

STATE OF MICHIGAN  
COURT OF APPEALS

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MARVELL O'FLYNN,

Plaintiff-Appellant,

v

CONSUMERS ENERGY,

Defendant-Appellee.

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UNPUBLISHED

July 5, 2005

No. 255561

Jackson Circuit Court

LC No. 01-003213-CZ

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

HOEKSTRA, J., (*concurring*).

I agree with the majority opinion except insofar as it holds that the trial court erred in not considering evidence of incidents of discrimination and hostile work environment experienced by others at defendant's plant.<sup>1</sup> 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). Because a plaintiff is required to show that he was subjected to unwelcome communication or conduct intended to change the nature of his employment or create a hostile work environment for him, the trial court's refusal to consider evidence of incidents of which plaintiff was not aware was proper. Proper consideration is given only to those incidents of which plaintiff was aware or to which plaintiff was personally subjected. *Id.*

However, in this case, plaintiff's deposition testimony established severe and pervasive conduct sufficient to allow a reasonable person to find that he was himself subjected to a racially

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<sup>1</sup> I note that this issue 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 the circumstances of the named plaintiff.

hostile work environment. Consequently, I agree with the majority that the trial court's dismissal of that claim was improper.

/s/ Joel P. Hoekstra