STATE OF MICHIGAN

COURT OF APPEALS

WILLIE WRIGHT,

Plaintiff-Appellant,

v

MICRO ELECTRONICS, INC.,

Defendant-Appellee,

and

TONY NUNEZ and FRANK ANGELUCCI,

Defendants.

UNPUBLISHED
March 18, 2008

No. 274668
Oakland Circuit Court
LC No. 2003-050906-NO

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's opinion and order granting defendant Micro Electronic, Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(10).[1] We affirm in part, reverse in part, and remand.

This action arises from the posting of plaintiff's photograph at several locations inside defendant's Madison Heights store where plaintiff was employed. Plaintiff filed this action on July 1, 2003, alleging that the photographs were posted on or about July 2, 2002. Written on each of the photos were the following remarks:

> WANTED
> For Transmiting [sic]
> Aid To Hundreds
> of underage
> Boys.

[1] The individual defendants, Tony Nunez and Frank Angelucci, were dismissed by stipulation, with prejudice.

Last Seen:
Making away
By foot. Near
Basketball court.

If Seen:
Shoot to
Kill.

Contact
www.Autoless or

Plaintiff's complaint included claims for defamation, false light invasion of privacy, intentional infliction of emotional distress, negligence, and race discrimination and hostile work environment harassment under the Michigan Civil Rights Act, MCL 37.2201 *et seq.*

This Court reviews the trial court's grant or denial of summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The trial court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence filed by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. MCR 2.116(G)(2); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Allstate Ins Co v Dep't of Mgt & Budget*, 259 Mich App 705, 709-710; 675 NW2d 857 (2003). The motion should be granted only if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *MacDonald*, *supra* at 332.

Plaintiff first argues that the trial court erred in relying on *Gladych v New Family Homes, Inc*, 468 Mich 594, 595; 664 NW2d 705 (2003), to conclude that his defamation claims were barred by the statute of limitations. We agree.

The limitations period for a defamation claim is one year. MCL 600.5805(9); *Mitan v Campbell*, 474 Mich 21, 25; 706 NW2d 420 (2005). Although plaintiff filed his complaint on July 1, 2003, less than one year after the alleged defamatory conduct on July 2, 2002, the trial court, relying on *Gladych*, *supra*, found that plaintiff's defamation claims were barred by the one-year limitations period because service was not accomplished until August 2003, after the one-year period expired. We conclude that *Gladych* is not applicable to this case.

In *Gladych*, the Supreme Court overruled its decision in *Buscaino v Rhodes*, 385 Mich 474, 481; 189 NW2d 202 (1971), which held that the statute of limitations is tolled upon the filing of a complaint. Instead, the Court in Gladych concluded

> that the unambiguous language of MCL 600.5805 and MCL 600.5856 provides that the mere filing of a complaint is insufficient to toll the statute of limitations.

> In order to toll the limitations period, one must also comply with the requirements of [MCL 600.5856]. [*Gladych*, *supra* at 595.]

However, observing that there had been extensive reliance on *Buscaino*'s interpretation of § 5856, the Court in *Gladych* held that its decision would be given

> limited retroactive application, applying only to those cases in which this specific issue has been raised and preserved. In all other cases, the decision is given prospective application, effective September 1, 2003." [*Gladych*, *supra* at 607-608.]

In this case, plaintiff filed his complaint on July 1, 2003, the same day that *Gladych* was decided. Although defendant filed an answer and raised the statute of limitations as an affirmative defense, that answer was not filed until January 30, 2006. Thus, at the time *Gladych* was decided, defendant had neither raised nor preserved this specific issue. Because this action was filed before September 1, 2003, and because defendant had neither raised nor preserved this specific issue at the time *Gladych* was decided, we conclude that *Gladych* does not apply. Accordingly, this case is controlled by *Buscaino*, and plaintiff's filing of his complaint less than one year after the alleged defamatory conduct occurred was sufficient to toll the limitations period. Thus, the trial court erred in granting summary disposition on this basis.

The trial court alternatively concluded that even if the defamation claims were timely filed, defendant was not liable under the doctrine of respondeat superior. We agree with plaintiff that the trial court erred in finding that there was no genuine issue of material fact whether defendant could be liable under this doctrine.

"Under the doctrine of respondeat superior, the general rule is that an employer is not liable for the torts intentionally or recklessly committed by an employee when those torts are beyond the scope of the employer's business." *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 221; 716 NW2d 220 (2006). In *Zsigo*, the Supreme Court observed that 1 Restatement Agency, 2d, § 219(2) sets forth the general rule of respondeat superior and also lists certain exceptions to employer nonliability:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency in question.

The *Zsigo* Court explained that the fourth exception, § 219(2)(d), has not been adopted in Michigan because it would amount to a strict liability policy. *Id.* at 227.

Here, the trial court found that defendant could not be liable under a respondeat superior theory because the submitted evidence showed that the objectionable photographs were posted by an employee, Tony Nunez, who was acting outside the scope of his employment duties. We conclude that the trial court erred by focusing only on whether it was within the scope of Nunez's employment to write the allegedly defamatory comments on the photographs and post them in the workplace.

There was evidence that photographs of employees were often posted in the store and that Tony Nunez sometimes posted signs in the scope of his employment. Even excluding the hearsay evidence that Frank Angelucci may have helped Nunez edit the language on the photographs, Angelucci testified that he taught Nunez how to make color copies when Nunez asked for instruction in order to post something. More significantly, there was evidence that several store managers, including Colleen Niemiec, a customer service manager, Matt McLennan, the retail sales manager, and Gary Dingeman, the store's general manager, were present for two days while the pictures were allegedly posted throughout the workplace. Although they each denied ever observing the photographs, the evidence showed that the photos were posted in several different locations at the workplace and Angelucci, who was plaintiff's supervisor, testified that a person would have to be "blind" not to see them. Angelucci also stated that if the managers were doing their jobs, they would have walked by the photographs at least ten times during an eight-hour day.

Further, plaintiff testified that he did not complain to Niemiec because he observed her looking at the photograph "on multiple occasions" and she laughed when she looked at it. Additionally, plaintiff testified that McLennan, Angelucci's supervisor, saw the photograph and told plaintiff that he could not sue defendant over this. Angelucci testified that he confronted McLennan, Niemiec, and the store's general manager, Gary Dingeman, about the photographs, telling them that they should be ashamed for not having the photos removed, and McLennan responded by stating, "What, don't you have a sense of humor?" Thus, even though McLennan, Niemiec, and Dingeman all denied seeing the photographs, plaintiff submitted circumstantial evidence showing that the photographs were conspicuously displayed in their presence and other direct evidence indicating that they were aware of and had viewed the photos. Questions of credibility are for the jury to resolve. *Mich Nat'l Bank v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988).

Given the evidence that management personnel were aware of the photos and not only tolerated their display, but engaged in conduct that may have tacitly reflected their endorsement or approval of the displays, and rebuked comments suggesting that they were in poor taste, we conclude that a question of fact exists whether defendant may be liable under the doctrine of respondeat superior because it either intended Nunez's conduct or consequences, or because its own negligent or reckless conduct permitted the displays. *Zsigo, supra* at 221. Thus, the trial court erred in determining that defendant could not be liable under a respondeat superior theory.

We also agree with plaintiff that he established a prima facie case of defamation per se. "The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mitan, supra* at 24. MCL 600.2911(10) provides that "[w]ords imputing a lack of chastity to any

female or male are actionable in themselves and subject the person who uttered and published them to a civil action for the slander in the same manner as the uttering or publishing of words imputing the commission of a criminal offense."

The photographs of plaintiff contained the following written comments:

> WANTED
> For Transmiting [sic]
> Aid To Hundreds
> of underage
> Boys.

Although defendant argues that the statements must be considered "in context" as a joke, we believe that a reasonable trier of fact could interpret the statements as suggesting that plaintiff had a sexually transmitted disease, which he transmitted to hundreds of underage boys, thereby implying his participation in sexual acts with hundreds of underage boys. Such a statement, if believed, is actionable irrespective of special harm. *Linebaugh v Sheraton Michigan Corp,* 198 Mich App 335, 339; 497 NW2d 585 (1993).

We disagree with defendant's argument that the dismissal of plaintiff's federal court action requires dismissal of plaintiff's state court claims based on res judicata. Because the federal action was dismissed for lack of jurisdiction, plaintiff was not barred by res judicata from bringing his state claims in state court. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 381-382; 596 NW2d 153 (1989).

Plaintiff also argues that the trial court erred in dismissing his claim for false light invasion of privacy. We agree.

"In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." *Duran v The Detroit News, Inc*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993). Additionally, the defendant must have known of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff was placed. *Detroit Free Press, Inc v Oakland Co Sheriff*, 164 Mich App 656, 666; 418 NW2d 124 (1987).

The trial court determined that defendant was entitled to summary disposition of this claim because plaintiff failed to show that defendant had knowledge of the photographs. Accordingly, the court concluded that plaintiff could not establish that defendant knowingly acted in reckless disregard to the falsity of the publicized matter.

We agree with plaintiff that the trial court erred in determining that there was no genuine issue of material fact regarding defendant's knowledge of the photographs or whether defendant acted in reckless disregard of the falsity of the publicized matter.

As discussed previously, plaintiff submitted evidence that the photographs were conspicuously displayed in several locations in the store. According to Angelucci, a person

would have to be "blind" not to see them, and the managers would have had to walk past them at least ten times a day as part of their jobs. Additionally, plaintiff testified that he observed the customer service manager, Colleen Niemiec, look at the photographs "on multiple occasions" and laugh when she saw them. Plaintiff also testified that Angelucci's supervisor, Matt McLennan, made a comment about the photographs, telling plaintiff that he could not sue "over this." Moreover, Angelucci testified that he confronted Niemiec, McLennan, and Dingeman, telling them that they should be ashamed for leaving the photographs up, to which McLennan responded, "What, don't you have a sense of humor?" Viewed in a light most favorable to plaintiff, this evidence was sufficient to show that defendant had knowledge of the photographs.

Additionally, plaintiff testified that he did not have AIDS and had never engaged in sex with any man or boy. Thus, plaintiff presented evidence that the comments on the photographs attributed characteristics or conduct to him that were false, unreasonable, and highly objectionable.

Furthermore, the evidence established an issue of fact whether defendant acted in reckless disregard of the falsity of the publicized matter and the false light in which plaintiff was placed. Viewed most favorably to plaintiff, there was evidence that defendant's management personnel allowed the photographs to remain posted, despite their knowledge of the photos and the objectionable content, and that they may have engaged in conduct or commentary signifying their endorsement or approval of the display.

The trial court also granted summary disposition of plaintiff's false light claim because it concluded that plaintiff failed to present evidence showing that the publication was made to the general public or to a large number of people. We disagree.

There was evidence that the photograph was posted in several different locations in the workplace, including a public area of the store. Moreover, the photos were posted for more than one day. Plaintiff observed several coworkers looking at the photos. Plaintiff also testified that Nunez showed the photographs to other employees, including plaintiff's former fiancée, and to a new hire, and continued to show them to people even after they were taken down. At least four coworkers and two customers made comments to plaintiff about the photograph. One customer, a lawyer, gave plaintiff his card. In light of this evidence, there was a genuine issue of fact whether the photograph was published to the general public or a large number of people to avoid summary disposition on this basis.

Next, plaintiff asserts that the trial court improperly dismissed his claim for intentional infliction of emotional distress. We agree.

"The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress." *Linebaugh, supra* at 342. "Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been 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.*

The trial court dismissed this claim because it concluded that plaintiff could not show that the photographs were extreme and outrageous, noting that plaintiff never even complained about

the photos. Although plaintiff did not complain about the photographs to management, he explained that this was because he was concerned for his job and he did not want to "make waves" at work. Moreover, there was evidence suggesting that plaintiff had legitimate reasons for believing that complaining would not have helped the situation. Plaintiff presented evidence that Colleen Niemiec openly laughed at the photos, and that McLennan told plaintiff that he could not sue "over this." Further, contrary to the trial court's determination, we believe that publicly posting a person's photograph with the suggestion that the person is a pedophile who transmitted a sexually transmitted disease to hundreds of underage boys is conduct that may be considered sufficiently extreme and outrageous to support submission of this issue to the trier of fact. See *Linebaugh, supra* at 342-343 (a depiction of the plaintiff engaged in a sexual act with a coworker was sufficiently outrageous and extreme in character to support submission of the issue to the trier of fact).

The trial court also determined that there was no evidence that plaintiff suffered severe emotional distress. "[E]motional distress 'includes all highly unpleasant mental reactions, such as fright, horror, grief, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.' " *Haverbush v Powelson*, 217 Mich App 228, 235; 551 NW2d 206 (1996), quoting 1 Restatement Torts, 2d, § 46, Comment j, p 77. "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." *Id.* It is not necessary that the plaintiff seek medical treatment. *Id.*

Plaintiff testified that he no longer wanted to go to work after the photograph was posted, that he became more angry as time went by, and that he was embarrassed by the photos, and that he believed that his coworkers thought less positively about him. The evidence raised a genuine issue of material fact whether the posting of the photographs caused severe emotional distress.

For these reasons, the trial court erred in dismissing plaintiff's claim for intentional infliction of emotional distress.

Plaintiff also argues that the trial court erroneously dismissed his negligence claim. To establish a claim for negligence, a plaintiff must "demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached the duty, (3) the defendant's breach of the duty proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

Plaintiff submitted evidence of defendant's written employment policy, which states that harassment, including "offensive conduct which creates an intimidating work environment or interferes with work performance," is a violation of company policy. Angelucci testified that the photograph violated defendant's harassment policy, that the other managers were aware of the photos when they were posted, that the managers did not act to remove the photos, and that when Angelucci confronted the managers about them, they responded without interest. Plaintiff testified that he observed the managers looking at the photograph, that Niemiec laughed at it, and that McLennan warned him that he could not sue defendant because of it. Plaintiff testified that the photographs damaged his reputation, was the cause of repeated comments from his coworkers, and caused him to avoid the workplace. Giving plaintiff the benefit of reasonable doubt, reasonable minds could differ on whether defendant's conduct regarding the photograph

was negligent. *Allstate Ins Co, supra* at 709-710. Thus, the trial court erred in dismissing plaintiff's negligence claim.

Finally, plaintiff argues that the trial court improperly dismissed his claims for race discrimination and hostile work environment harassment based on plaintiff's race.

To establish a prima facie case of race discrimination under the Civil Rights Act, a plaintiff must provide "enough evidence to create a rebuttable presumption of discrimination." *Harrison v Olde Financial Corp*, 225 Mich App 601, 607-608; 572 NW2d 679 (1997). "Proof of discriminatory treatment in violation of the [Civil Rights Act] may be established by direct evidence or by indirect or circumstantial evidence." *Sniecinski v Blue Cross Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). "Direct evidence" is evidence that, if believed, "requires the conclusion that unlawful discrimination was at least a motivating factor." *Harrison, supra* at 610. In cases involving indirect evidence, a plaintiff must use a burden-shifting approach by first presenting "a rebuttable prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination." *Sniecinski, supra* at 134.

To establish a hostile work environment claim, a plaintiff must show (1) that he belonged to a protected group, (2) that he was subjected to communication or conduct on the basis of his protected status, (3) that the conduct or communication was unwelcome, (4) that the unwelcome conduct was intended to or did in fact create an intimidating, hostile, or offensive work environment, and (5) respondeat superior. *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996).

We agree with the trial court that plaintiff failed to present evidence, direct or indirect, that the posting of the photographs, or the comments thereon, were based on plaintiff's race. Although Angelucci referred to Nunez as "a racist," the photographs did not refer to plaintiff's race and there was nothing overtly racist about any of the comments on the photos. Plaintiff admitted that he had no proof that the photographs had anything to do with his race and that he was not really sure why Nunez posted them. Contrary to plaintiff's suggestion on appeal, we do not believe that the mere statement that plaintiff was seen near a basketball court raises a general issue of fact regarding whether race was a factor that led to the posting of the photographs. Indeed, plaintiff admitted that he and Nunez played basketball together. Accordingly, the trial court properly dismissed plaintiff's claims for race discrimination and hostile work environment harassment based on plaintiff's race.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder