

STATE OF MICHIGAN  
COURT OF APPEALS

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VERNE S. JEFFRIES,  
Plaintiff-Appellant,

UNPUBLISHED  
July 5, 2005

v

CONSUMERS ENERGY and NUCLEAR  
MANAGEMENT CO.,

No. 253009  
Jackson Circuit Court  
LC No. 01-003209-CZ

Defendant-Appellees.

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Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

HOEKSTRA, J., (*concurring in part and dissenting in part*).

I agree with the majority's conclusions that plaintiff's disparate treatment claim was improperly dismissed based on the preemptive effect of § 301 of the Labor Management Relations Act, 29 USC 141 *et seq.*, but that dismissal ultimately was proper because plaintiff failed to establish an actionable claim. However, I respectfully disagree that the trial court erred in dismissing plaintiff's hostile work environment claim.

At issue regarding plaintiff's claim for hostile work environment is whether plaintiff was subjected to unwelcome communication or conduct based on his race and, if so, whether this communication or conduct was sufficiently severe or pervasive to create a hostile work environment. See *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996). To be subject to unwelcome communication or conduct, plaintiff must be aware of it; plaintiff cannot rely on instances of alleged racial conduct or communication of which he was not aware. See, e.g., *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich app 309, 317; 385 NW2d 778 (1986). Thus, although there is evidence of incidents of discrimination and hostile work environment experienced by a number of others at the plant,<sup>1</sup> the proper focus is on

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<sup>1</sup> I note that this evidence arises, in part, from the peculiar procedural history of this case. Plaintiff's claims were originally filed, along with the claims of seventeen other minority plaintiffs, as part of a single multi-plaintiff case. However, the trial court ordered the claims severed into individual actions for each plaintiff. Afterward, eighteen individual actions, including this case, were re-filed, but each of the individual complaints that were filed was identical to the original multi-plaintiff complaint; only the caption was changed to omit the names of the other individual plaintiffs. No effort was made to individualize the complaints to  
(continued...)

plaintiff's own deposition testimony about the communication and conduct of which he was either aware or to which he was himself subjected. *Id.*

In his deposition testimony, plaintiff indicated that he had, "a few times" within the prior three to five years, seen and been required to remove graffiti that included racial epithets. He did not, however, report the graffiti to defendants as they had sent him to remove it and thus already knew about the graffiti. Plaintiff had also heard about racial comments being made by a manager in regard to another employee. These comments were not directed toward plaintiff and he again did not report them to defendants. In fact, plaintiff testified that nothing offensive had been said to him personally and that, although aware that a supervisor had used the word "nigger" in a conversation with another employee, plaintiff himself had never heard that word used at the plant. As regards other conduct, plaintiff indicated that he had heard that a security guard made a noose that was found at the plant in the summer of 2002, and had also heard that a month later a janitor found a noose in the janitor's closet. Plaintiff did not see either noose himself, but was told about them by others. Plaintiff also indicated that he was aware of several other nooses having been found, but could not say specifically where these were discovered or when, and again did not himself see or report the nooses to defendants.

Whether an environment is hostile is to be determined by looking at all of the circumstances, including the frequency of the conduct, its severity, whether it is physically threatening or humiliating or is merely comprised of "offensive utterances," and whether it unreasonably interferes with an employee's work performance. *Quinto, supra* at 370 n 9, citing *Harris v Forklift Systems, Inc*, 510 US 17, 22-23; 114 S Ct 367; 126 L Ed 2d 295 (1993). This Court has previously held that, to be actionable, a hostile work environment must be shown to have affirmatively manifested itself to the complaining party or parties, and be "sufficiently severe and persistent to affect seriously the psychological well being' of the employees in question." *Langlois, supra*. On the facts of this case, I agree with the trial court that plaintiff failed to present evidence of the affirmative manifestation of sufficiently severe or pervasive conduct to allow a reasonable person to find that plaintiff was himself subjected to a racially hostile work environment. *Id.* Consequently, I would affirm the trial court's grant of summary disposition of plaintiff's hostile work environment claim.

/s/ Joel P. Hoekstra

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(...continued)

the circumstances of the named plaintiff.