURT OF APPEALS

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| ROXANNE DANCA,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>August 25, 2000 |
| v | No. 208738<br>Wayne Circuit Court |
| KMART CORPORATION,<br><br>Defendant-Appellant. | LC No. 94-423520 CZ |

Before: Gribbs, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's denial of its motion for judgment notwithstanding the verdict (JNOV) regarding plaintiff's gender discrimination and hostile work environment claims. After a lengthy, eleven-day trial, the jury found for plaintiff with respect to both claims and awarded her $2.5 million in damages. We reverse.

I

Defendant hired plaintiff in August 1979. After initially working in the shipping and receiving areas of defendant's Canton distribution center, plaintiff received a promotion in 1989 to a second shift checking leader position. In April 1993, plaintiff was promoted to the position of second shift warehouse receiving leader. After an October 1993 incident involving plaintiff's tape recording of another employee, however, plaintiff was suspended and then demoted from her receiving leader job to a general warehouse associate position, which demotion she declined to accept.

On August 5, 1995, plaintiff filed her complaint against Kmart Corporation and nine individual Kmart employees, six of whom represented plaintiff's supervisory employees, and three of whom were plaintiff's coworkers.[1] Plaintiff's complaint alleged generally that during the years before her discharge

[1] In December 1996, before trial, the trial court entered an order dismissing six of the individual defendants, Tom Colwell, James Spears, Ernie Hendricks, Dennis Rons, Daniel Waddups and Patrick O'Neil. The transcript of the first day of trial, June 16, 1997, indicates that plaintiff's counsel agreed on that date to dismiss the remaining individual defendants, Joseph Morgan, Thomas Demers and Larry

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she endured gender-related verbal and physical abuse and that she repeatedly informed her supervisors of the harassment, but that defendants failed to respond to her complaints. Count I of the complaint charged all defendants with conspiring "to discharge and discriminate against Plaintiff based on her sex."[2] Count II of the complaint sought damages pursuant to the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., on the basis that plaintiff "was made subject to discriminatory disparate treatment, disparate impact and intentional, discrimination and harassment, based upon her sex by the Defendants," leading ultimately to her wrongful discharge.

On July 16, 1997, the jury unanimously returned the following special verdict:

> *Jury Foreperson*: Question number one, part one, was the Plaintiff treated differently by Defendant because of her sex or gender in any terms, conditions or privileges of her employment? Our answer was yes.
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> * * *
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> Was Plaintiff subjected to unwelcome sexual harassment? Our answer was yes. Was alleged harassment based on sex or gender? Yes. Did the alleged harassment have the effect of unreasonably interfering with Plaintiff' work performance and creating an intimidating, hostile or offensive work environment? Yes. Did the Defendant breach its duty to the Plaintiff? Yes. Did Defendant's treatment cause the Plaintiff economic and/or non-economic damages? Yes. What is the amount of past, present and future economic loss to Plaintiff? One and a half million dollars. What is the amount of past, present and future non-economic loss to Plaintiff? One million dollars.

On July 25, 1997, the trial court entered a judgment consistent with the jury's verdict. The trial court denied defendant's posttrial motions for JNOV, new trial, or remittitur.[3]

II

A

Defendant first contends that it is entitled to JNOV regarding plaintiff's disparate treatment gender discrimination claim. When reviewing the denial of a motion for JNOV, this Court views the

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James. On July 16, 1997, the day the jury returned its special verdict, the trial court entered a stipulated order dismissing all nine individual defendants.

[2] The July 14, 1997 trial transcript indicates that after defendant presented its last witness, and before the parties' attorneys delivered their oral arguments on July 15, 1997, the conspiracy count was withdrawn from the jury's consideration.

[3] After plaintiff's presentation of proofs, defendant moved for directed verdicts with respect to both counts of plaintiff's complaint, which the trial court denied.

evidence and all legitimate inferences that may be drawn from the evidence in the light most favorable to the nonmoving party. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). A motion for JNOV should be granted only when the nonmoving party presented insufficient evidence to create an issue for the jury. *Pontiac Sch Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997), lv gtd in part 457 Mich 871; 586 NW2d 918 (1998). If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Central Cartage*, *supra*. "The general rule in a[ gender] discrimination case is that, to survive a motion for a directed verdict, the plaintiff must present evidence that, when viewed in a light most favorable to the plaintiff, would permit a reasonable jury to find that the plaintiff [experienced an adverse employment action] because of [gender]." *Meagher v Wayne State Univ*, 222 Mich App 700, 709-710; 565 NW2d 401 (1997). The plaintiff's gender need not represent the only reason or even the main reason for the adverse employment action, but must have been a determining factor in the adverse action. *Id*. at 710.

B

Plaintiff sought relief pursuant to MCL 37.2202(1)(a); MSA 3.548(202)(1)(a), which prohibits an employer from "discharg[ing], or otherwise discriminat[ing] against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . sex."[4] Plaintiff's complaint included the allegation that she "was made subject to discriminatory disparate treatment . . . and intentional[] discrimination and harassment, based upon her sex."

Disparate treatment claims may be subcategorized pursuant to the different methods of proof employed. An intentional discrimination or mixed motive claim arises when a plaintiff can present ordinary evidence that, if believed, would require the conclusion that discrimination was at least a factor in the adverse employment action. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360; 597 NW2d 250 (1999).

> The elements of a mixed motive case are (1) the plaintiff's membership in a protected class, (2) an adverse employment action, (3) the defendant was predisposed to discriminating against members of the plaintiff's protected class, and (4) the defendant actually acted on that predisposition in visiting the adverse employment action

[4] Courts have recognized two broad categories of claims under this statutory subsection: (1) disparate treatment claims or (2) disparate impact claims. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999); *Donajkowski v Alpena Power Co*, 219 Mich App 441, 448; 556 NW2d 876 (1996), aff'd 460 Mich 243; 596 NW2d 574 (1999). Establishment of disparate impact theory gender discrimination requires a showing that an otherwise facially neutral employment practice has a discriminatory effect, but does not require that the plaintiff prove that the defendant intended to discriminate. *Donajkowski*, *supra* at 449, 450-451. Plaintiff's proofs, however, did not address any facially neutral policy of defendant that allegedly had a discriminatory effect.

> on the plaintiff. "[O]nce the plaintiff has met the initial burden of proving that the illegal conduct . . . was more likely than not a 'substantial' or 'motivating' factor in the defendant's decision, the defendant has the opportunity to show by a preponderance of the evidence that it would have reached the same decision without consideration of the protected characteristic." [*Wilcoxon, supra* at 360-361, quoting *Harrison v Olde Financial Corp,* 225 Mich App 601, 611; 572 NW2d 679 (1997).]

"Pretextual claims" involve utilization of the prima facie test articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), as a framework for evaluating alleged gender discrimination. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695 (Brickley, J., joined by Boyle and Weaver, JJ.), 707 (Riley, J., concurring in relevant part); 568 NW2d 64 (1997); *Wilcoxon, supra* at 359.

> A plaintiff may establish a pretextual *McDonnell-Douglas* type prima facie case of prohibited discrimination by demonstrating that "(1) she was a member of the protected class; (2) she suffered an adverse employment action . . . ; (3) she was qualified for the position; but (4) she [suffered the adverse employment action] under circumstances that give rise to an inference of unlawful discrimination." [*Wilcoxon, supra* at 361, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173 (Weaver, J.); 579 NW2d 906 (1998).]

Circumstances give rise to an inference of unlawful gender discrimination when they reveal that the plaintiff was treated differently than a man for the same conduct or performance. *Wilcoxon*, *supra*; *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994). The essence of a gender discrimination civil rights suit is that similarly situated people have been treated differently because of their sex. *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994).

C

A "mixed motive" or "intentional discrimination" claim

Defendant argues that absolutely no evidence shows that plaintiff's gender played any role in its decision to suspend and demote her. Our extensive review of the record reveals no indication, within any of the trial testimony concerning management's decision making process, of a Kmart management predisposition to discriminate on the basis of gender.

The trial testimony revealed that after plaintiff's October 1993 tape recording of Canton distribution center second shift warehouse worker Thomas Demers, several management level employees of defendant, Donald D. MacArthur,[5] Tony Mauro,[6] Michael Sanders,[7] Arnold Hendricks,[8]

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[5] In September 1993, MacArthur began working in defendant's Troy corporate headquarters as a human resource director.

[6] Mauro worked at defendant's Troy corporate headquarters as senior vice president of transportation and distribution.

Tom Colwell,[9] Dale Tritten[10] and Savan Giffen,[11] all contributed some input toward defendant's decisions to suspend and demote plaintiff. Pursuant to MacArthur's request, Colwell investigated the tape recording incident involving Demers. After his investigation, Colwell reported to headquarters, perhaps inaccurately, regarding some language contained on the tape plaintiff made and advised headquarters of associates' complaints concerning plaintiff's communication skills. According to MacArthur's testimony, Colwell and Hendricks informed headquarters that they had always supported plaintiff.

MacArthur and Sanders specifically denied that plaintiff's gender influenced the decisions to suspend and demote her. Undisputed testimony indicated that warehouse associates were offended by plaintiff's tape recordings. MacArthur testified that plaintiff's tape recording constituted the basis for her demotion because the recording violated Kmart's general policy that employees should treat each other with mutual respect, and because plaintiff's recording destroyed her credibility with the supervised employees and thus undermined her ability to effectively act as a leader. Sanders similarly stated that on verification that the taping occurred, he concluded that plaintiff had to be suspended and ultimately demoted because she violated the trust and mutual respect inherent in the leader-associate relationship, and could not "expect to be able to . . . get them [the associates] to follow your direction and your lead and respond effectively and have that credibility" necessary to lead others. MacArthur and Sanders believed that the fact of the tape recording represented the overriding concern, and that while its contents might have had some import they would not have played a determining factor in the decision to demote plaintiff.

Absent some indication that those participating in the Kmart management decisions to suspend and demote plaintiff acted on a predisposition to discriminate against women, we conclude that plaintiff failed to establish a prima facie case of intentional gender discrimination. *Wilcoxon*, *supra* at 360-361.

In her brief on appeal, plaintiff asserts that the following statements establish a Kmart management predisposition to discriminate against women: (1) Hendricks' and Colwell's statements to plaintiff, when she visited them to complain that some employees indicated they would refuse to listen to her, that "one of the problems that these guys had was taking orders from a female," and (2) Colwell's statement to Wendy Ihnen[12] that women "were a minority in the warehouse . . . and that we should expect to get ridiculed and harassed to some point because we were the minority." Viewing Colwell's

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[7] At the time of trial, Sanders worked as a vice president of logistics operations at defendant's Troy corporate headquarters.

[8] Hendricks was the Canton distribution center's general manager.

[9] Beginning in 1993, Colwell worked as the Canton distribution center's operations manager.

[10] Tritten worked as the Canton distribution center's human resources manager.

[11] Giffen was defendant's employment attorney.

[12] From December 1992 through May 1993, Ihnen worked afternoons for Friske Building Maintenance Company cleaning warehouse offices at the Canton distribution center.

second statement in the light most favorable to plaintiff, a reasonable juror could infer that a predisposition to discriminate existed.

Even assuming that a management predisposition to discriminate existed, however, plaintiff presented no direct evidence suggesting that, in making its decision to suspend and demote plaintiff, defendant's management acted on any existing predisposition by considering plaintiff's gender. Plaintiff instead suggests that Colwell's decision to act on his predisposition to discriminate against women may be inferred from the facts that (1) while MacArthur requested that Colwell prepare a written report concerning his investigation for headquarters' review prior to defendant's arrival at a decision regarding a disciplinary action for plaintiff's tape recording, Colwell did not prepare a written report; and (2) while Colwell acknowledged his awareness that headquarters intended to rely on his investigation and report before reaching a decision concerning an appropriate disciplinary sanction for plaintiff, he failed to inform headquarters of sexually negative comments directed at plaintiff and of plaintiff's several complaints about the receiving area employees.

We ascertain from these allegations no reasonable inference that defendant's management acted on a predisposition to discriminate against women when it suspended and demoted plaintiff. First, nothing in the record relates Colwell's conduct during the investigation to his alleged predisposition to discriminate, rather than any other conceivable explanation for his conduct. MacArthur's unrebutted testimony revealed that both Hendricks and Colwell indicated during the course of the investigation that they liked and supported plaintiff, attempted to work with her, and that she had never previously complained to them that the workers sexually harassed or discriminated against her. Furthermore, to the extent Colwell failed to apprise headquarters with respect to (1) the exact contents of the tape plaintiff made, (2) plaintiff's complaints regarding the warehouse workers, and (3) James Spears'[13] alleged warning to plaintiff that she was being set up by the second shift receiving area employees, the unrebutted testimony of MacArthur and Sanders establishes that the availability of this information would not have altered the decision to demote plaintiff.

Because we find no evidence that would support a rational jury's conclusion that gender played any role, least of all a determining role, in plaintiff's demotion, we conclude that a prima facie case of intentional discrimination was not established. *Meagher*, *supra* at 709-710.

D

A pretextual claim

The parties do not dispute that plaintiff represents a member of a protected class, or that plaintiff experienced an adverse employment action when defendant demoted her. Defendant contends that it is entitled to JNOV with respect to plaintiff's pretextual sex discrimination claim on the basis that plaintiff absolutely failed to establish her qualifications for her receiving leader position. Viewing the conflicting

[13] Spears worked as assistant manager of the Canton distribution center's second shift.

testimony regarding plaintiff's qualifications in the light most favorable to plaintiff, however, we find that a reasonable jury could conclude that plaintiff was qualified for her position. *Central Cartage, supra*.

Defendant also avers that plaintiff failed to create an inference of discrimination by showing her differential treatment from another, similarly situated Kmart employee. "To create an inference of disparate treatment, [a plaintiff] must prove that . . . 'all of the relevant aspects' [of her employment situation] were 'nearly identical' to those of [a differently treated person]." *Wilcoxon, supra* at 370, quoting *Town, supra* at 699-700.

Plaintiff sought to compare herself with Tom Demers, claiming that the fact that plaintiff lost her position and Demers did not, even receiving a subsequent promotion, when both plaintiff and Demers violated the same Kmart policy creates an inference of gender discrimination. First, we note that plaintiff and Demers held different positions at the time of the taping incident and defendant's subsequent disciplinary actions. Plaintiff worked as a second shift receiving group leader. Demers labored as a general receiving area employee, who occasionally substituted for plaintiff's coleader Randall Flynn when he was absent. It is undisputed that at the time the taping occurred plaintiff was acting as Demers' supervisor.

Second, we observe that while plaintiff suggests that she and Demers violated the same Kmart policy that employees should treat each other with mutual respect, plaintiff and Demers did not engage in the same conduct. Plaintiff tape recorded her subordinate employees. The unrebutted testimony of management level employees and other employee witnesses concluded that plaintiff's tape recording of a subordinate employee destroyed plaintiff's credibility and effectiveness as a leader. Demers swore and directed name calling at plaintiff, his supervisor. The record reflects that defendant's management meted out different punishments (plaintiff's demotion, and Demers' written record of his conduct, the first level in defendant's formal discipline policy) because it considered that differences existed between plaintiff's and Demers' positions and conduct.[14]

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[14] While plaintiff suggests that the fact that Demers in November 1993 received a promotion to an accelerated flow through (AFT) group leadership position further illustrates Kmart's disparate treatment of its male and female employees, no inference of discrimination arises from the fact of this subsequent promotion because plaintiff and Demers were not similarly situated. Moreover, Colwell's and MacArthur's uncontradicted testimony explained that Demers received the promotion only after management received Demers' apology and expression of remorse and also warned Demers that another instance of conduct similar to that plaintiff recorded would result in his termination.

Plaintiff then submits that while management received two employee complaints concerning Demers after Demers was promoted, defendant still failed to demote or terminate him. No employees complained, however, that Demers engaged in conduct similar to that for which plaintiff was demoted (i.e., tape recording). Furthermore, the subsequent complaints concerning Demers did not involve allegations of his harassment similar to that plaintiff recorded, and for which Kmart management had informed Demers that it would terminate his employment.

Plaintiff also attempts to draw a comparison between defendant's treatment of herself and Canton distribution center employee Joseph Morgan, noting that both she and Morgan engaged in recording activities at the distribution center, but that plaintiff was demoted and Morgan was not. No inference of disparate treatment may arise from any comparison of plaintiff and Morgan, however, because they were not similarly situated. As mentioned, plaintiff was a leader at the time she recorded conversations with her subordinates, while Morgan represented a general warehouse worker when he was observed engaging in his "recording" activity. Additionally, Morgan did not tape record coworker conversations, but simply took photographs inside the distribution center.

We conclude that plaintiff was not similarly situated to Demers or Morgan. *Wilcoxon*, *supra*. Furthermore, contrary to plaintiff's suggestion, we detect no inference of discrimination arising from any of the following circumstances.

1. Management's alleged application of different standards of conduct with respect to plaintiff and male leaders

Plaintiff averred that unlike male warehouse leaders, management required that she secure the presence of a management level employee to witness her efforts to write up employees for their misconduct. Brian Javor, who worked with plaintiff as a checking leader up to and including part of 1993, also agreed that unlike other leaders plaintiff had to have a witness present. Unanimous testimony concerning defendant's written disciplinary procedure revealed, however, that the written record of verbal discussion constituted the first step within defendant's formal disciplinary policy, and that before any write up could occur a management level employee had to be present. Javor himself testified that on the occasions that he issued written warnings he was required to have present someone from management. Colwell testified that all leaders followed the same guidelines, and Sara Rockentine, a Canton distribution center merchandising leader, likewise stated that no leader could issue a written record of verbal discussion outside the presence of a management level employee. Thus, the record does not substantiate plaintiff's argument that defendant treated her differently than it treated male leaders who wished to write up other employees.

Plaintiff also alleged that management singled her out for reprisal after two 1991 letters concerning plaintiff had been mailed to defendant's Troy headquarters.[15] Plaintiff suggested at trial that

[15] Sometime in 1991, several second shift general warehouse employees mailed to Kmart's Troy, Michigan headquarters a letter concerning plaintiff's performance as a temporary receiving leader. Though the letter was not produced at trial, the employees apparently complained that plaintiff lacked leadership abilities. Plaintiff alleged that she "went to everybody in management at the warehouse and nobody would do anything about anything." Therefore, she responded by sending her own letter to Troy. In the letter she complained of "a lax attitude by the employees" regarding their obedience of orders, "absolutely no support from some of [her] fellow Leaders and Management," and noted her sensations at being singled out in the following fashions: "Special leader instructions written only for me, special meetings where I'm singled out, and a cutback in responsibilities, which I know I've fulfilled are all examples of the continuing harassment which are totally unfair."

after the employees' 1991 letter to Troy had stripped her of her status as the temporary substitute receiving leader, she experienced an incident in which she was treated differently with respect to her checking duties than other employees. Plaintiff left some unfinished parcels for the next shift to finish checking, which she testified was customarily done in instances of unfinished business, but was reprimanded the next day by Dennis Rons, the first shift receiving manager, who told her that it "was [her] responsibility and no other shift's responsibility now." Plaintiff further opined that "after the first letter was sent to Troy, I was called in the office on a daily basis about checking errors, just petty stuff." Rons explained, however, that he had discussed several times a recurring deficiency in plaintiff's performance, and that ultimately it became necessary to prepare a written report of her conduct. Even assuming arguendo that a reasonable jury could infer from these facts that defendant's management unfairly singled out plaintiff, we find no indication that management so acted on the basis of plaintiff's gender.

2. Management's alleged failure to document and conscious avoidance of plaintiff's complaints that receiving area employees refused to follow her orders and mistreated her

a. Plaintiff's 1991 letter to headquarters

Plaintiff argues that defendant's headquarters ignored the complaints contained within the 1991 letter she mailed to Troy in response to a disparaging letter earlier mailed by warehouse employees. In the letter, plaintiff complained of "a lax attitude by the employees" and a lack of management and coleader support, but did not indicate that she experienced gender-based differential treatment. Moreover, while headquarters itself did not conduct an investigation concerning plaintiff's 1991 letter, uncontradicted testimony indicates that the local level of Kmart management did address plaintiff's concerns.

b. The receiving area employees' October 6, 1993 letter to headquarters

Plaintiff also suggests that defendant's headquarters failed to make any effort to investigate the veracity of the second shift employees' allegations against her contained within their 1993 letter to headquarters, citing the testimony of Waddups that headquarters never contacted him concerning the 1993 letter. Testimony showed, however, that by October 1993 Waddups had left his position as second shift manager. Moreover, MacArthur's uncontradicted testimony indicated generally that letters to headquarters were taken seriously and required investigation, and that after being apprised of the 1993 letter regarding plaintiff he spoke with its alleged author, then spoke with Hendricks and Colwell, and directed Colwell to investigate the letter's allegations. MacArthur further indicated that Colwell returned verbal reports updating MacArthur regarding his discussions with warehouse employees, and that headquarters had reached no definitive determination how to handle the letter before discovering that plaintiff tape recorded Demers.

c. Offensive writing on the bathroom walls concerning plaintiff

Plaintiff also implies that defendant's management consciously ignored the presence of derogatory statements and drawings concerning plaintiff that often appeared on the walls of a warehouse men's restroom. Plaintiff cites John L. Lester's[16] statement that after observing some disparaging graffiti, he informed plaintiff, who advised Spears, who then replied that while the graffiti could be wiped off someone would only replace it. Further testimony from Colwell revealed, however, that plaintiff did not represent the exclusive target of bathroom graffiti, but that graffiti regarding both male leaders and managers and general employees likewise appeared on the bathroom's walls. Moreover, the testimony of several employees established that management quickly obliviated graffiti, whether it concerned males or females, by painting over it.

d. Plaintiff's repeated complaints regarding employee insubordination and misconduct

Plaintiff emphasizes the testimony of Javor, Lester, Ihnen and others to the effect that they never observed management respond to plaintiff's many complaints that employees disobeyed her orders, and that they never observed plaintiff's situation improve despite management's knowledge that certain employees had problems responding to a woman's orders. Our review of the record reveals, however, that none of these cited witnesses possessed personal knowledge concerning the actual extent of management's investigative activities, and that the following unrebutted testimony establishes that management in fact responded to plaintiff's complaints.

Waddups testified that with respect to plaintiff's approximately ten complaints to him concerning the employees as well as the complaints he received from other employees regarding plaintiff, he investigated every one by speaking with the employees involved in each complaint and anyone who worked nearby. Because his investigations of plaintiff's complaints did not produce collaboration of her allegations, Waddups stated that he did not know who to believe, but concluded that a personality conflict unrelated to plaintiff's gender existed.

Spears also generally recalled receiving several complaints from plaintiff that certain employees would not perform requested work. Spears testified that he responded by speaking with these employees and directing them to cooperate with plaintiff, and that the employees responded that they would do so. Spears likewise denied that his investigations indicated that plaintiff experienced gender-based discrimination.

Colwell further testified generally that after plaintiff advised him of her complaints, he spoke with the employees mentioned by plaintiff attempting to obtain their sides of the story. Plaintiff observed that on one or two occasions after she made complaints employees returned well-behaved from speaking with Colwell, but plaintiff denied that the good behavior endured for more than one or two days. Colwell also recalled after receiving employee complaints regarding plaintiff that he spoke with plaintiff and attempted to counsel her regarding proper management skills.

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[16] During the early 1990s, prior to 1993, Lester worked for approximately one year as a second shift receiving department employee.

Regarding management's responses to specific incidents of plaintiff's complaint, the record also contains the following information.

1. Morgan, who acknowledged prior difficulties with male supervisors, testified that on at least one occasion after plaintiff had complained about him to Spears, Spears instructed him to "just go back and do what she tells you to do and try to get along and work with her."

2. In July 1993, plaintiff complained to Colwell that Michael Stokey, who worked in the Canton distribution center during the early 1990s and who dated plaintiff for approximately one year, had made sexual remarks concerning her. Colwell spoke with Stokey and discovered that Stokey had in fact made the complained of remarks. Colwell then prepared a written record of the event and placed it in Stokey's employee file, and instructed Stokey to "keep his remarks to himself and to do his job." Plaintiff's and Colwell's trial testimony agreed that Colwell advised plaintiff of the outcome of his investigation, and that plaintiff indicated her satisfaction of Colwell's handling of the complaint. Plaintiff indicated that she had no further difficulties with Stokey.

3. With respect to a complaint from plaintiff that second shift Canton distribution center employee Bob Andering refused to obey her orders, Colwell testified that he discussed the complaint with Andering and concluded that Andering had in fact done what plaintiff requested, but had not responded immediately to plaintiff's order. Colwell also apprised plaintiff of his conclusion, and plaintiff indicated "it was okay with her."

4. In September 1993, a meeting of many receiving employees occurred, at which several employees complained that plaintiff screamed and swore at them and showed them no respect. Colwell testified that he instructed the employees "to do their job, that they had to listen to [plaintiff]," and that "[t]hey weren't real happy with it but they said they would try." Plaintiff testified that after this meeting, which occurred while she was on vacation, she requested that Colwell speak with several employees to obtain their more favorable appraisals concerning plaintiff, and stated that Colwell spoke with these individuals.

5. Plaintiff recalled a specific incident when Demers failed to unload some freight in the manner she had instructed. Plaintiff indicated that Demers refused to correct his mistake, and that arguing and fighting ensued between plaintiff and Demers and another employee. According to plaintiff, Waddups arrived and directed Demers to do his job.

6. Plaintiff remembered another specific incident involving Morgan's refusal to perform an order. Plaintiff testified that Morgan indicated over the warehouse's public address system that he would do what plaintiff requested if she asked nicely. She informed Colwell and Spears of Morgan's behavior, and did not deny that Colwell followed up on this complaint.

7. Flynn, plaintiff's coleader in receiving, testified that while working together with plaintiff, she occasionally informed him that she had problems with an employee. Flynn stated that he never ignored any complaint plaintiff shared with him, and offered plaintiff advice in dealing with employees.

In conclusion, we fail to detect any circumstances or occurrences within the instant record that "give rise to an inference of unlawful discrimination." *Wilcoxon*, *supra* at 361. Because no reasonable jury could have found that plaintiff was suspended and demoted on the basis of her gender, the trial court erred in denying defendant's motion for JNOV regarding plaintiff's disparate treatment claims. *Meagher*, *supra* at 709-710.

III

Defendant next argues that the evidence presented at trial did not support the jury's determination that plaintiff worked within a hostile work environment, and that therefore it likewise was entitled to JNOV concerning this claim.

A

An examination of the ELCRA, MCL 37.2103(i), 37.2202(1)(a); MSA 3.548(103)(i), 3.548(202)(1)(a), reveals five necessary elements to establish a prima facie hostile work environment claim:

> (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. [*Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

Plaintiff's gender satisfies the first required element of a hostile work environment claim; thus the question becomes whether plaintiff experienced unwelcome communication or conduct on the basis of her gender.

B

The record reflects several arguably offensive, arguably sex-based occurrences concerning plaintiff within the Canton distribution center during the period of plaintiff's employment (1979-1993).

Plaintiff also testified that Colwell and Hendricks informed her that the male warehouse employees who would not respond to her orders had a problem taking orders from women.[17]

The record is unclear concerning exactly how many of these remarks and occurrences plaintiff heard or observed, or of which she became aware. Frank Pongranz did not specify whether the derogatory remarks he heard were directed at plaintiff, or that plaintiff had knowledge of these remarks.[18] No indication exists in the record that plaintiff had knowledge of a rumor that she performed sexual favors inside the warehouse. Plaintiff had knowledge that some drawings or comments appeared on the men's restroom wall because Lester informed her of these. The extent of the information Lester provided cannot be ascertained from the record—whether, for example, Lester advised plaintiff of a single comment or drawing, several writings that appeared on the walls on one occasion, or whether Lester informed plaintiff on more than one occasion what derogatory writings he may have witnessed inside the restroom. Plaintiff denied that she actually saw the bathroom writings, and denied that she otherwise observed written pictures or comments anyplace else inside the warehouse, except on one occasion in the early to mid 1980's when someone left on her desk an unspecified comic or hand

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[17] This statement of purported fact certainly was not intended to interfere with plaintiff's employment in any respect, but could arguably have been perceived by plaintiff as unwelcome or offensive. Several further remarks mentioned within various portions of plaintiff's brief, while referring to gender, do not represent *unwelcome conduct or communications directed toward plaintiff on the basis of her gender*: Javor's and Lester' observations that some receiving area employees disliked taking orders from a woman, and Javor's recounting of employee statements about "getting rid of plaintiff;" Spears' nonspecific observance of an employee's attempt to induce plaintiff to discipline him in front of others and his opinion on this basis that some employees were attempting to set up plaintiff; and Demers' acknowledgment that he told plaintiff that he would not accept her orders without a second opinion. Furthermore, while Jane Brabyn and Donna Smith, two Canton distribution center employees circa 1993 who did not work directly with plaintiff but allegedly had difficulties with warehouse workers Demers and Larry James, opined that Demers and James contributed to a work environment hostile toward female employees, they testified that they had never directly observed Demers' and James' belittlement, harassment or verbal abuse of women employees. While they complained about Demers, the record does not substantiate any specific, gender-related complaints. With respect to Ihnen's testimony that Colwell told her that plaintiff "should expect this [treatment]. We were a minority in the warehouse, women were, and that we should expect to get ridiculed and harassed to some point because we were the minority," this comment occurred during a nonbusiness-related phone call by Colwell to Ihnen's home. No indication exists that Colwell phoned from the distribution center, or that plaintiff had knowledge of this statement.

[18] Pongranz worked the second shift under plaintiff's supervision after her 1993 promotion. Pongranz' testimony that he did not recall witnessing any employees' outright refusal to perform plaintiff's orders, together with plaintiff's own testimony that no employee ever explicitly refused to follow an order on the basis of her gender creates an inference that plaintiff was not within earshot when Pongranz heard the disparaging remarks.

drawing. No indication exists that plaintiff became aware of the remarks and comments overheard by Ihnen, which Ihnen testified were made behind plaintiff's back. Stokey testified that Demers' "skinny" remark occurred outside plaintiff's presence. Plaintiff certainly heard Morgan's statement, however, concerning PMS and Demers' tape recorded remark that she was a "big tough chick."

Under these circumstances, the jury reasonably could have concluded that plaintiff had awareness of at least some offensive, gender-related comments. *Central Cartage, supra*.

C

The next element of the prima facie case requires that these remarks were "intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment." *Grow v W A Thomas Co*, 236 Mich App 696, 706; 601 NW2d 426 (1999). A hostile work environment claim is actionable when the work environment is so tainted that, in the totality of the circumstances, a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment. *Radtke, supra* at 372. For any sexual harassment to be actionable, however, the conduct must be severe or pervasive. *Chambers v Trettco, Inc*, 232 Mich App 560, 563; 591 NW2d 413 (1998).

We note that workplace hostilities or tensions arising from personality conflicts generally do not support a finding of an actionable, discriminatory hostile work environment under Title VII.[19] *Valdez v Mercy Hosp*, 961 F2d 1401, 1403 (CA 8, 1992). In light of the abundant record of Canton distribution center employee complaints concerning plaintiff's management style and mistreatment of coworkers, much of the alleged mistreatment plaintiff endured appears to represent the product of personality conflicts. We further note that the record is unclear concerning the frequency or pervasiveness with which plaintiff endured or became aware of the gender-based comments concerning her.

Viewing in the light most favorable to plaintiff, however, the facts that some Canton distribution center workers (1) reportedly expressed distaste for working subordinate to a woman and (2) uttered at least some gender-based, offensive comments concerning plaintiff, the jury reasonably could have concluded that plaintiff was subjected to hostility on the basis of her gender. Moreover, we will assume that plaintiff was aware of all the remarks and statements concerning her, and that these remarks occurred with such frequency as to constitute pervasive hostility. *Chambers, supra*.

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[19] As noted by the Michigan Supreme Court, "[w]hile this Court is not compelled to follow federal precedent or guidelines in interpreting Michigan law, this Court may, 'as we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision.'" *Radtke, supra* at 381-382, quoting *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 525; 398 NW2d 368 (1986).

D

Even assuming the existence of a hostile working environment, however, the instant record does not support a reasonable jury's conclusion that defendant negligently failed to address the alleged sexual harassment. Therefore, plaintiff failed to establish the fifth element, defendant's culpability, necessary to her hostile work environment claim. *Radtke, supra* at 383.

Where the employer himself is not accused of engaging in sexual harassment and the complainant's allegations involve the conduct of a coworker, the doctrine of respondeat superior must be considered to determine whether the employer may be held liable for his employee's actions. *Radtke, supra* at 396-397. Under the ELCRA, an employer may avoid liability if it adequately investigated and took prompt and appropriate remedial action on notice of the alleged hostile working environment. *Radtke, supra* at 396; *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991). An employer must have actual or constructive notice of alleged harassment before being held liable for not implementing action. *Radtke, supra* at 396-397; *Downer, supra* at 235. Thus, in coworker harassment cases, the employer is liable when it "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." *Blankenship v Parke Care Centers, Inc*, 123 F3d 868, 872 (CA 6, 1997).[20]

1

Before defendant may be held liable for the second shift receiving employees' alleged sexual harassment of plaintiff, it must have known, or reasonably should have known, of the charged sexual harassment. The record does not support that plaintiff ever complained to any management personnel that she had experienced harassment on the basis of her gender, except for the single occasion on which she complained of Stokey's comments of a sexual nature. Plaintiff acknowledged that no one ever specifically refused to follow her orders on the basis of her gender. Furthermore, according to MacArthur's testimony, Colwell and Hendricks never heard plaintiff complain specifically of any sexual harassment. Plaintiff described the harassment she received in the following manner

> [*Defense counsel*] As a matter of fact, the incidents of harassment that you talked about during the time that you were receiving leader were essentially, mainly refusal to do work, standing around on the docks talking and not working while they're talking and taking off early. Isn't that right?
>
> [*Plaintiff*] That and calling me names, drawings on the walls. Basically the way I was treated. If it were a male leader, and they told these guys to do something,

[20] The Sixth Circuit in *Blankenship* noted that when the complainant alleges sexual harassment by coworkers, the "respondeat superior" label inaccurately characterizes the employer's liability, which represents direct liability on the basis of negligence. *Id*. See also *Chambers, supra* at 563 ("[A]n employer can be liable for a supervisor's sexual harassment where the employer's own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it.").

> they would do it, no arguing, no refusal—But when I did it—So I have to say yes, it was due to the fact that I was a female.

In discussing all the specific complaints she could recall, however, plaintiff never indicated that she relayed to management a complaint that she experienced any coworker conduct of a sexual nature, except for the instance in which she accused Stokey.[21] Limiting the analysis to this testimony concerning plaintiff's complaints to management, absolutely no reasonable inference arises that plaintiff ever addressed to management a concern that she had experienced sexual harassment, except for her complaint concerning Stokey.

While no hint of gender-based discrimination or sexual harassment appears within plaintiff's complaints to management documented within the instant record, plaintiff testified that Colwell and Hendricks both indicated to her that some male warehouse employees disliked taking a woman's orders.[22] Thus, despite both management's and plaintiff's testimony illustrating that plaintiff never

[21] A review of the specific complaints recalled by plaintiff at trial reveals the following: (1) on the day management posted that plaintiff had won the receiving leader promotion, she complained to Colwell that Demers and Morgan had told her that she did not deserve the promotion and that "they were getting [plaintiff's] job;" (2) plaintiff complained to Colwell that after she had given Morgan an order over the public address system, he responded over the public address system that he would "do it if you ask me nicely;" (3) other, unspecified instances when Morgan would not follow plaintiff's order to move freight, or would refuse to unload a truck because he "didn't like the load;" (4) unspecified instances when James refused to unload trucks or move freight; (5) unspecified instances when Andering refused to follow orders; (6) while unloading a truck on one occasion, second shift warehouse employee Dale Zarone began yelling and screaming at plaintiff; (7) problems with Ed Skulley "not completing his paperwork, refusing to check trucks," on one occasion asserting that "he didn't have the time;" (8) one occasion on which Andering "told me to stop watching him, my job was too [sic] pass out trucks nothing else and if he wanted to get on a tug he would and I was not going to tell him he couldn't."

[22] Plaintiff responded affirmatively to her counsel's inquiry whether she "talk[ed] with Mr. Colwell or Mr. Hendricks about your concerns about being treated differently because you were a woman?" Plaintiff then explained,

> Well, the problems I would go to [Colwell] with about being harassed and these guys telling me not, that they weren't going to do what I told them. I think the first incident I remember was when they actually posted that I received the receiving leader's job and Joe Morgan and Tom Demers made the statement. . . . something about not doing what I was going to tell them and they weren't going to listen to me or whatever. I'm not sure. But I went to Tom Colwell and he said he already knew because Joe Morgan had already been in there to tell him that he would be in there everyday to complain about me and he also told me that one of the problems that these guys had was taking orders from a female.

Plaintiff similarly testified with respect to Hendricks,

(continued…)

specifically complained to management concerning sexual harassment, from the fact that Colwell and Hendricks apparently knew that certain employees resented taking orders from a woman the jury might reasonably have concluded that defendant's management knew of or should have been aware that some potential existed for warehouse disharmony on the basis of plaintiff's gender.

2

Even assuming that a hostile work environment existed and that defendant should have known of its existence, the instant record does not support the jury's conclusion that defendant's management failed to adequately investigate and take prompt, appropriate remedial action concerning the alleged hostile working environment. *Radtke*, *supra* at 396; *Central Cartage*, *supra*. With respect to plaintiff's only complaint of explicitly sexual behavior to which she was subjected, management investigated the complaint by discussing the matter with Stokey, ascertained Stokey's guilt of the alleged conduct, and disciplined him by placing a written report of the incident within Stokey's personnel file. Plaintiff conceded her satisfaction that management had properly handled this complaint, and that she experienced no further problems from Stokey. Also as previously discussed, at pages 15 through 17, *supra*, the unrebutted testimony of defendant's managerial employees indicated that they acknowledged and addressed each and every complaint plaintiff brought them. Regarding the writing on the bathroom walls, testimony indicated that management on at least one occasion immediately, and otherwise quickly or at least periodically painted over the graffiti.

In light of this undisputed testimony regarding management's attention to plaintiff's complaints, we find that defendant cannot reasonably be considered negligent with respect to its responses to the complaints. *Radtke, supra* at 396-397; *Chambers*, *supra*. Given that the proofs at trial, viewing all the evidence in the light most favorable to plaintiff, were deficient with respect to at least one required element of plaintiff's hostile work environment claim, we conclude that the trial court erred in denying defendant JNOV regarding this claim. *Central Cartage*, *supra*; *Pontiac Sch Dist*, *supra*.

In light of our dispositive conclusions concerning the merits of plaintiff's disparate treatment and sexual harassment claims, we need not address the remaining appellate issues defendant raises.

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(…continued)

> Well, I went to him with complaints about the guys not doing what I told them, giving me a hard time and we talked and he made that very same comment, that these guys had a problem with taking orders from a female and it was basically accepted. That's just the way it is.

Reversed.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Hilda R. Gage