STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH PELLENS and FREDRIC PELLENS,

Plaintiffs-Appellants,

v

CITY OF FLINT and FLINT HOUSING COMMISSION,

Defendants-Appellees,

and

REGGIE RICHARDSON,

Defendant.

UNPUBLISHED
July 9, 2002

No. 231452
Genesee Circuit Court
LC No. 98-62492-CZ

Before: Judge Kelly, P.J., and Murphy and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this hostile work environment sexual harassment case brought under the Civil Rights Act (CRA), MCL 37.2101 *et seq.* We affirm.

I. BASIC FACTS

Plaintiff[1] had been employed with the City of Flint off and on since the mid-1970s. In the late fall of 1994, Reggie Richardson was appointed as the director of the Flint Housing Commission. Plaintiff worked full-time as Richardson's executive secretary. Initially, plaintiff had a positive relationship with Richardson, and she considered him a friend. On occasion, plaintiff and Richardson would go out to lunch together, and at times they would discuss their respective personal lives.

[1] For purposes of this opinion, when we reference "plaintiff" in the singular, it shall refer to Deborah Pellens. Reference to "defendants" applies to the city and the commission.

By the early fall of 1995, plaintiff began having severe headaches, and she was missing time from work. At about that same time, plaintiff believed that Richardson started behaving in a manner that constituted sexual harassment. Plaintiff asserted that Richardson's behavior consisted of hugging her from behind, telling her that she smelled good, telling her how to dress, buying jogging suits for her, telling her that she looked sexy in jeans or other outfits, telling her that she had nice black woman legs, commenting to her about the size of his sexual organ, asking her about her bras, telling her that if they had sex, he would drive her wild, telling her that he was "horny," and giving her unwanted kisses. Plaintiff would typically respond by telling him to stop it so that she could get her work done. Plaintiff considered Richardson's actions and language to be serious sexual advances, and not merely joking around.

Around the time of the alleged incidents of harassment, Richardson had told plaintiff to keep her office door closed so that others in the office would not interfere with her work. The alleged harassment continued and grew worse over time, and plaintiff's headaches also became worse. Plaintiff claimed that she did not want to be left alone with Richardson, and she began to dread going into work. Plaintiff continued missing time at work, and she last worked at the office during normal hours on December 8, 1995. Between December 8, 1995, and May of 1996, plaintiff, at times, would come into the office with her daughter late at night to get some work done and to avoid Richardson, but otherwise she was drawing sick pay. Plaintiff's sick leave applications indicated that she was suffering from headaches, stress at work and home, confusion, inability to concentrate, depression, and inability to sleep. There was no mention of sexual harassment.

After May 1996, plaintiff was not working in any manner, and she was on extended sick leave with a July 1996 sick leave application indicating severe depression and inability to sleep. In July 1996, plaintiff filed for workers' compensation benefits based on emotional stress related to work. It was only during the processing of the workers' compensation claim that plaintiff first revealed to anyone the allegations of sexual harassment. The allegations were made by plaintiff to a doctor in November 1996. There is no issue of fact that plaintiff did not tell anyone of the sexual harassment until she was no longer working for defendants.

Plaintiff testified that she did not lodge any complaints with city officials because she was fearful that Richardson would retaliate against her in light of his control over her job. Plaintiff's fear of retaliation was based, in part, on an incident involving negative anonymous letters concerning Richardson sent to the mayor and city commissioners. Richardson called a meeting with employees, and according to plaintiff, the following occurred:

> He addressed the situation about the anonymous letters. And he looked at everyone there in the staff and said you know who you are, you are in a political arena, you have to play the political game; you mark my words, if you don't play the game, Reggie Richardson will be here, you will not be here.

Plaintiff did testify that during her employment with Richardson, he never acted in a vindictive manner towards her. Phyllis Miller, a member of the board of commissioners, testified that the commission was not aware of any sexual harassment claims during plaintiff's employment; therefore, they had taken no action on the matter. Only after plaintiff had filed a workers' compensation claim and was no longer working did the commission become aware of plaintiff's claims. Richardson had told the commission that plaintiff filed a workers'

compensation claim because of an aneurysm. Miller testified that the people working under Richardson were fearful of retribution and loss of employment if they made any complaints about him.[2]

The magistrate handling the workers' compensation claim awarded plaintiff benefits in the amount of $386 per week. The magistrate found that work-related factors supported the disability claim based on emotional stress brought on by the actions of Richardson. The magistrate believed the testimony of plaintiff concerning the claims of sexual harassment and rejected Richardson's denials.

Richardson denied that he ever made any sexual advances towards plaintiff, and that plaintiff invented and mischaracterized her allegations. Defendants also point out that plaintiff admitted to participating in some male/female horseplay with other employees. Defendants also reference Christmas cards from plaintiff to Richardson that are very pleasant and indicate that plaintiff thought very highly of Richardson.

Plaintiffs filed a complaint, which included a claim against Richardson,[3] a separate claim against the city and the commission based on sexual harassment/hostile work environment, and a

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[2] Miller testified at her deposition as follows:

> Q. Was it - - did it ever reach the point where you felt that the staff was intimidated to come forward to the Commission and air anything that was going on?
>
> A. Yes. Nobody wanted - - nobody wants to lose their job, and I feel this way and like I told some of the people, some of the staff, I said, you know, I can say this, and I can say a lot of different things, I said, but I don't want anybody to lose their job. And the only thing I can do is get mad. I'm over there at the Delphi working every day and you're out there on the street, because Reggie has all of this in his office, like an attitude problem, and it always came back when he got up in the staff meetings and act nasty [sic] towards his staff. It did get back, it came back. Everybody know about the nasty staff meetings he had, how nasty he was, and rude to the staff.
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> * * *
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> Q. Would it have been an environment where if an employee wanted to tell you about a problem they were experiencing, that you would have been open to listen to whatever they had to say?
>
> A. Yes, but they wouldn't. They would not come forward, because nobody wanted to lose their job. And I would come through there every Friday to sign the checks, stop to talk to different people. The people that was [sic] having the problems, they never told me. I heard it from somebody else and I felt so bad, because I didn't know what to do without somebody losing their job.

claim by Fredric Pellens against all defendants based on loss of consortium. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) on the basis that they received no notice of sexual harassment claims; therefore, there could be no liability based on a hostile work environment.

II. TRIAL COURT'S RULING

The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court ruled:

> [P]laintiff has come forward with no evidence to show knowledge or notice on the part of [defendants].
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> Therefore, there is no genuine issue as to a material fact on that particular element of proof. And without that element of proof the Plaintiff cannot sustain an action against Mr. Richardson's employer.

III. PARTIES' ARGUMENTS ON APPEAL

Plaintiffs argue that the trial court erred in granting summary disposition to defendants because it failed to take into consideration the reasons why plaintiff failed to provide notice to defendants; those reasons being intimidation and fear of losing employment. Plaintiffs rely on *Burlington Industries, Inc v Ellerth*, 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998), for their proposition that an employer must prove that it promptly addressed claims of sexual harassment and corrected the situation, or, in cases where there is no notice, the employer must prove that the employee unreasonably failed to take advantage of any preventative or corrective options. Plaintiffs argue that there is a question of fact regarding whether it was reasonable not to provide notice. Plaintiffs also make an argument that Richardson was verbally disciplined in the late 1980s for sexually harassing a female "client;" therefore, defendants had some notice of Richardson's proclivity for sexual harassment, but yet he was made director of the housing commission.

Defendants first argue that even accepting as true the facts asserted by plaintiff regarding the actions and statements of Richardson, they were insufficient to create a hostile work environment. This issue was not addressed by plaintiffs or the trial court. Defendants next argue that notice was required to hold defendants liable. Defendants maintain that *Ellerth, supra* is not applicable in light of our Supreme Court decision in *Chambers v Trettco, Inc,* 463 Mich 297; 614 NW2d 910 (2000). Defendant finally argues that there is no issue of genuine fact that plaintiff failed to provide notice to defendants during her employment.

(…continued)

[3] The claim against Richardson was dismissed per a stipulation with plaintiffs based on an agreement to submit the claim to arbitration.

IV. ANALYSIS

A. MCR 2.116(C)(10) and Standard of Review

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Our Supreme Court has ruled that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties is viewed "in the light most favorable to the party opposing the motion." *Id*.

This Court reviews rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999).

B. Sexual Harassment and Hostile Work Environment

In *Corley v Detroit Bd of Ed*, 246 Mich App 15, 19; 632 NW2d 147 (2001), this Court, addressing a sex discrimination claim, stated:

> Under Michigan law, freedom from discrimination in employment because of a person's sex is a civil right. MCL 37.2102; *Chambers v Trettco, Inc*, 463 Mich 297, 309; 614 NW2d 910 (2000). Subsection 202(1)(a) of the CRA provides that an employer may not "discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . sex . . . ." MCL 37.2202(1)(a). Discrimination because of a person's sex includes sexual harassment of the person. MCL 37.2103(i); *Chambers, supra* at 309. [Omissions in original.]

MCL 37.2103(i) defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature" under particular circumstances as defined in the statute. The circumstance at issue here is sexual harassment creating a hostile work environment, which is addressed in MCL 37.2103(i)(iii), and which provides:

> The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, . . . or creating an intimidating, hostile, or offensive employment . . . environment.

Our Supreme Court in *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993), stated that there are five necessary elements to establish a prima facie case of a hostile work environment, which factors are "(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) respondent superior." Citations omitted.

The *Radtke* Court held that a gender-neutral reasonable person standard is to be applied in determining whether a hostile work environment has been established. *Id.* at 392-394. Defendants' argument to the contrary, we believe that the deposition testimony of plaintiff regarding the numerous actions and statements of Richardson clearly established an issue of fact as to whether there was an intimidating, hostile, or offensive work environment.

C. Employer Liability and Notice

Addressing the issue of respondeat superior and notice, the *Radtke* Court stated:

> Under the Michigan Civil Rights Act, an employer may avoid liability "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Downer v Detroit Receiving Hosp,* 191 Mich App 232, 234; 477 NW2d 146 (1991). . . . Such prompt and appropriate remedial action will permit an employer to avoid liability if the plaintiff accuses either a co-worker, *McCarthy v State Farm Ins Co,* 170 Mich App 451, 457; 428 NW2d 692 (1988), or a supervisor of sexual harassment. *McCalla v Ellis,* 180 Mich App 372, 380; 446 NW2d 904 (1989) . . . . **An employer, of course**, **must have notice of alleged harassment before being liable for not implementing action.** [*Radtke, supra* at 396-397 (emphasis added; some citations omitted).]

Plaintiffs recognize the holding of *Radtke*, but they argue that subsequent United States Supreme Court precedent in *Ellerth* supports their position. We find it unnecessary to review *Ellerth* to determine if it supports plaintiffs' position because our Supreme Court's decision in *Chambers* clearly rejected plaintiffs' argument.

The *Chambers* Court noted that strict imposition of vicarious liability on an employer is illogical in a hostile work environment claim because the supervisor acts outside the scope of actual or apparent authority to hire, fire, discipline, or promote. *Chambers, supra* at 311.[4] The Supreme Court continued by stating:

> The bottom line is that, in cases involving a hostile work environment claim, a plaintiff must show some *fault* on the part of the employer. That is the essence of *Radtke*'s requirement that a plaintiff prove that the employer failed to take prompt and adequate remedial action upon notice of the creation of a hostile work environment. [*Id.* at 312 (emphasis in original).]

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[4] The Supreme Court distinguished a case of quid pro quo harassment where there is vicarious liability because the harasser, by definition, uses the power of the employer to alter the terms and conditions of employment. *Chambers, supra* at 311. Here, the parties agree that this is not a quid pro quo case.

The *Chambers* Court, specifically rejecting the analysis and holding in *Ellerth* in addressing a sexual harassment claim under our CRA, stated:

> If this Court were to adopt the principles announced by the United States Supreme Court in *Faragher* [*v Boca Raton*, 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998)] and *Ellerth*, it would represent a significant change in our approach to determining employers' vicarious liability for sexual harassment. Specifically, the holdings issued by the United States Supreme Court in those cases both: (1) conflate the concepts of quid pro quo harassment and hostile environment harassment, and (2) shift the burden of proof from the employee to the employer regarding whether the employer should be held vicariously liable "for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, *supra*, 524 US 807; *Ellerth*, *supra*, 524 US 765. To avoid vicarious liability under this new federal rule, an employer, essentially, must establish affirmatively that it was not negligent in failing to prevent the harassment and that the victim was negligent in failing to avail herself of opportunities provided by the employer to avoid the harm from such harassment. *Id.* [*Chambers*, *supra* at 314-315.]

The *Chambers* Court, in further rejecting *Ellerth*, stated that the decision would be inconsistent with the decision in *Radtke*. *Chambers*, *supra* at 315. Therefore, the principles announced in *Radtke* and reaffirmed in *Chambers* require notice to the employer in a hostile work environment case brought under the CRA in order to allow the employer an opportunity to correct the problem and avoid liability. Plaintiffs fail to cite any cases, other than those rejected by *Chambers*, to support their proposition that there is an exception to the notice requirement where an employee is fearful of retaliation. Neither *Chambers* nor *Radtke* enunciate such an exception. Here, there is no genuine issue of fact that defendants did not receive notice until after plaintiff ceased working, and thus the trial court properly granted defendants' motion for summary disposition.[5]

That being said, we observe that although there is no evidence that the employer had notice of Richardson's alleged harassing conduct, there was evidence that the employer had notice that employees were afraid to complain about Richardson. While in *Chambers*, *supra*, the Supreme Court clearly rejected the federal approach, and reiterated that notice is required in a hostile environment case, the Court was not there presented with a situation where there is evidence that the employer knew that, based on well-founded fears of retribution, employees would forego notifying the employer of complaints regarding the supervisory employee alleged

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[5] As to plaintiffs' argument regarding a sexual harassment claim against Richardson back in the 1980s by another woman, plaintiffs fail to cite any authority supporting their position that the incident put defendants on notice of a hostile work environment arising out of plaintiff's employment years later. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Moreover, it appears that defendants addressed the prior incident by reprimanding Richardson.

to have created the hostile environment. Should the Supreme Court wish to modify the notice requirement in such cases, the issue is squarely presented.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Helene N. White