STATE OF MICHIGAN

COURT OF APPEALS

TERRIE J. BOVEE,

Plaintiff/Counterdefendant-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant/Counterplaintiff-Appellant,

and

ROBERT SILSBURY,

Defendant/Counterplaintiff.

UNPUBLISHED
December 13, 2002

No. 225009
Ingham Circuit Court
LC No. 98-088514-NO

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

In this sexual harassment case, defendant Michigan Department of Corrections (MDOC) appeals as of right from a judgment obtained by plaintiff against the department and defendant Silsbury, jointly and severally, in the amount of $392,770.36.[1] Plaintiff alleged both hostile work environment and quid pro quo harassment by Silsbury, who was one of her supervisors. We reverse and remand for entry of judgment in favor of MDOC.[2]

MDOC argues that the trial court erred by denying its motions for directed verdict and judgment notwithstanding the verdict (JNOV) as to plaintiff's hostile work environment claim. We agree. We review de novo the trial court's denial of these motions. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). When addressing a challenge to a trial court's handling of either motion, "we view the evidence, as well as any legitimate inferences, in the

[1] The jury awarded $300,000 for present and future damages. Plaintiff was also awarded $27,547.77 in interest, and costs and attorney fees of $65,222.59.

[2] Silsbury is not a party to this appeal, nor has he filed a separate appeal in the matter.

light most favorable to the nonmoving party and decide whether a factual question exists about which reasonable minds might have differed." *Id.*

To establish a prima facie claim of hostile work environment sexual harassment, an employee must prove

> (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) (footnotes omitted).]

In *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000), our Supreme Court observed that

> [w]hen the submission to or rejection of the unwelcome sexual conduct or communication has *not* been factored into an employment decision, but a hostile work environment has nevertheless been created because unwelcome sexual communication or conduct substantially interferes with an individual's employment, the violation can only be attributed to the employer if the employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment. [Emphasis in original.]

MDOC argues that plaintiff did not establish her prima facie case because the evidence showed that MDOC took prompt and appropriate remedial action after plaintiff filed her complaint. *Radtke, supra* at 396. MDOC asserts this was the first time it received adequate notice of the situation. Plaintiff counters that months before filing the complaint, she informed Lieutenant Margaret Houghton, her immediate supervisor, of a specific incident of unwanted sexual touching by Silsbury. This communication, plaintiff argues, put MDOC on notice that she was being sexually harassed.

We believe that the evidence does not support a finding that under the circumstances, MDOC had reason to be aware of the harassment. "[N]otice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring." *Chambers, supra* at 319.

Although Houghton denied it, plaintiff testified that she told Houghton about one of the instances of harassment. However, plaintiff admitted that she told Houghton not to tell anyone about the situation and that she, plaintiff, would handle it herself. There is no evidence that Houghton passed the complaint on to anyone else. Further, we agree with MDOC that knowledge of the situation cannot be imputed to it by the report to Houghton, because Houghton was not in "higher management." In *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 622; 637 NW2d 536 (2001), this Court defined the term higher management "to mean someone in the employer's chain of command who possess the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." The

record does not contain evidence concerning whether Houghton possessed such authority over Silsbury. Without such proof, knowledge of the harassment cannot be imputed to MDOC.

MDOC also argues that the trial court erred in denying its motion for JNOV as to plaintiff's quid pro quo claim. Again, we agree. To establish a prima facie case of quid pro quo harassment, plaintiff must show that an agent of the employer used plaintiff's submission to or rejection of unwelcome sexual conduct or communication as a factor in decisions affecting her employment. MCL 37.2103(i)(ii); *Chambers, supra* at 313. "[Q]uid pro quo harassment occurs only where an individual is in a position to offer tangible job benefits in exchange for sexual favors or, alternatively, threaten job injury for a failure to submit." *Champion v Nation Wide Security*, 450 Mich 702, 713; 545 NW2d 596 (1996).

> "Tangible employment action" has become a term of art in cases involving sexual harassment, and is analogous to the term "adverse employment action" in employment discrimination cases based on disparate treatment, but it allows for the idea that, in sexual harassment cases, a decision maker could secure an employee's submission to unwelcome sexual advances by conditioning a beneficial (rather than adverse) change in an individual's employment status on that submission. See, e.g., [*Burlington Industries, Inc v Ellerth*, 524 US 742, 761; 118 S Ct 2257; 141 L Ed 2d 633 (1998)] (explaining that "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote," and comparing this to the holdings in a string of federal cases that stand for the proposition that, in disparate treatment cases, in order for an employment action to be adverse, it must be materially and objectively adverse). [*Chambers, supra* at 320, n 7.]

Plaintiff argued to the jury that a leave agreement drafted by Silsbury constituted a tangible employment action.[3] We disagree. While Silsbury did make some cryptic remarks about plaintiff "owing" him after the agreement was signed, the evidence does not support a finding that the execution or enforcement of the agreement was conditioned on plaintiff's acquiescence to Silsbury's improper advances. In short, plaintiff failed to establish the requisite causal relationship between the agreement and her response to Silsbury's actions. *Id.* at 317. Further, we do not believe that the drafting of the leave agreement can be properly characterized as a "significant change in employment status," akin to such actions "as hiring, firing, failing to promote."

Plaintiff also argued that she had been constructively discharged, and that this constituted a tangible employment action. While constructive discharge does satisfy this element of the prima face case, *Chambers, supra* at 317, plaintiff's proofs do not support the conclusion that she was constructively discharged. Constructive discharge "occurs where the employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to"

[3] In denying MDOC's motion for summary disposition under MCR 2.116(C)(10), the trial court specifically concluded that the leave agreement "does not constitute a tangible employment action." However, plaintiff specifically argued to the jury that the leave agreement was a tangible employment action. MDOC and Silsbury neither objected to this argument nor asked for a curative instruction on the matter.

leave his or her employment. *Champion*, *supra* at 710. We do not believe that based on the evidence adduced at trial, it was reasonable to conclude that Silsbury's conduct was so severe that a person in plaintiff's place would feel compelled to leave her job.

Accordingly, we reverse and remand to the trial court with instructions to enter a judgment in favor of MDOC.[4]

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens

[4] Because of our resolution of the first two issues raised by MDOC, we need not address its alternative arguments that the verdict was against the great weight of the evidence, and that the trial court erred in failing to grant remittitur.