STATE OF MICHIGAN

COURT OF APPEALS

CONNIE WOOLNER,

Plaintiff/Cross-Defendant-Appellant/Cross-Appellee,

v

ALLEGAN COUNTY and JON CAMPBELL,

Defendants/Cross-Plaintiffs-Appellees/Cross-Appellants,

and

WILLIAM DEETZ,

Defendant-Appellee.

UNPUBLISHED
September 27, 2005

No. 261130
Allegan Circuit Court
LC No. 03-034476-CD

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arose out of plaintiff's employment with the Allegan County human resources department. Plaintiff alleges that defendant Deetz, the director of the department, sexually harassed her through a course of conduct that included sending her sexually explicit jokes by email, making sexual comments, and touching her thighs and buttocks. In May 2002, plaintiff, through her attorney, submitted an internal complaint pursuant to the county's sexual harassment policy, accusing Deetz of sexual harassment. Deetz was placed on administrative leave pending investigation of the complaint, and defendant Campbell oversaw the department in Deetz's absence. At the conclusion of the investigation, Deetz resigned his position and received a $50,000 severance payment. After Deetz's departure, the county reorganized the human resources department. A new director was hired from outside the department. In July 2003, an outside consultant recommended that plaintiff's position be eliminated as part of a budget

reduction plan. Plaintiff was terminated from her position effective August 22, 2003. Plaintiff subsequently commenced this action, alleging claims for hostile work environment sexual harassment and unlawful retaliation under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., and a common-law claim for intentional infliction of emotional distress.[1]

The trial court found that defendants Deetz and Campbell were not individually liable under the CRA. It also found that the county was not liable for sexual harassment under a respondeat superior theory because it did not have notice of any sexual harassment before plaintiff filed her internal complaint in May 2002, and it promptly took appropriate remedial action upon receiving that complaint. The court also dismissed plaintiff's claim for intentional infliction of emotional distress against defendant Deetz. We review summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, is reviewed de novo on the basis of the entire record in the light most favorable to the non-moving party to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999).

To establish a claim for hostile work environment sexual harassment, a plaintiff must demonstrate that: (1) the employee belonged to a protected group; (2) the employee was subjected to conduct or communication on the basis of sex; (3) it was 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. *Rymal v Baergen*, 262 Mich App 274, 312; 686 NW2d 241 (2004). Under the final element, the employer may only be liable for hostile work environment claims on a showing of fault, meaning "the employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment." *Chambers v Trettco, Inc*, 463 Mich 297, 312-313; 614 NW2d 910 (2000). Notice of the harassment need not be actual, but in the absence of actual knowledge the standard is objective and requires a totality of the circumstances such that the employer reasonably should have known. *Elezovic v Ford Motor Co*, 472 Mich 408, 426; 697 NW2d 851 (2005).

Plaintiff contends that the county knew or should have known about the harassment before May 2002 because Deetz sent his offensive emails to his superiors; because her supervisor, Christine Jurkas, witnessed some of the offensive incidents; and because she complained to Campbell in 2001. We disagree.

A plaintiff can demonstrate knowledge on the part of the employer by showing that she complained to higher management or by showing that the harassment was so pervasive that it gave rise to the inference of knowledge or constructive knowledge. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001). "Higher management" means "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." *Id.* at 622. There is no evidence that Jurkas possessed the requisite control over

[1] Plaintiff also alleged claims for defamation and wrongful discharge, which are not at issue on appeal.

Deetz, and indeed she was apparently inferior to Deetz in the County's chain of command.[2] A complaint to Campbell might be sufficient, but plaintiff only indicated to Campbell that Deetz was "out of control," which is too vague to constitute sufficient notice. See *Sheridan, supra* at 624; see also *Chambers v Trettco, Inc* (*On Remand*), 244 Mich App 614; 624 NW2d 543 (2001). Most of the emails, jokes, and pictures either were not "sexual in nature," meaning "conduct or communication that *inherently* pertains to sex" *Corley v Detroit Bd of Ed*, 470 Mich 274, 279; 681 NW2d 342 (2004) (emphasis in original), or they "could be considered equally offensive to both male and female employees." *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 341; 497 NW2d 585 (1993). We do not find the remainder objectively sufficient to put Allegan County on notice.

Plaintiff next contends that Allegan County's remedial measures were inappropriate. We disagree. Our Supreme Court has explained that "the relevant inquiry concerning the adequacy of the employer's remedial action is whether the action reasonably served to prevent future harassment of the plaintiff." *Chambers, supra* at 319. The only negative workplace experience plaintiff encountered after Deetz was placed on leave was being "snubbed" by her co-workers, but this was dealt with by Campbell's meeting with the co-workers. There is no question that Allegan County's response, placing Deetz on administrative leave, "reasonably served to prevent future harassment." We find no authority in support of plaintiff's assertion that Deetz's severance payment negated the appropriateness of this response, nor do we perceive any logical reason why an employer cannot resolve a problem through negotiation. Allegan County's response was appropriate after it received notice.

Plaintiff next argues that there was a genuine issue of material fact whether the county unlawfully retaliated against her for exercising her right to complain of sexual harassment when it terminated her in August 2003. To establish a prima facie case of retaliation, a plaintiff must show (1) that she engaged in a protected activity; (2) that the defendant knew of the plaintiff's involvement in protected activity; (3) that the defendant's actions adversely affected the plaintiff's employment; and (4) that the adverse employment action was causally connected to the protected activity. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005). Close temporal proximity between the protected activity and the adverse actions may support an inference of a causal link. *Rymal*, *supra* at 303. However, as with retaliation under the Whistleblowers' Protection Act, retaliation under the CRA requires more than proof of temporal proximity alone. *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 661-662; 653 NW2d 625 (2002). Plaintiff provides no additional evidence, and she admits that Campbell intervened in the interim to improve the office atmosphere for her.

Even if plaintiff could establish a prima facie case of retaliation, Allegan County carried its burden of articulating a legitimate, non-retaliatory reason for plaintiff's discharge. *Hazle v Ford Motor Co*, 464 Mich 456, 462-466; 628 NW2d 515 (2001). The county eliminated plaintiff's position in conjunction with a cost-reduction plan and an outside consultant's report

[2] Plaintiff also admitted that she was uncertain whether some of the touching incidents were intended to be sexual or were even intentional.

that recommended elimination of her position. Plaintiff contends that this reason was pretextual for retaliation, because her job was the only one eliminated, and her termination did not save the county much money. A work force reduction can, however, legitimately consist of the elimination of only one employee. *Taylor, supra* at 660. The county explained that plaintiff's job was eliminated because she had the least seniority and her duties could be easily reassigned to other employees. Plaintiff has not shown that this was a pretext for discrimination.

Plaintiff argues that Allegan County violated other provisions of MCL 37.2701, but these issues are waived on appeal because they were not raised in the statement of questions presented. *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 309; 600 NW2d 664 (1999); MCR 7.212(C)(5). In any event, we are not persuaded. Plaintiff claims that Deetz's and Campbell's "deal" whereby Deetz received a $50,000 severance payment violated MCL 37.2701(e), which prohibits "[w]illful[] obstruct[ion] or prevent[ion of] a person from complying with this act . . . ." There is no evidence that Deetz improperly influenced Campbell's or the county's severance payment decision, and there is no evidence that the $50,000 severance payment was illegal or improper. Plaintiff also claims that the county violated MCL 37.2701(f), which provides that a person shall not "[c]oerce, intimidate, threaten, or interfere with a person . . . on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act." Plaintiff relies entirely on inadmissible hearsay that may not be used to establish a question of fact precluding summary disposition. MRE 801; MRE 802; *Maiden, supra* at 125.

Finally, plaintiff claims that the trial court erred in dismissing her intentional infliction of emotional distress claim against Deetz. We disagree.

To establish a claim for intentional infliction of emotional distress, a plaintiff must prove (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004). The conduct complained of must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.* A defendant is not liable for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003). Whether the offending conduct is extreme and outrageous is initially a question of law for the court. *Id.* at 197. Where reasonable minds may differ, the jury decides whether a defendant's conduct is so extreme and outrageous as to warrant liability. *Id.*

Deetz's emails and jokes were clownish, puerile, unprofessional, and in some instances mildly sexual, but they cannot reasonably be described as outrageous, atrocious, or utterly intolerable. We doubt they would be remarkable to anyone familiar with contemporary popular culture. The alleged touching incidents involved a few occasions when Deetz lightly and briefly touched plaintiff, with no clear indication that they were intended to be offensive or even intended at all. The incidents did not involve any sexual remarks, or more offensive conduct such as squeezing, groping, or fondling. In *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 346; 483 NW2d 407 (1991), the plaintiff's supervisor and co-workers ridiculed her weight and appearance, referred to her as a "Jewish-American princess," and asked her whom she had slept with to get her job. We found this insufficient to support a claim for intentional infliction of emotional distress. *Id.* In *Trudeau v Fisher Body Div, General Motors Corp*, 168 Mich App 14, 20; 423 NW2d 592 (1988), we also found insufficient evidence of this tort where the

plaintiff's supervisor told the plaintiff, "I'm 40 years old and I've never screwed a white woman. . . . I think it would feel kind of good." Deetz's alleged conduct is less egregious than the conduct in these cases, which carried overtones of malice, racial and religious hostility, and direct sexual propositioning. Breaking into plaintiff's personal email account and sharing her messages with Campbell is invasive, but far less so than a defendant secretly videotaping himself having sex with a plaintiff. See *Lewis*, *supra* at 197-198. It also lacks the breach of trust inherent in that case.

We need not address the alternative grounds for affirmance discussed in the cross-appeal.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Alton T. Davis