

STATE OF MICHIGAN
COURT OF APPEALS

APRIL L. TROUTEN,

Plaintiff-Appellant,

v

AUTOZONE, INC., d/b/a AUTOZONE
MICHIGAN, INC.,

Defendant-Appellee.

UNPUBLISHED

July 15, 2003

No. 232690

Hillsdale Circuit Court

LC No. 00-000018-NZ

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

In this sexual harassment action, plaintiff appeals by right from the circuit court's grant of defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff, who worked for defendant, alleged that four of defendant's other employees sexually harassed her during the course of her twenty-six-month employment with defendant. She claimed that she was subjected to at least fifty-three instances of sexual harassment by coworkers and supervisors. The alleged offensive conduct included multiple instances of unwelcome touching of plaintiff, lewd conduct in her presence, and inappropriate comments directed toward her.

Although plaintiff was aware of defendant's policies against sexual harassment, she failed to report any sexual harassment or retaliation to higher managers. Nor did she call a toll-free hotline in place for victims of sexual harassment. When asked by visiting management whether she was being sexually harassed, plaintiff denied that she was. When she did ultimately concede that a store manager was sexually harassing her, defendant began an immediate investigation that resulted in the termination of the offending employee.

Plaintiff claimed that as a result of her report, defendant's employees retaliated against her. The alleged retaliation consisted of a denial of overtime hours and the promotion of a different employee to an assistant store manager position for which plaintiff had also applied. Following the promotion of the other employee, plaintiff felt she could no longer work for defendant and therefore resigned.

On appeal, plaintiff first argues that the trial court erred in dismissing her quid pro quo sexual harassment claim. We review de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. See, generally, *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The moving party must initially support its position by affidavits, depositions, admissions, or other documentary evidence. *Id.* at 455. "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the nonmoving party would bear the burden of proof at trial, that party may not merely rely on the allegations or denials in the pleadings but must set forth specific facts demonstrating the existence of a genuine issue of material fact. *Smith, supra* at 455. The trial court must view the affidavits and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* at 454. If the opposing party fails to establish the existence of a material factual dispute, summary disposition is appropriate. *Id.* at 455.

Michigan law recognizes that, in employment, freedom from discrimination because of sex is a civil right. MCL 37.2102. Employers are prohibited from violating this right. MCL 37.2202. MCL 37.2103(i) provides:

Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:

- (i) Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
- (ii) Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment, public accommodations or public services, education, or housing.
- (iii) Such 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.

The first and second subsections set forth a theory under which a party may make out a claim for what has been labeled "quid pro quo" harassment. *Champion v Nationwide Security, Inc*, 450 Mich 702, 708; 545 NW2d 596 (1996). The third subsection sets forth what is most often referred to as "hostile work environment" sexual harassment. *Radtke v Everett*, 442 Mich 368, 381; 501 NW2d 155 (1993).

Plaintiff alleges the type of quid pro quo sexual harassment set forth in MCL 37.2103(i)(ii). To succeed on such a claim, a party generally must establish: "(1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute, and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment." *Champion, supra* at 708-709.

Plaintiff argues that her claims in the instant case are analogous to that at issue in *Champion*, a case in which the Supreme Court found that a supervisor's decision to rape his employee [the plaintiff] constituted the required "decision [sic] affecting . . . employment" under MCL 37.2103(i)(iii). *Champion, supra* at 709-710, quoting MCL 37.2103(i)(ii). Plaintiff's argument is similar to that made by Justice Kelly in her dissent in *Chambers v Tretco, Inc*, 463 Mich 297; 614 NW2d 918 (2000). Justice Kelly stated that a correct interpretation of *Champion* requires the conclusion that a supervisor's decision to make sexual contact with an employee without her consent constitutes, in and of itself, a decision affecting the employee's employment. *Id.* at 331.

In response to that argument, the majority stated:

The dissent also argues that a supervisor's decision to engage in conduct that creates a hostile work environment can suffice as the decision that affects employment and thereby establish quid pro quo harassment – even when there is no other effect on employment other than the substantial interference with employment that qualifies the environment as hostile. However, the plain language of the statute . . . explicitly distinguishes between the decision to harass and the subsequent decision affecting employment that results from the victim's reaction to the harassment. Even if we contemplated [the offending employee's] pattern of behavior as a series of discrete events, there is no evidence suggesting that he engaged in one incident of misconduct on the basis of plaintiff's reaction to a previous incident. To the contrary, it is manifestly evident that [the offending employee] understood that his overtures were unwelcome and was indifferent to both plaintiff's rejection of them and the fact that, as he engaged in this conduct, he was interfering with her employment; this is the very essence of hostile environment sexual harassment.

* * *

The dissent simply ignores the statutory definitions of sexual harassment and would simply label all harassment by individuals possessing supervisory authority as "quid pro quo" and all harassment by coemployees as "hostile work environment." This is an interesting proposition, but it lacks any basis in law. Rather, imposing liability on an employer is predicated on the application of agency principles to the categories of conduct described by the statute, and not on the basis of the dissent's supervisor/nonsupervisor distinction. It is clear that supervisors can engage in hostile environment sexual harassment that is distinct from quid pro quo harassment. [*Chambers, supra* at 323-324.]

Chambers makes clear that most of plaintiff's claims of quid pro quo harassment are not viable. See also *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 474; 652 NW2d 503 (2002) (discussing and applying *Chambers*). Indeed, with the exception of a claim involving William Hall, plaintiff failed to present any evidence that employees harassed her because of her reaction to earlier sexual advances or harassment.

The only allegation that fits within the quid pro quo framework here is plaintiff's contention that a store manager, Hall, treated her harshly because she had "broke [his] heart." Plaintiff cites *Corley v Detroit Bd of Education*, 246 Mich App 15; 632 NW2d 147 (2001), application for leave to appeal held in abeyance, 654 NW2d 329 (2002), in support of her claim with respect to Hall. We agree that *Corley* supports plaintiff's argument, because *Corley* acknowledged that a quid pro quo sexual harassment claim can be premised on an employer's (or an employer's agent's) adverse treatment of an employee due to a past, consensual, romantic relationship.¹ See *id.* at 20-23. Under *Corley*, if plaintiff can establish a constructive discharge like that at issue in *Champion, supra* at 711, and that resulted from the circumstances of a prior romantic relationship between her and Hall, then her quid pro quo sexual harassment claim can succeed. While such a claim might not ultimately succeed at trial, plaintiff has set forth at least some facts demonstrating (1) that Hall viewed his earlier relationship with plaintiff as romantic and (2) that Hall treated plaintiff harshly and made her working conditions intolerable because of the termination of this relationship. Accordingly, we conclude that the summary dismissal of this claim was inappropriate and that a remand for trial is necessary.

Next, plaintiff argues that the trial court erred in dismissing her hostile work environment sexual harassment claim. To state a prima facie case of hostile work environment sexual harassment, a plaintiff must establish these five elements:

- (1) the employee belonged to a protected group;
- (2) the employee was subjected to communication or conduct on the basis of sex;
- (3) the employee 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 the employee's employment or created an intimidating, hostile, or offensive work environment; and
- (5) respondeat superior. [*Radtke, supra* at 382-383 (footnote omitted).]

There is no dispute in this case with regard to the first four elements. The fifth element, whether plaintiff has established respondeat superior, is at issue. We agree with the trial court that plaintiff has failed to establish respondeat superior.

¹ The evidence demonstrates that Hall and plaintiff initially had a mutual friendship and that plaintiff was not offended when Hall brought her a flower and called her at home. When plaintiff moved in with a different man, Hall allegedly became upset, but there is no evidence that he made further (and unwelcome) advances on plaintiff.

An employer is liable for hostile environment sexual harassment only if it failed to investigate and take prompt, appropriate remedial action after having been put on notice of the harassment. *Chambers, supra* at 313. In *Chambers*, our Supreme Court emphasized 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." *Id.* at 319. An employer cannot be held liable for a hostile work environment unless it received actual or constructive notice of the harassing conduct. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001). Notice is considered adequate if, under the totality of the circumstances and viewing the circumstances objectively, a reasonable employer would have known there was a substantial probability that an employee was being sexually harassed. *Id.* at 622. Here, the evidence indicates that defendant did not have notice of the hostile work environment (that is, until plaintiff reported a store manager, after which defendant took prompt, appropriate remedial action by firing the offending employee).

Indeed, plaintiff specifically denied to defendant's investigators that she was being sexually harassed. We cannot conclude in this case that the harassment was so obvious to outside observers that defendant should have been aware of a serious problem that needed to be formally addressed despite plaintiff's specific denials that she had been harassed. See, e.g., *id.* Moreover, even though plaintiff testified that two different store managers sexually harassed her and suggests that this in itself provided notice to defendant of the harassment (because the managers themselves, as opposed to equal-ranking coworkers, perpetrated the harassment), we note that this argument cannot succeed under *Sheridan*. In *Sheridan, id.* at 622, the Court indicated that a plaintiff complaining of sexual harassment must have reported the harassment to "higher management" in order to establish respondeat superior. The Court defined higher management 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." *Id.*; see also *Jager, supra* at 475. Here, plaintiff did not complain about the store managers' harassment to someone with the authority to discipline the offensive employees. *Sheridan, supra* at 622. Accordingly, while we are sympathetic with regard to the working conditions plaintiff endured, we simply cannot conclude on the facts of this case that respondeat superior has been established such that *defendant* should be held liable. The trial court did not err in dismissing plaintiff's claim of hostile work environment sexual harassment.

Lastly, plaintiff argues that the trial court erred in dismissing her claim of retaliation. MCL 37.2701 states, in part:

Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted or participated in an investigation, proceeding, or hearing under this act.

The requirements for a prima facie case of retaliation were set forth by this Court in *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997):

To establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he 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.

The specific adverse acts alleged by plaintiff were (1) that plaintiff was denied overtime because in retaliation for plaintiff reporting her former supervisor's sexual harassment, a coworker began to request overtime specifically so that plaintiff could not work those extra hours; and (2) that she was not promoted to the position of assistant store manager in August 1999.

With regard to the denial of overtime, the evidence shows that plaintiff's coworker worked a total of approximately nine hours more than plaintiff during the weeks in question. Moreover, plaintiff worked between five minutes and eight hours of overtime each of those weeks. Additionally, when asked at her deposition whether she believed that her coworker began to ask for overtime to spite her, she said that she understood why he would want to make himself look better in order to advance his career. Thus, the available evidence indicates that rather than an act of retaliation, the coworker's requests for overtime were merely attempts at advancing his career. Plaintiff's allegations of retaliation with regard to overtime hours fail to satisfy the fourth prong of the test: that there was a causal connection between her allegations against her supervisor and her coworker's requests for more overtime hours. *Id.*

With regard to defendant's failure to promote plaintiff to the position of assistant store manager, plaintiff provides no evidence that this was retaliatory in nature. Her area manager, Mike Manley, testified that he was the one who decided to promote another employee. He stated that it was his impression that plaintiff did not want the promotion because she told him that she liked her position as parts manager because of the overtime and that she was going to school to become a nurse. Because of this conversation, Manley believed plaintiff was not interested in the assistant manager position and did not even consider plaintiff for the promotion. Manley further stated that he did not believe plaintiff to be qualified for the position.

Plaintiff asserts that she was denied the promotion in retaliation for reporting that her supervisor was sexually harassing her. However, her theory is not supported by evidence of retaliatory motive on the part of Manley (the one who made the decision), nor has she established any other causal connection between her report and the decision to promote the other employee instead of plaintiff.² Therefore, the trial court properly granted summary disposition with regard to the issue of retaliation, and we decline to grant relief on this issue.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Janet T. Neff

/s/ Pat M. Donofrio

² Nor has plaintiff demonstrated that the additional acts of alleged sexual harassment that occurred after her sexual harassment report occurred in retaliation for the report.