STATE OF MICHIGAN

COURT OF APPEALS

PAMELA PEREZ,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY and DANIEL P. BENNETT,

Defendants-Appellees.

UNPUBLISHED
March 10, 2005

No. 249737
Wayne Circuit Court
LC No. 01-134649-CL

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals by right from the judgment granting defendants Ford Motor Company and Daniel Bennett summary disposition.[1] Plaintiff's claim alleged that Bennett, a supervisor, had sexually harassed her on several occasions in 1999 at Ford's Wixom plant. The lower court held Ford was not vicariously liable for Bennett's harassment of Perez because plaintiff failed to show that Ford had notice of the harassment. It also held that under current law, Bennett could not be individually liable for a sexually hostile work environment. We reverse in part, affirm in part, and remand.

Plaintiff began working at the Wixom plant in December 1990, as an hourly employee. She claims that Bennett sexually harassed her for the first time during the summer of 1999, when he offered her money to buy lingerie to model for him. Later, Bennett made a remark about meeting after work. Then, in August 1999, plaintiff was in Bennett's office. He exposed himself to her and offered her money for a hotel room. Plaintiff did not report these incidents.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the

[1] Appeals related to this case are *McClements v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, decided April 22, 2004 (Docket No. 243764), lv gtd ___ Mich ___ (12/27/04), *Maldonado v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, decided April 22, 2004 (Docket No. 243763), and *Elezovic v Ford Motor Co*, 259 Mich App 187; 673 NW2d 776 (2004), lv gtd 470 Mich 892 (2004).

record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Ford brought its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, review under (C)(10) is the appropriate basis for review. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

MCL 37.2202(1) prohibits an employer from discriminating because of sex, which includes sexual harassment. Sexual harassment includes a hostile work environment created by unwelcome sexual conduct or communication. MCL 37.2103(i)(*iii*). To maintain a claim of hostile environment harassment, an employee must prove the following 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 v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000), quoting *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993).]

Under a hostile work environment claim, an employer can be vicariously liable for sexual harassment of an employee only if it failed to take prompt and adequate remedial action after having been put on notice of the harassment. *Chambers, supra* at 312. The notice can be actual or constructive. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001), citing *McCarthy v State Farm Ins Co*, 170 Mich App 451, 457; 428 NW2d 692 (1988), overruled in part on other grounds *Norris v State Farm Fire & Cas Co*, 229 Mich App 231 (1998). The employee gives the employer actual notice if she complains about the harassment to higher management. *Id.* If the employee never complained to higher management, she can prove the employer had constructive notice "by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Id.* If an objective view of the totality of the circumstances indicates that a reasonable employer would have known there was a substantial probability that sexual harassment was occurring, then notice was adequate. *Chambers, supra* at 319.

Plaintiff admits that by failing to report the incidents, she never gave Ford actual notice of Bennett's harassment. However, she argues that other women's complaints about Bennett gave Ford constructive notice of a hostile work environment at its Wixom plant. Although a complaint of a single coworker may be insufficient to establish notice of a plaintiff's claim of harassment, *Elezovic v Ford Motor Co*, 259 Mich App 187, 196; 673 NW2d 776 (2003), lv gtd 470 Mich 892 (2004), citing *Sheridan, supra* at 627-628, plaintiff provided much more than one complaint. One coworker testified at her deposition that she told a production manager on several occasions that Bennett was sexually harassing her; she also told a superintendent during

the time he was temporarily assigned to labor relations, as well as her UAW committeeperson. Defendant admits that the proper procedure for reporting a sexual harassment claim was to report to the labor relations department or a UAW committeeperson.

Moreover, when the coworker reported Bennett's acts toward herself, she also mentioned that Bennett had harassed another employee as well. The superintendent temporarily assigned to labor relations testified that he mentioned the allegations to Bennett who just laughed and drove away; he then reported the allegations to his supervisor in labor relations, who told him not to get involved. Therefore, plaintiff presented evidence that Ford had *actual* notice with respect to two coworkers' claims against Bennett.[2] In addition to plaintiff's allegations and the allegations of her two coworkers, three other women who worked at the plant testified that Bennett either sexually assaulted them or propositioned them for sex between 1997 and 1999. According to the testimony presented, Bennett sexually harassed six different women during this time.

Furthermore, with respect to general pervasiveness of sexual harassment, plaintiff and two of the women testified that low-level harassment occurred all the time, but they learned to put up with it because they did not think anyone would believe them, and those who complained were bullied. This appears to be corroborated by Ezra Carter, the plant's human resources manager from 1995 to 2001, who acknowledged that eight sexual harassment complaints had been filed by women other than those previously mentioned, against seven different men other than Bennett. He stated that in seven charges, each investigation resulted in a conclusion that there was no basis to the complaint.[3] In addition, the plant manager during the time in question indicated he would need to see corroborating evidence or photographs demonstrating that the allegations were true before taking action, and that Bennett had been sent home with pay to protect Bennett and the plant from further false charges.

The instant case is distinguishable from *Chambers, supra*, and *Sheridan, supra*. First, *Chambers* does not address whether harassment must be against a particular plaintiff to be considered constructive notice. *Sheridan* is a bit more instructive. In *Sheridan*, the plaintiff, a custodian, alleged that a fellow custodian had repeatedly sexually harassed her at the school where they both worked. She did not tell anyone about the harassment until after the fourth incident. *Id.* at 624, 627. Then, less than a month after she first complained, the school district conducted an investigation and fired the alleged harasser. *Id.* at 613. In refusing to hold the district vicariously liable, this Court held that a prior incident of harassment five years earlier was not so pervasive that the district should have known that the defendant was also harassing plaintiff. *Id* at 627-628. That ruling implies that where harassment is not so remote in time and is more pervasive, the harassment of a fellow employee might be sufficient to impute constructive knowledge to an employer.

---

[2] The two coworkers who complained testified that they were afraid of losing their jobs for mentioning the incidents. Another woman testified that she witnessed an incident with Bennett and one of the coworkers.

[3] In the remaining charge, the supervisor admitted making the lewd comment and was told not to make such comments in the future; there is no indication he was further disciplined.

After considering this evidence in the light most favorable to the nonmoving party, we conclude that a material factual dispute exists whether Ford should have known that a hostile work environment existed at the Wixom plant. In *Maldonado v Ford Motor Co,* unpublished opinion per curiam of the court of Appeals, decided April 22, 2004 (Docket No. 243763), slip op at 9, this Court recently held that evidence of other acts of harassment was highly probative whether Ford should have known that Bennett was sexually harassing the plaintiff in that case. This Court stated that the testimony of other employees helped show the "totality of the circumstances" known to Ford. *Id.* Therefore, granting Ford summary disposition was improper.

Finally, plaintiff asks that this Court hold Bennett individually liable under her hostile work environment claim. Originally, plaintiff conceded dismissal of Bennett under *Jager v Nationwide Truck Brokers, Inc,* 252 Mich App 464; 652 NW2d 503 (2002). In *Jager*, this Court held that the Civil Rights Act imposes liability only on employers, and not on individual employees of employers, with regard to sexual harassment claims. *Id.* at 484-485. Therefore, the *Jager* Court concluded that a supervisor may not be held individually liable for violating a plaintiff's civil rights. *Id.* Although this Court expressed disfavor of *Jager* in *Elezovic, supra* at 198, a conflict panel was not convened, *id.* at 801. However, in granting leave to appeal, our Supreme Court specifically directed the parties to brief this issue. 470 Mich App 892 (2004). Oral argument was heard December 8, 2004, but the Court has yet to issue an opinion. Therefore, under current law, Bennett cannot be held individually liable.

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

/s/ Patrick M. Meter
/s/ Donald S. Owens

STATE OF MICHIGAN

COURT OF APPEALS

PAMELA PEREZ,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY and DANIEL P. BENNETT,

Defendants-Appellees.

UNPUBLISHED
March 10, 2005

No. 249737
Wayne Circuit Court
LC No. 01-134649-CL

Before: Murray, P.J., and Meter and Owens, JJ.

MURRAY, P.J. (*concurring in part, dissenting in part*).

I concur with the majority opinion that defendant Bennett cannot be held liable as a matter of law under *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464; 652 NW2d 503 (2002). However, I disagree with the conclusion that the trial court erred in granting defendant Ford Motor Company's (Ford) motion for summary disposition as to plaintiff's sexual harassment claim.

As the majority recognizes, determining whether liability exists against Ford for Bennett's alleged acts comes down to whether plaintiff has set forth admissible evidence to establish a genuine issue of material fact that Ford was on constructive notice that plaintiff was subjected to a sexually hostile work environment. The majority concludes that plaintiff did so, primarily on the basis that there were several other women who complained that Bennett had harassed them, and because there were approximately seven other complaints of sexual harassment over a seven- or eight-year period at the Wixom plant.[1] Because this evidence does not establish as a matter of fact that Ford was constructively on notice that Bennett had allegedly sexually harassed other female employees at the time plaintiff alleges Bennett sexually harassed her, and because even if it did, it would still fail as a matter of law to establish constructive notice as to Ford, I must respectfully dissent.

[1] Plaintiff worked at Ford's Wixom assembly plant, which has a workforce of approximately 3,000 employees.

As our Supreme Court has long recognized, the Legislature has determined that an employer can be liable for an agent's acts of sexual harassment, and determining whether such liability exists hinges on common law respondeat superior liability. See *Chambers v Trettco, Inc*, 463 Mich 297, 312; 614 NW2d 910 (2000) and *Radtke v Everett*, 442 Mich 368, 396-397; 501 NW2d 155 (1993). However, because any agent committing an illegal act of sexual harassment acts outside the scope of his or her authority, an employer must have notice of the alleged harassment so that it can have the opportunity to take prompt and adequate remedial action if necessary. *Chambers, supra* at 312. We recently summarized these notice requirements in *Bageris v Brandon Twp*, 264 Mich App 156, 164-165; 691 NW2d 459 (2004):

> An employer must have notice of the alleged harassment before liability will attach because, without such notice, the employer has no basis on which to take remedial action. *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001). Moreover, "[c]ourts must apply an objective standard of review when considering whether the employer was provided adequate notice." *Id.* "'[N]otice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.'" *Id.* at 622, quoting *Chambers v Trettco, Inc*, 463 Mich 297, 319; 614 NW2d 910 (2000). [Emphasis omitted.]

As the *Chamber's* Court held, whether notice was given is based upon an objective standard, looking to the circumstances of each case. *Chambers*, *supra* at 319. *Perry v Harris Chernin, Inc*, 126 F3d 1010 (CA 7, 1997), cited with approval in *Chambers*, *supra* at 319, accurately described the interrelationship between reporting and notice:

> What we are saying is the law against sexual harassment is not self-enforcing. A plaintiff has no duty under the law to complain about discriminatory harassment, but the employer in a case like this one will not be liable if it had no reason to know about it. [*Perry*, *supra* at 1014.]

There seems to be no dispute that plaintiff cannot establish that Ford had actual notice of plaintiff's allegations, for plaintiff admits that she never informed Ford management that she was allegedly harassed. The only way plaintiff can establish notice, therefore, is through a constructive notice theory.[2]

---

[2] Plaintiff's suggestion that she provided Ford with actual notice through her July 2001, deposition testimony in *Elezovic v Ford Motor Co*, 259 Mich App 187; 673 NW2d 776 (2003), is without merit. First, plaintiff failed to provide any case law to support the assertion that an employee may provide actual notice to her employer by testifying in a deposition in another case two years after the events allegedly occurred. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) (issues are abandoned if no authority is cited). Second, the *Chambers* Court held that events that first come to light in the plaintiff's deposition are relevant for two purposes only: (1) to establish the nature and extent of the hostile work environment, and any employer response, and (2) to establish *constructive* notice. *Chambers*, *supra* at 791-793.

Plaintiff alleges that Bennett sexually harassed her during the summer of 1999, with the last incident occurring in August 1999. Thus, the question is whether Ford knew, as of June 1999, that Bennett was allegedly sexually harassing plaintiff or the other persons cited by plaintiff, particularly Justine Maldonado, Milissa McClements, or Lula Elezovic. The evidence shows that it did not.[3]

In *Elezovic v Ford Motor Co*, 259 Mich App 187; 673 NW2d 776 (2003), we held that the plaintiff (Lula Elezovic) had failed to give Ford actual or constructive notice of the alleged acts of sexual harassment taken against her at Ford. *Elezovic*, *supra* at 194, 196. Moreover, the complaint in *Elezovic* was filed in November 1999, *id.* at 190, several months after the last incident plaintiff alleges occurred to her. Plaintiff Maldonado filed her lawsuit in June 2000, well after the incidents complained of by plaintiff. *Maldonado v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, decided April 22, 2004 (Docket No, 243763), slip op at 1. Further, we recognized that plaintiff Maldonado did not inform anyone at the Wixom plant about the alleged January and February 1998, incidents involving Bennett. Although plaintiff Maldonado also alleged incidents occurring between June 1998, and August 1999, the opinion is unclear on whether she reported those incidents to Ford. In her deposition, however, plaintiff Maldonado testified to informing a temporary Labor Relations employee in October 1998, and soon thereafter a UAW representative, about several incidents. Finally, plaintiff McClements, who was not a Ford employee, never reported Bennett's alleged harassment to Ford or her employer, *McClements v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, decided April 22, 2004 (Docket No. 243764), lv gtd __ Mich __ (2004), slip op at 1, and she filed her complaint against Ford on September 4, 2001. *Id.* at 2.

In light of our own opinions, it is evident that Ford was never placed on notice prior to the summer of 1999 that either Elezovic or McClements were allegedly being harassed by Bennett. Thus, Ford was not even on constructive notice that plaintiff was subjected to a hostile work environment based upon what allegedly occurred to these two women. And, even if Maldonado properly notified Ford in October 1998, of certain of Bennett's alleged acts that occurred since June 1998, this alone would not suffice to provide Ford with constructive notice of harassment with respect to plaintiff.

Both *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611; 637 NW2d 536 (2003), and *Elezovic*, *supra*, compel such a conclusion. In both of these cases, this Court held that evidence that other employees were sexually harassed and notified the employer about the harassment did not establish actual or constructive knowledge that *the plaintiff* was subjected to a sexually hostile work environment.

---

[3] Plaintiff also relies upon Bennett's 1995 misdemeanor conviction of indecent exposure. The act leading to that conviction occurred on a public highway, not on Ford premises. Bennett was, however, driving a vehicle owned by Ford. Two other panels of this Court have held this evidence to be inadmissible against Ford in similar sexual harassment cases, *Elezovic*, *supra* at 204-208; *Maldonado v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, decided April 22, 2004 (Docket No, 243763), slip op at 7-8, and for those same reasons, that evidence should not be admissible against Ford in this case.

In *Sheridan*, for example, the plaintiff alleged that the defendant was on constructive notice of the harassment because of two complaints of sexual harassment, one made against the same person that the plaintiff alleged harassed her, the other a general complaint. This Court rejected this evidence because it did not establish that the employer was notified about the *plaintiff's* work environment, i.e. that the plaintiff was allegedly being harassed:

> Therefore, even with defendant's knowledge of a prior substantiated complaint of sexual harassment against Knapp in 1988, and a second generalized complaint made in 1988 relating to conduct occurring in 1985, defendant had no basis on which to conclude that sexual harassment *relating to plaintiff* was occurring before August 1993, because plaintiff made no complaints or statements when specifically questioned about Knapp. See *Chambers v Trettco* (*On Remand*), 244 Mich App 614, 618-619; 624 NW2d 543 (2001). Furthermore, because plaintiff remained silent about these incidents immediately after they occurred, defendant could not have learned of the harassment through other employees. [*Sheridan*, *supra* at 628 (emphasis added).]

Likewise, the plaintiff in *Elezovic* alleged that Ford was on constructive notice that Bennett was sexually harassing her based on actions by Bennett against her, as well as through testimony that the plaintiff and other women had, in general, been sexually harassed. We again rejected this testimony as being sufficient to establish constructive notice, because it provided no notice with respect to the *plaintiff's* claim of harassment:

> In addition to the incidents involving Bennett's sexual harassment, plaintiff provided testimony that other supervisors sexually harassed her and that other female employees were sexually harassed. Nonetheless, this evidence did not establish that the sexual harassment was such that Ford had constructive notice. Plaintiff indicated that there were no witnesses to the alleged incidents of sexual harassment against her. *Further, the complaint of alleged sexual harassment of plaintiff's coworker cannot be said to establish notice with respect to plaintiff's claim of harassment.* [*Elezovic*, *supra* at 196 (emphasis added).]

The holdings in *Sheridan* and *Elezovic* are supported by the reasoning in a host of other decisions from both our Court and the Supreme Court. For example, in *Radtke*, *supra* at 396, the Court held, quoting *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991), that an employer must have "'notice of *the alleged* hostile work environment'" before it can be responsible for not alleviating what is occurring in the workplace. [Emphasis added.] Further, in *Chambers*, the Court remanded that case to address the issue of whether "defendant failed to take prompt and appropriate remedial action after receiving adequate *notice that Wolshon was sexually harassing plaintiff*." *Chambers*, *supra* at 318-319 (emphasis added). With respect to the issue concerning the adequacy of the employer's remedial action, the Court emphasized that the relevant inquiry was "whether the action reasonably served to prevent future harassment of *the plaintiff*." *Id*. at 319 (emphasis added). See, also, *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999).

In this case, Ford was never on constructive notice that plaintiff's work environment was sexually hostile. There were no witnesses to what plaintiff alleges Bennett did, and there was no evidence that anyone informed management that Bennett was allegedly harassing plaintiff.

Moreover, none of the other women (with the possible exception of Maldonado) notified Ford of Bennett's alleged acts. Quite simply, there was no evidence submitted to the trial court that showed that anything related to what Bennett was allegedly doing to plaintiff or anyone else was brought to Ford's attention, or was done in an area where it reasonably could have been detected by other employees or management.

And that is what sets this case apart from those cases relied upon by plaintiff. Indeed, in virtually all of the cases relied upon by plaintiff, the facts established that someone, either the plaintiff or a coworker, *had* notified the employer of at least some of the harassing conduct of which the plaintiff brought suit over. See *Hirase-Doi v US West Communications, Inc*, 61 F3d 777, 780-781, 784 (CA 10, 1995) (employer "clearly knew" about complaints made by the plaintiff's coworkers about the harassment inflicted by the same offender); *Dees v Johnson Controls World Services, Inc*, 168 F3d 417, 422-423 (CA 11, 1999) (evidence showed that human resource employee knew of prior complaints arising from the same department, and that another employee reported that the plaintiff was being harassed); *Deters v Equifax Credit Information Services, Inc*, 202 F3d 1262, 1271 (CA 10, 2000) (the plaintiff could rely on employer's notice that another employee was being harassed); *Jackson v Quanex Corp*, 191 F3d 647, 663 (CA 6, 1999) (the plaintiff was not required to report all instances of racial harassment because other employees had informed management of same incidents, and many were in public areas frequented by all employees); *Hurley v Atlantic City Police Dept*, 174 F3d 95, 105, 111 (CA 3, 1999) (the plaintiff complained to management, and the police chief testified to being aware of certain acts of sexual harassment against the plaintiff).[4]

It is true, as plaintiff contends, that constructive notice can be established by showing "'that the employer knew of the harassment . . . by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge.'" *Sheridan*, *supra* at 627, quoting *McCarthy v State Farm Ins Co*, 170 Mich App 451, 457; 428 NW2d 692 (1988). However, to come within the purview of those cases, the illegal misconduct must be so pervasive that it permeates the entire workplace, or the acts complained of must take place in areas frequented by other employees or management. Compare *Allen v Tyson Foods, Inc*, 121 F3d 642, 647 (CA 11, 1997) with *Durham v Philippou*, 968 F Supp 648, 657 (MD Ala, 1997) and *EEOC v Domino's Pizza, Inc*, 909 F Supp 1529, 1535 (MD Fla, 1995). In the present case, there was no evidence of sexual pictures, magazines, or jokes that were posted or spoken about throughout the plant. There was also no evidence of an unusual amount of reports of sexual harassment. Indeed, Mr. Carver testified that from 1995 through 2001, he could recall only seven other instances of internal sexual harassment complaints or lawsuits being filed (none involving Bennett), and of those internal complaints, none were found to have merit. Seven complaints (plus the four others previously discussed) over a six-year period in a workplace with over 3,000 employees does not amount to a pervasive environment such that Ford should be

---

[4] Additionally, *Jackson* and *Dees* were decided under the standards set forth in *Faragher v City of Boca Raton*, 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998), and *Burlington Industries, Inc v Ellerth*, 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998), which are not to be utilized when interpreting our civil rights act. *Chambers, supra* at 315-316.

declared to have had constructive notice that plaintiff was working in a sexually hostile work environment.[5]

For all these reasons, I would affirm the trial court's order granting Ford's motion for summary disposition of plaintiff's claim of sexual harassment.

/s/ Christopher M. Murray

[5] Additionally, plaintiff testified that she had previously used Ford's anti-harassment complaint procedure with success. Given Ford's apparently successful adoption and utilization of a complaint procedure, it is questionable whether it could be held liable on a constructive notice theory as a matter of law. See, e.g., *Farley v American Cast Iron Pipe Co*, 115 F3d 1548, 1553-1554 (CA 11, 1997), *Gary v Long*, 59 F3d 1391, 1398 (CA DC, 1995), and *Bouten v BMW of North America, Inc*, 29 F3d 103, 110 (CA 3, 1994).