

STATE OF MICHIGAN
COURT OF APPEALS

ANGELA BURTON,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY,

Defendant-Appellee,

and

PATRICIA GAGE and MARK NUGENT,

Defendants.

UNPUBLISHED

June 3, 2003

No. 234129

Washtenaw Circuit Court

LC No. 99-005064-NO

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition to defendants Gage and Ford Motor Company (Ford) under MCR 2.116(C)(10) in this sexual harassment and retaliation case brought pursuant to the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* We affirm in part and remand in part.

Plaintiff, a nurse for Ford, received repeated unwanted telephone calls from Doctor Mark Nugent, her supervising doctor. Nugent's calls were sexual in nature, recounted his sexual escapades, demeaned plaintiff as sheltered and naïve and, at least once, told her she was fired. Plaintiff reported Nugent's calls to her nursing supervisor, defendant Gage, a senior nurse. Plaintiff testified that Gage told plaintiff not to take her complaints to the human resources department, and that Gage told plaintiff that Gage had spoken to the corporate department and they said they wanted Nugent's problems handled within the medical department, and not by human resources. The ongoing problem was finally reported to human resources, over a year after the harassment began, and action was taken. Plaintiff contends that thereafter she was given poor performance ratings and that eventually she was forced to take a demotion.

Plaintiff argues that the circuit court erroneously concluded that she failed to provide evidence that Ford had notice of the initial harassment. We review *de novo* a trial court's grant of summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

To establish respondeat superior for a hostile work environment sexual harassment claim, “an employer must have actual or constructive notice of the alleged harassment.” *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001). A plaintiff must either demonstrate that “higher management” was notified about the conduct or that the employer should have known about the harassment because of its pervasiveness. *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 475; 652 NW2d 503 (2002).¹ “Higher management” is defined as “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.” *Sheridan, supra* at 622.

The record is devoid of evidence to support that defendant Gage was a member of “higher management,” as that term is defined in *Sheridan, supra*. Gage’s responsibilities were administrative and involved day-to-day supervision of nurses. There is no record evidence that Gage had authority or influence regarding hiring, firing, or disciplining Nugent. Accordingly, we agree with the circuit court that plaintiff failed to establish respondeat superior liability with respect to Gage. We thus affirm the court’s determination that notice to Gage was insufficient to impose liability on Ford.

Plaintiff also submitted evidence that Nugent’s conduct was reported to Karen Carter and Dr. Patrucko in “corporate.”² There was some testimony that Carter was Gage’s superior and

¹ Defendant Ford filed a supplemental authority brief citing *Sheridan* and *Jager, supra*, both of which were decided during the pendency of this appeal.

² Plaintiff testified at deposition in pertinent part:

[question missing from copied portions of deposition]

A I had no issues with Pat Gage, besides the fact that I was told that these phone calls would stop and they weren’t stopped.

Q You were told that by Pat Gage?

A That she would take care of this, and these things would not be part of my work life any more.

* * *

Q And you personally never went to Human Resources, any one in Human Resources to raise this issue, correct?

A I was told not to.

Q Who told you not to?

A Pat Gage.

Q You personally went to Pat Gage?

A Correct.

Q Did you go to any one else other than Pat Gage?

A Not that I can recall.

Q Why not?

(continued...)

that Dr. Patrucko was Nugent's superior.³ However, Carter's and Patrucko's roles were not developed below in the context of *Sheridan*, which was decided while this case was on appeal.

(...continued)

A Because I trusted that my nursing supervisor being aware of the problems that were not only being caused to me, but other people within the medical department was going to take care of the problems. And, she told me what she was doing to take care of the problems. She spoke to Corporate and Corporate did not want HR involved.

Q Corporate being Karen Carter?

A Karen Carter, Dr. Patrucko, and that is all I knew of.

Q And you heard that from Pat Gage?

A Yes.

Q And you were satisfied that the issue was at the higher levels within the medical community there at Ford?

A Yes, and I entrusted them that they would take care of it.

* * *

Q In Paragraph 11 [of the complaint], you say here that you were told by Defendant Gage not to go to Human Resources, but to keep the matter within the Department. Did that happen one time or more than one time?

A More than one time.

Q Did you question your aunt [defendant Gage] about why that was the case?

A I questioned her and she said because she had talked to Karen Carter and Dr. Petrucko, and that is at [sic] the way they wanted to handle it and they were going to handle it that way.

Q So the Medical Department were [sic] going to Karen Carter and Dr. Petrucko and they were going to handle it?

A Correct; that is what I understood.

³ Plaintiff testified that after she complained to Gage and the calls continued, she brought the subject up again and asked what was being done about it:

Q. And what response, if any, did you get?

A. Pat Gage told me she had talked to Karen Carter, who was a Corporate Nurse and had talked to Dr Petrucko and they were taking care of it.

* * *

Q. Okay Karen Carpenter you said is a corporate nurse?

A. It is Karen Carter. . . . She is one of the head nurses up at Corporate who oversees Pat and Sr. Nurses in certain plants.

Q. She is someone who would be higher up in the corporation?

A. Correct.

Q. And Dr. Patrucko would be someone higher up in the Medical organization?

A. Yes.

Q. Would he be higher up than Dr. Nugent?

A. Yes.

We remand to address whether any information Gage provided to “corporate,” most specifically Patrucco,⁴ was sufficient to place “higher management,” as defined in *Sheridan, supra* at 622-623, on notice of plaintiff’s complaints that conduct violative of the CRA was occurring in the workplace.

Plaintiff also argues that the circuit court erred when it held as a matter of law that she had not experienced any retaliation for eventually disclosing Nugent’s ongoing misconduct. We disagree.

To establish a prima facie case of retaliation under the Civil Rights Act, a plaintiff must show (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000).]

To establish a causal connection, the protected activity must be a significant factor in causing the employer to take the adverse action. *Barrett v Kirtland Comm College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

Plaintiff’s demotion, i.e., reduction of status to supplemental nurse (on-call), occurred in the summer of 1998, long after higher management learned of Nugent’s sexual harassment and took remedial action in July 1997. The adverse employment action and protected activity were thus not temporally close. Ford maintained that plaintiff’s demotion followed her submission of two separate expense reports that covered the same trip, each one claiming the trip’s hotel charge. In response, plaintiff failed to demonstrate that her disclosures regarding Nugent were a significant factor that caused her demotion, thus the circuit court properly dismissed her retaliation claim.

Plaintiff also argues that Gage began scrutinizing plaintiff’s performance after plaintiff disclosed Nugent’s past harassment to human resources. Gage would then reprimand her, sometimes falsely, for any error she discovered. To qualify as an adverse employment action, however, the action “must be materially adverse in that it is more than ‘mere inconvenience or an alteration of job responsibilities’” *Meyer, supra* at 569, quoting *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999). This record does not reflect that Gage’s actions rose to the level of being materially adverse. Plaintiff admits that the scrutinized work constituted an important part of her job. Further, the error log does not indicate an appreciable increase in reprimands after plaintiff reported Nugent’s harassment. Finally, the log indicates that plaintiff would go months without receiving a reprimand. The circuit court properly dismissed plaintiff’s retaliation claim.

We affirm the dismissal of plaintiff’s retaliation claim. Regarding the sexual harassment claim, we affirm the determination that plaintiff’s notice to Gage was insufficient to impose liability on Ford. We remand for a determination whether any information Gage provided to

⁴ Given the testimony that Carter was a head nurse, it seems unlikely that she had the requisite management authority over Nugent, unless she held some other administrative position.

“corporate” constituted notice to “higher management,” as defined in *Sheridan, supra* at 622-623, that conduct violative of the CRA was occurring in the workplace. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra