STATE OF MICHIGAN

COURT OF APPEALS

JANE DOE,

Plaintiff-Appellee,

v

ANN ARBOR PUBLIC SCHOOLS, BRUCE GLAZIER, and WALEED SAMAHA,

Defendants-Appellants,

and

DLS SERVICES, INC., ROLAND SMITH, ERIC RUTLEY, and ROBERT GALARDI,

Defendants.

UNPUBLISHED
June 21, 2011

Nos. 294692; 294715; 294994
Washtenaw Circuit Court
LC No. 08-000018-NO

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In these consolidated appeals,[1] defendants Ann Arbor Public Schools, Bruce Glazier, and Waleed Samaha appeal by leave granted in Docket No. 294692 and by right in Docket No. 294715 the trial court's order denying defendants' motion for summary disposition with regard to plaintiff's civil rights and negligence claims. In Docket No. 294994, defendants appeal by leave granted the trial court's order allowing plaintiff to admit certain evidence at trial. In Docket Nos. 294692 and 294715, we affirm in part and reverse in part. In Docket No. 294994, we dismiss the appeal as moot.

These appeals arise from a lawsuit commenced by plaintiff Jane Doe, a student at Huron High School, which is operated by Ann Arbor Public Schools (AAPS) and at which Samaha was an assistant principal. Eric Rutley, who was supervised by AAPS employee Glazier, sexually

[1] *Doe v Ann Arbor Pub Sch*, unpublished order of the Court of Appeals, entered March 2, 2010 (Docket Nos. 294692, 294715, 294994).

assaulted plaintiff at the high school while working as a custodian after regular school hours. Plaintiff sought to recover against defendants under a theory that they violated her civil rights under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, and for their negligent selection, retention, and monitoring of Rutley.

We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. MCR 2.116(G)(4); *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). We also review de novo the applicability of governmental immunity. *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 271; 792 NW2d 798 (2010).

Defendants argue that the trial court erred in denying them summary disposition as to plaintiff's ELCRA claim.[2] The basis for plaintiff's ELCRA claim is sexual harassment interfering with her education. Under the ELCRA, a person cannot be denied access to educational facilities on the basis of sex. MCL 37.2102(1). Discrimination because of sex includes sexual harassment. MCL 37.2103(i). "Sexual harassment" is defined by the ELCRA as

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> * * *
>
> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [MCL 37.2103(i).]

Sexual harassment that falls within subsection (*iii*) is known as hostile environment sexual harassment. *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d 910 (2000).

To establish her claim of hostile environment sexual harassment, plaintiff must prove the following elements by a preponderance of the evidence: (1) she belonged to a protected group;

---

[2] The trial court dismissed this claim as to defendant Glazier. Therefore, the issue raised on appeal relates only to AAPS and Samaha.

(2) she was subjected to communication or conduct on the basis of sex; (3) she 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 her education or created an intimidating, hostile, or offensive environment; and (5) respondeat superior. *Id*. at 311, quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).

In arguing whether plaintiff was subjected to sexual harassment, both parties reference Rutley's sexual assault as evidence of either welcome or unwelcome sexual conduct. However, the sexual assault itself cannot be the conduct on which plaintiff's claim is based because defendants can only be held liable for conduct of which they had notice and failed to adequately remedy. *Chambers*, 463 Mich at 313, 319. The parties do not dispute that defendants did not have notice of the sexual assault before it occurred. Thus, they had no opportunity to address the conduct. Therefore, only conduct or communication that occurred before the sexual assault can form the basis of plaintiff's claim.

"[A]ctionable sexual harassment requires conduct or communication that *inherently* pertains to sex." *Corley*, 470 Mich at 279 (emphasis in original). Plaintiff's testimony showed that Rutley conveyed his sexual interest in her through written and verbal communications, which made her uncomfortable to the point that she sought out Samaha's help. Although lacking many specific examples, plaintiff's deposition testimony was sufficient to create a genuine issue of material fact regarding whether Rutley's communications constituted unwelcome sexual communications. *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008) ("This Court is liberal in finding genuine issues of material fact."); *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 625; 739 NW2d 132 (2007), aff'd 482 Mich 136 (2008) (stating that a genuine factual issue exists where the truth of material factual assertions depends on credibility).

Defendants argue that, nevertheless, they were entitled to summary disposition because plaintiff's testimony did not create a factual question regarding whether they had notice of the alleged sexual harassment. Defendants can be liable for hostile environment sexual harassment only if they failed to investigate and take prompt, appropriate remedial action after having been put on notice of the harassment. *Chambers*, 463 Mich at 313.[3] Notice is considered adequate if,

---

[3] In contrast, vicarious tort liability under general tort principles "generally can be imposed only where the individual tortfeasor acted during the course of his or her employment and within the scope of his or her authority." *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 624; 363 NW2d 641 (1984), superseded by statute on other grounds as stated in *Peters v Bay Fresh Start, Inc*, 161 Mich App 491, 498; 411 NW2d 463 (1987). Thus, respondeat superior under the ELCRA and vicarious liability under general tort principles have differing standards of proof, as defendants concede. Defendants nonetheless assert that they cannot be held liable under a vicarious liability theory based on their reading of plaintiff's ELCRA claim. However, plaintiff affirmatively states on appeal that she did not assert a claim of vicarious tort liability, and a reasonable reading of plaintiff's complaint supports her assertion. Therefore, defendant's argument on this issue is irrelevant.

under the totality of the circumstances, when viewed objectively, a reasonable defendant "would have been aware of a substantial probability that sexual harassment was occurring." *Id.* at 319. Thus, a defendant cannot be held liable unless it received actual or constructive notice of the harassing conduct. *Sheridan v Forest Hills Pub Sch*, 247 Mich App 611, 621; 637 NW2d 536 (2001). A plaintiff can establish that a defendant had knowledge of the harassment "by showing that she complained to higher management of the harassment . . . or by showing the pervasiveness of the harassment . . . ." *Sheridan*, 247 Mich App at 621 (quotations and citation omitted).

Here, the parties do not dispute that plaintiff spoke to Samaha approximately four days before Rutley assaulted her. While plaintiff's testimony was equivocal at times, it is to be viewed in the light most favorable to plaintiff when determining a summary disposition motion. *Corley*, 470 Mich at 278. The evidence is weak regarding plaintiff's disclosure to Samaha as to the sexual nature of Rutley's communications, but we find that it is sufficient to create a factual question. Plaintiff stated that she told Samaha about Rutley's interest in her and the letters and gifts continuously left in her locker by Rutley. The logical inference in plaintiff's favor is that Rutley's interest inherently pertained to sex. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010) (stating that all reasonable inferences must be drawn in favor of the party opposing summary disposition). Plaintiff also testified that she identified Rutley as "Sam's brother," who worked at the school and was being flirtatious, which made her uncomfortable. We conclude that reasonable minds could differ in determining if a reasonable defendant "would have been aware of a substantial probability that sexual harassment was occurring." *Chambers*, 463 Mich at 319. Consequently, genuine issues of material fact exist regarding whether plaintiff was subjected to unwelcome verbal and/or written sexual communication and whether defendants had sufficient notice of it. Accordingly, the trial court did not err in denying summary disposition on plaintiff's ELCRA claim as to AAPS and Samaha.

Defendants also argue that the trial court erred in denying their motion for summary disposition in regard to plaintiff's negligent hiring, retention, and supervision claim. MCL 691.1407(2) addresses governmental immunity from tort liability, providing in pertinent part:

> . . . [E]ach . . . employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the . . . employee . . . while in the course of employment . . . if all of the following are met:
>
> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

In *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2009), the Supreme Court held that the phrase "the proximate cause" in MCL 691.1407(2)(c) refers to "the one most

immediate, efficient, and direct cause of the injury or damage." In her brief on appeal plaintiff concedes that defendants' conduct was not the one most immediate, efficient, and direct cause of her injuries and that, therefore, defendants are entitled to summary disposition on her claim for negligent hiring, retention, and supervision.[4] Based on plaintiff's concession, we reverse the trial court's order denying defendant's motion for summary disposition on the claim.[5] In addition, because the trial court's evidentiary ruling pertained to plaintiff's negligence claim, plaintiff's concession renders defendants' appeal in Docket No. 294994 moot.

In Docket Nos. 294692 and 294715, we affirm in part and reverse in part the trial court's order denying defendants' summary disposition motion. We dismiss as moot defendants' appeal in Docket No. 294994.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

---

[4] Plaintiff argues that *Robinson* was incorrectly decided, but we are bound under the rule of stare decisis to follow the decisions of the Supreme Court. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008).

[5] Because defendants' conduct was not "the proximate cause" of plaintiff's injuries, we need not address whether defendants' conduct could amount to "gross negligence," which is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," MCL 691.1407(7)(a).