

STATE OF MICHIGAN
COURT OF APPEALS

DIONNE D. PARKER,

Plaintiff-Appellee,

v

PLASTIPAK PACKAGING, INC.,

Defendant-Appellant,

and

OUTSOURCING INTERNATIONAL, INC.,¹

Defendant.

UNPUBLISHED

October 17, 2006

No. 262247

Wayne Circuit Court

LC No. 01-115512-CL

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant, Plastipak Packaging, Inc. (Plastipak), appeals as of right the trial court's order dismissing defendant, Outsourcing International, Inc., in this sexual harassment in employment action. We affirm.

This action arises out of plaintiff's employment, through a temporary employment agency called Tandem Staff for Industry, at Plastipak's plant. Plaintiff contends that an employee of Plastipak, Robert Crouse, sexually harassed her and that Plastipak failed to take prompt remedial action. Plastipak asserts that the trial court erred in entering judgment against it when the evidence showed that plaintiff experienced only a single incident of sexual harassment, to which Plastipak responded by promptly terminating Crouse's employment with defendant. We disagree.

This Court reviews de novo a trial court's decision to deny a directed verdict, *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997), and for a denial of summary disposition, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A trial court's

¹ Tandem Staff for Industry was a defendant below but is not participating in this appeal.

decision on a motion for JNOV is also reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the decision, this Court must view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party. *Id.* “If reasonable jurors honestly could have reached different conclusions” based upon the evidence, “neither the trial court nor this Court may substitute its judgment for that of the jury.” *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

As a preliminary matter, this Court addresses Plastipak’s assertion that the trial court erred in determining that evidence pertaining to other incidents of harassment engaged in by Crouse that did not involve plaintiff, were admissible. Specifically, the parties dispute whether a separate incident involving a different female employee of Plastipak, Judy Drapowski, that occurred in early September, 2000, which was reported to Plastipak management, involving Crouse’s exposure of himself to Drapowski, was admissible. The trial court determined this evidence to be admissible, but for the limited purpose of establishing notice and not as substantive proof of plaintiff’s claim of sexual harassment. We concur.

In accordance with MRE 402:

All relevant evidence is admissible, except as otherwise provide by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

In turn, MRE 401 defines “relevant evidence” to mean “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The trial court correctly admitted evidence regarding this prior incident for the limited purpose of demonstrating that Plastipak was on notice regarding Crouse’s proclivity to engage in indecent and inappropriate behavior directed toward female employees. This determination is not contrary to prior rulings that “improper behavior of a given type is not an inevitable predictor of other types of improper behavior” *Elezovic v Ford Motor Co*, 472 Mich 408, 430; 697 NW2d 851 (2005). This case is distinguishable from *Elezovic* because the harassing behavior occurred in the same locale and under similar circumstances, merely with different victims. As such, it was relevant to the issue of notice.

The Civil Rights Act (CRA) prohibits certain forms of discrimination in employment. MCL 37.2101 *et seq.* “An employer shall not . . . discriminate against an individual . . . because of . . . sex,” MCL 37.2202(1)(a), and “[d]iscrimination because of sex includes sexual harassment,” MCL 37.2103(i). “Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal *or physical conduct* or communications *of a sexual nature*” under certain conditions. MCL 37.2103(i) (emphasis added). The conditions include where the “conduct or communication has the purpose or effect of substantially interfering with an individual’s employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.” MCL 37.2103(i)(iii).

A claim of hostile environment harassment has five elements that a plaintiff must prove by a preponderance of the evidence:

- (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. [*Chambers, supra*, p 311.]

The first three elements are not disputed. Hence, the focus of our review is on the remaining two factors pertaining to notice and employer liability.

To this end, to impose liability, a “plaintiff must show some *fault* on the part of the employer.” *Id.*, p 312 (emphasis in original). “[T]he question is always whether it can be fairly said that the employer committed the violation – either directly or through an agent.” *Id.* “[A] single incident, unless extreme, will not create an offensive, hostile, or intimidating work environment.” *Radke v Everett*, 442 Mich 368, 395; 501 NW2d 155 (1993). Therefore, “a plaintiff usually must prove that (1) the employer failed to rectify a problem after adequate notice, and (2) a continuous or periodic problem existed or a repetition of an episode was likely to occur.” *Id.*

Notice requires a showing that under the totality of the circumstances, a reasonable employer would have been on notice of a substantial probability that sexual harassment was occurring. *Elezovic, supra*, p 429. Notice can be actual or constructive. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001) (citations omitted). Actual notice typically involves an employee complaining to an employer's higher management staff about the occurrence of harassment. *Id.*, p 623. If an employee failed to complain to higher management, constructive notice can be demonstrated “by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge.” *Id.*, p 621. If an objective view of the totality of the circumstances shows that a reasonable employer would have known there was a substantial probability that sexual harassment was occurring, notice is deemed to be adequate. *Chambers v Trettco*, 463 Mich 297, 319; 614 NW2d 910 (2000).

Initially, the parties dispute whether a car ride incident that involved Crouse masturbating in plaintiff's presence, that occurred after work and away from Plastipak's work site, may be considered as part of the alleged harassment. Off work, off-premises conduct by a coworker cannot fairly be attributed to the employer, nor can it fairly be said to be the “fault” of the employer. *Chambers, supra*, p 312. Although we conclude that such an incident cannot suffice to impose liability against the employer, an issue does remain regarding whether an employer's knowledge of off-site conduct could constitute notice to the employer “that plaintiff's work environment was sexually hostile.” *Elezovic, supra*, p 430.

Following the car ride incident, Crouse followed plaintiff, during work hours, to the restroom and waited outside the room at Plastipak. Plaintiff reported this incident, and the car ride incident, to a Plastipak supervisor. After the bathroom incident, Crouse, reportedly, continued to follow plaintiff while at work, and to stare at her as she left the plant, “looking and lurking” at her. Plaintiff learned that Crouse had told another employee that he wanted to grab plaintiff, but was afraid. Although there is a lack of evidence that plaintiff reported to higher management the rumor that Crouse said he wanted to grab plaintiff, the remaining incidents of inappropriate behavior by Crouse were reported by plaintiff to Plastipak supervisors and are sufficient, under a totality of the circumstances analysis, to imply notice to Plastipak of the ongoing occurrence of harassment. These incidents all occurred in close temporal proximity before the culminating event of September 27, 2000, when Crouse actually exposed himself to plaintiff. Notably, prior to exposing himself to plaintiff, Crouse tried to interact with plaintiff at work. Plaintiff became uncomfortable with Crouse’s behavior and informed a supervisor. Despite having reported the prior incidents and Crouse’s involvement in an investigation following his inappropriate behavior with Drapowski, the supervisor instructed plaintiff to return to the work area, where Crouse was known to be, pending the availability of another worker to relieve plaintiff. Upon arrival at plaintiff’s work area, the supervisor observed Crouse to be exposed and masturbating.

Consistent with *Radtke*:

A hostile work environment claim is actionable only when, in the totality of the circumstances, the work environment is so tainted by harassment that a reasonable person would have understood that the defendant’s conduct or communication had either the purpose or effect of substantially interfering with the plaintiff’s employment, or subjecting the plaintiff to an intimidating, hostile, or offensive work environment. [*Radtke, supra*, p 398.]

The Drapowski incident, which was known to Plastipak and investigated, occurred during this period of harassment directed at plaintiff. When viewing the temporal contiguity of the complaints made by plaintiff to Plastipak, coupled with notice received by the employer regarding inappropriate behavior by Crouse with Drapowski, “a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.” *Elezovic, supra*, p 426. Clearly, despite having received counseling for his interaction with Drapowski, Crouse was comfortable in also harassing plaintiff within the work environment. Based on the totality of the circumstances, we affirm the imposition of liability against Plastipak and the award to plaintiff.

Finally, Plastipak asserts for the first time on appeal that it did not assume the status of being plaintiff’s employer based on her placement as a contract employee through defendant, Outsourcing International, Inc. This Court need not address an issue that is raised for the first time on appeal, *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005), because it is not properly preserved for appellate review, *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998). Because defendant failed to timely

assert this claim, it is forfeited. *Stein v Braun Engineering*, 245 Mich App 149, 154; 626 NW2d 907 (2001).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael J. Talbot