STATE OF MICHIGAN

COURT OF APPEALS

FENICIA M. HAYES,

Plaintiff-Appellant/ Cross Appellee,

v

METRO-DETROIT PIZZA and
MARK MATTOX,

Defendants-Appellees/ Cross Appellants.

UNPUBLISHED
September 13, 1996

No. 180177
LC No. 93-331786

Before: Gribbs, P.J., and Saad and J. P. Adair,* JJ.

PER CURIAM.

Plaintiff appeals and defendants cross appeal as of right the trial court's grant of summary disposition in favor of defendants in this sexual harassment claim brought under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. We affirm in part and reverse in part.

This action arose as the result of alleged sexual harassment of plaintiff, an employee of Metro-Detroit Pizza, by Mark Mattox, who worked for Metro-Detroit and was plaintiff's supervisor at the time of the alleged incident. Metro-Detroit owns several Domino's Pizza franchises. Plaintiff alleged that Mattox directed unsolicited sexual advances, including touching and lewd remarks, at her. She alleged that, following her refusal of Mattox's advances, her working hours were decreased significantly. After reporting the incident to Metro-Detroit, an investigation was conducted, Mattox was reprimanded through a letter, and plaintiff voluntarily transferred to another store. Plaintiff eventually resigned, and indicated that her resignation was unrelated to the incident involving Mattox. She brought a claim under the civil rights act for sexual harassment based on a hostile work environment. Claims for assault and battery, intentional infliction of emotional distress and failure to maintain a safe work environment were also brought.

Following initial discovery, it was learned that plaintiff, who had worked for other Domino's franchises before working for Metro-Detroit, had falsely indicated on her employment application with Metro-Detroit that she had quit her previous employment. In fact, plaintiff admitted in her deposition

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* Circuit judge, sitting on the Court of Appeals by assignment.

that she had been terminated upon the franchisee's suspicion that she had mishandled funds. Metro-Detroit indicated that had it known that plaintiff had been terminated from another franchise for mishandling funds, it would not have hired her.

The trial court found plaintiff's sexual harassment and assault and battery claims to be barred by the after-acquired evidence rule. Defendants' motion was granted as to plaintiff's claim regarding defendants' failure to maintain a safe work environment on the basis that the claim fell within the scope of worker's compensation laws and therefore the court was without jurisdiction to hear the claim. Finally, the claim for intentional infliction of emotional distress was dismissed for failure to present supporting evidence. This appeal, which involves only the claim relating to sexual harassment under the civil rights act, followed.

On appeal, plaintiff asserts that the trial court either erred in applying the after-acquired evidence rule or that, because Metro-Detroit failed to demonstrate that the alleged misrepresentation was material to its hiring of plaintiff, her claim is not barred by its application.

The after-acquired evidence doctrine was applied by the United States Supreme Court in the context of an age discrimination case in *McKennon v Nashville Banner Publishing Co*, 513 US ___; 115 S Ct 879; 130 L Ed 2d 852 (1995). The Supreme Court concluded that, where a defendant could demonstrate that after-acquired evidence of misconduct by an employee would have resulted in dismissal of the employee, the misconduct could be used to limit the nature of the plaintiff's relief. *McKennon*, *supra*, 130 L Ed 2d 863. A plaintiff would generally be denied reinstatement and front pay, but back pay might be found to be appropriate. *Id.* This reasoning was adopted by this Court in the context of state civil rights laws in *Wright v Restaurant Concept Management, Inc*, 210 Mich App 105; 532 NW2d 889 (1995), and most recently in *Horn v Dep't of Corrections*, 216 Mich App 58; 548 NW2d 660 (1996).

The trial court here found plaintiff's claims to be barred in their entirety based on the after-acquired evidence doctrine. This was in error. The after-acquired evidence rule should have been applied only to limit the relief afforded to plaintiff. See *Horn*, *supra* at 67; *Wright*, *supra* at 112-113. Moreover, we reject plaintiff's assertion that her falsification of her employment application was immaterial. As she was hired as a delivery driver and would therefore be handling money, we find to be material the fact that she was discharged from her previous employment upon a suspicion of mishandling funds.

However, we find the trial court's result to be correct as to Metro-Detroit, albeit for the wrong reason. See *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 235; 477 NW2d 146 (1991). As argued by defendants in their cross-appeal, we find that Metro-Detroit established that it adequately investigated the incident and took prompt and remedial action upon plaintiff giving it notice of the incident. This issue was raised below in defendants' motion and supported by the requisite documentary evidence for a summary disposition motion under MCR 2.116(C)(10). It is therefore properly preserved for appellate review. *Gortney v Norfolk & Western R Co*, 216 Mich App 535, 544; ___ NW2d ___ (1996). Thus, plaintiff's claim as to Metro-Detroit was properly dismissed.

To establish a prima facie civil rights claim based on a hostile work environment, an employee must demonstrate: that she was a member of a protected group and was subjected to unwelcome sexual communication or conduct on the basis of sex, which was intended to or did in fact substantially interfere with her employment or created an intimidating, hostile or offensive work environment. The employee must also establish respondeat superior. *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993). Once a prima facie case is established, "an employer may avoid liability for a sexual discrimination claim based on a hostile work environment if it adequately investigated and took prompt remedial action upon notice of the alleged hostile work environment." *Downer, supra* at 235. However, this duty to investigate and take prompt remedial action is triggered only upon the employer having actual or constructive notice of the offensive environment. *Id*.

In their motion for summary disposition, defendants asserted that Metro-Detroit conducted a prompt investigation and took appropriate remedial measures to address plaintiff's complaints. The federal courts, in the context of federal civil rights law, have determined that appropriate remedial measures are those which are reasonably calculated to end the harassment. *Barrett v Omaha Nat'l Bank*, 726 F2d 424, 426-427 (CA 8, 1988). The record demonstrates that plaintiff notified Metro-Detroit of Mattox's alleged conduct approximately two days after the incident occurred, and within six days an investigation had been conducted and letters sent to both plaintiff and Mattox. Plaintiff was transferred to a different store within a week of making her complaint. Following the investigation, Metro-Detroit called plaintiff on occasion to ensure that the harassment was not continuing, and, although she indicated in her deposition that two additional incidents occurred, Metro-Detroit took action as to one of those and had no knowledge as to the second.

Summary disposition pursuant to MCR 2.116(C)(10), on the basis that there exists no genuine issue of material fact, is appropriate when, after examining the record and all documentary evidence and giving the benefit of all reasonable doubt and inferences to the non-moving party, we determine that a record can not be developed upon which reasonable minds might differ. *Taylor v Lenawee Co Bd of Rd Comm'rs*, 216 Mich App 435, 437; ___ NW2d ___ (1996). We conclude that reasonable minds could not differ that Metro-Detroit's response to plaintiff's claims was prompt and was an adequate remedial measure to end the offensive conduct alleged by plaintiff. Therefore, summary disposition as to her claim of sexual harassment based on a hostile work environment against Metro-Detroit was appropriate.

Next, plaintiff argues that it was inappropriate to dismiss the claim brought against Mattox under the civil rights act. Defendants argue that the complaint implicates only the corporate defendant with regard to the sexual harassment claim.

Under the Elliott-Larsen Civil Rights Act, "employer" is defined as "a person who has 1 or more employees, and includes an agent of that person." MCL 37.2201(a); MSA 3.548(201)(a). Following *Munford v James T Barnes & Co*, 441 F Supp 459 (ED Mich, 1977), which involved alleged violations of Title VII of the Civil Rights Act of 1964, 42 USC 2000(e)-2, this Court held that "if a person has responsibility for making personnel decisions for the company, he is an agent [at least for that purpose] within the statutory definition of an employer." *Jenkins v American Red Cross*, 141

Mich App 785; 369 NW2d 223 (1985). In *Champion v Nationwide Security, Inc*, 205 Mich App 263; 517 NW2d 777 (1994), rev'd in part on other grounds 450 Mich 702; 545 NW2d 596 (1996), this Court clarified that "nowhere is it required that an employee must exercise complete control of plenary duties to qualify as an agent of the employer. Rather, all that is required is that the employee have 'significant control' of those duties." *Id.* at 267, quoting *Kauffman v Allied Signal, Inc*, 970 F2d 178, 186 (CA 6, 1992).

In the instant case, plaintiff alleged that Mattox was her supervisor, but there are no allegations regarding the amount of control he had over her duties. Although inartfully drafted, a fair reading of the complaint does implicate Mattox as an employee and alleged agent of Metro-Detroit who committed acts constituting sexual harassment. However, because the record does not contain sufficient facts regarding Mattox's status as an employee of Metro-Detroit at the time of the alleged incident to determine whether he was an "agent" for purposes of the Elliott-Larsen Civil Rights Act, summary disposition as to Mattox would be inappropriate. We therefore remand to the trial court for further proceedings with respect to Mattox's liability.

Affirmed in part and reversed in part. Remanded. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Henry William Saad
/s/ James P. Adair