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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2314-13T1

ANITA JONES,

Plaintiff-Appellant,

v.

DR. PEPPER SNAPPLE GROUP, JOSE CRUZADO, EUGENE MITCHELL, "CHRIS," AND "CARLOS,"

Defendants-Respondents.

Argued February 4, 2015 – Decided August 3, 2015

Before Judges Fuentes, Ashrafi and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2492-12.

Mark Mulick argued the cause for appellant.

Carmen J. DiMaria argued the cause for respondents (Ogletree, Deakins, Nash, Smoak & Stewart, P.C., attorneys; Mr. DiMaria, Ryan T. Warden and Robin Koshy, on the brief).

PER CURIAM

In this Law Against Discrimination (LAD) action, N.J.S.A. 10:5-1 to -42, plaintiff Anita Jones appeals a January 17, 2014 order that granted summary judgment to defendant Mott's LLP

(improperly pled as Dr. Pepper Snapple Group) and dismissed her complaint.[1] Plaintiff contends the trial court erred when it dismissed her claims for hostile work environment sexual harassment, quid pro quo sexual harassment, and disparate treatment. We reject plaintiff's arguments as to quid pro quo sexual harassment and disparate treatment and affirm the summary judgment order on those claims. For the reasons that follow, we reverse the order as to plaintiff's claim for sexual harassment through a hostile work environment.

I

The pertinent facts are as follows. Plaintiff was a temporary employee who worked as a machine operator at defendant's manufacturing facility from March 2011 to October 2011. She was re-hired as a temporary employee in January 2012 and hired as a permanent employee on February 27, 2012. She resigned on March 27, 2012.

Plaintiff alleges she was sexually harassed on multiple occasions between March 2011 and October 2011. When she was initially hired, Eugene Mitchell was assigned to train her. She claims he touched her breasts "numerous times" between March 2011 and October 2011. Plaintiff complained to Mitchell about

[1] The January 17, 2014 order also dismissed the complaint against defendants Jose Cruzado, Eugene Mitchell, Chris Williams, and Carlos Martinho. Plaintiff does not appeal the dismissal of these four defendants from the complaint.

his conduct, but he allegedly responded by yelling at her. Plaintiff declined to report that Mitchell touched her breasts because she was merely a temporary employee.

She did complain to Chris Williams, a supervisor within the company, about Mitchell berating her. According to plaintiff, Williams said that he would "take care of it" and instructed her to come to him if she experienced any additional problems with Mitchell. However, plaintiff claims that after she confided in Williams, on approximately twelve occasions he put his arm around her shoulders or touched her back. He also allegedly remarked, "Temps come a dime a dozen and [if] one don't do what you want, you get another one," suggesting to her that if she did not do what he wanted, he would get another temporary employee. Plaintiff did not complain to anyone about Williams's conduct because she was afraid that Williams would have her fired.

Plaintiff alleges that her supervisor and team leader, Jose Cruzado, asked her out on dates, offered to give her a massage, and on one occasion engaged in lewd conduct. Specifically, she claims that, after injuring her upper thigh on a machine, Cruzado put his hands on his thigh and moved his hands to his genital area while stating, "[w]e gonna start from here and work our way up." Plaintiff did not complain about Cruzado's

comments because she was afraid he could have her fired, as well.

Finally, plaintiff alleged Carlos Martinho, a co-worker, touched her shoulder and back on occasion and once commented that he "like[d] [her] butt better." Plaintiff did not complain about Martinho's conduct because "[she] was a temp" and "[she] would be the one that would be removed."

Plaintiff does not allege there were additional incidents of sexual harassment after she returned as a temporary employee in January 2012. She became a permanent employee on February 27, 2012, but resigned on March 27, 2012, because, on March 23, 2012, Williams attacked her work ethic during a staff meeting. Plaintiff asked to be transferred to another position, but the shift leader told her that she was "gonna have to quit."

On the day plaintiff resigned, plaintiff advised the Human Resources staff that she quit because of the sexual harassment she had experienced and recounted the aforementioned incidents that she alleged. She told the staff she had been afraid to report these incidents out of a fear she would not be considered for a full time position. The staff asked if she would reconsider her resignation if she were given another position or placed on a different shift but she refused, claiming she "could not work in the plant anymore."

On the day plaintiff was hired as a permanent employee, she was given an Employee Handbook. The handbook included a provision addressing sexual harassment, and directed employees to contact either their manager or a Human Resources representative if they experienced sexual harassment or discrimination. The handbook stated that defendant is committed to ensuring "open communication" to resolve questions, concerns, problems or complaints, including those that involve discrimination or harassment, and that defendant did not tolerate retaliation against any individual who makes a complaint of discrimination or harassment.

In its motion for summary judgment, defendant conceded for purposes of the motion that plaintiff's allegations constituted a prima facie case of hostile work environment sexual harassment.[2] Defendant asserted, however, that it could not be held vicariously liable for the alleged actions of its employees because it had implemented an effective anti-harassment policy. See Gaines v. Bellino, 173 N.J. 301, 314 (2002) (observing employer who has an effective anti-harassment policy may be insulated from a vicarious liability claim arising out of an

[2] To establish a prima facie case of hostile work environment sexual harassment, a female plaintiff must show that the alleged conduct occurred "because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993).

employee's harassing conduct of others). Defendant also argued that none of the four alleged harassers were plaintiff's supervisor, further shielding it from vicarious liability. Finally, defendant claimed there were no facts to support plaintiff's claims of disparate treatment and pro quid pro sexual harassment. The trial court granted defendant's motion for summary judgment.

II

Because this matter was resolved in favor of defendant on motion for summary judgment, we accept plaintiff's version of the facts as true. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

There are two primary categories of claims that arise from the alleged sexual harassment of employees: "a direct cause of action against the employer for negligence . . . under Restatement § 219(2)(b) . . . [and] vicarious liability under Restatement § 219(2)(d)." Aguas v. State, 220 N.J. 494, 512 (2015) (citing Restatement (Second) of Agency, §219).

An employer who fails to take measures to protect employees from a hostile work environment may be liable under negligence principles. Lehmann, supra, 132 N.J. at 621-22. Specifically, an employer may be held liable if it negligently failed to have an effective sexual harassment policy in place. Cerdeira v. Martindale-Hubbell, 402 N.J. Super. 486, 491 (App. Div. 2008)

(citing Lehmann, supra, 132 N.J. at 621-23). To defend itself against a claim of negligence, "an employer's implementation and enforcement of an effective anti-harassment policy," is "a critical factor in determining negligence . . . under Restatement § 219(2)(b)." Aguas, supra, 220 N.J. at 499 (citing Restatement (Second) of Agency, §219).

In Gaines, supra, 173 N.J. at 313, the Court found the existence of the following factors in an anti-harassment policy relevant in determining whether that policy is effective: a formal prohibition of harassment; formal and informal complaint structures; anti-harassment training; sensing and monitoring mechanisms for assessing the policies and complaint procedures; and unequivocal commitment to intolerance of harassment demonstrated by consistent practice. But the existence of an effective policy is not determinative of an employer's negligence and thus does not conclusively shield an employer against a claim for negligence. Id. at 314.

In addition to being potentially liable for negligence for failing to take measures to prevent sexual harassment in the workplace, an employer also may be vicariously liable for a supervisor's actions if he or she sexually harasses another in the workplace. Lehmann, supra, 132 N.J. at 619-20. However, an employer can insulate itself from vicarious liability claims for sexual harassment. The Aguas Court very recently recognized an

affirmative defense approved by the United States Supreme Court in Burlington Industries v. Ellerth, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633, 655 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 807-08, 118 S. Ct. 2275, 2292-93, 141 L. Ed. 2d 662, 689 (1998). Aguas, supra, 220 N.J. at 499. To get the protection of this affirmative defense, an employer must prove by a preponderance of the evidence that: it did not take any tangible employment action against the plaintiff; it exercised reasonable care to prevent and to promptly correct the sexually harassing behavior; and the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm.[3] Id. at 524.

Here, between March 2011 and October 2011, plaintiff was allegedly subjected to sexual harassment that defendant concedes (for purposes of this motion only) would establish a prima facie case of hostile work environment sexual harassment. It is undisputed plaintiff was not given a copy of the Employee Handbook, which contained defendant's anti-harassment policy,

[3] Previously, an employer could maximize the chance it was insulated from vicarious liability in a hostile work environment sexual harassment action if there was: periodic publication of the employer's anti-harassment policy, the presence of an effective and practical grievance process for employees to use, and training for workers, supervisors, and managers concerning how to recognize and eradicate unlawful harassment. See Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 121 (1999).

until February 27, 2012. She also never participated in any training.

To defend itself against a claim for negligence in a hostile work environment sexual harassment action, an employer must have in place, among other things, "formal and informal complaint structures" to enable an employee to report harassment, and the employer must provide anti-harassment training. Gaines, supra, 173 N.J. at 313. In order for an employer's affirmative defense to succeed on a claim for vicarious liability, one of the three elements an employer must prove is that it exercised reasonable care to prevent and to promptly correct the sexually harassing behavior.

Although defendant may have had formal and informal complaint structures in place, in order for these structures to have been effective, its employees had to be aware of them. Plaintiff claims she was not aware of these "structures." Between March and October 2011, she was not advised of the remedies defendant put in place for its employees' protection in the event they were harassed, and she never received any training at all. Clearly there is a question of fact whether defendant was negligent in its efforts to eradicate sexual harassment from the workplace by failing to alert plaintiff as a temporary employee of the steps she could take if subjected to harassment. Therefore, defendant's alleged negligence under

Restatement (Second) of Agency, §219(2)(b) cannot be resolved on summary judgment.

Defendant asserts it has an effective policy and thus is shielded from any claim it is vicariously liable for the alleged actions of Mitchell, Williams, Cruzado, and Martinho, but there is a question of fact whether defendant exercised reasonable care to prevent and to promptly correct the alleged harassment in light of the fact it failed to provide plaintiff with the Employee Handbook until she was hired as a permanent employee and failed to give her any training during her term of temporary employment. Plaintiff may not have endured – or at least may have been able to minimize – the sexual harassment she experienced if defendant had advised her when initially hired as a temporary employee of the remedies available in the event she were harassed. Therefore, there exists a factual dispute whether defendant's policy meets the standard necessary to enable it to take advantage of the safe haven affirmative defense, precluding summary judgment for the time period when plaintiff was a temporary employee.

Defendant contends that it cannot be held vicariously liable for any of the actions of the four employees who harassed plaintiff because none were supervisors. See generally Herman v. Coastal Corp., 348 N.J. Super. 1, 23-24 (App. Div.)

(observing employer's liability for hostile work environment sexual harassment depends upon whether the harasser was the victim's supervisor), certif. denied, 174 N.J. 363 (2002). However, plaintiff claims Cruzado was her supervisor. Moreover, the Court in Aguas expanded the definition of supervisor to include "not only employees granted the authority to make tangible employment decisions, but also those placed in charge of the complainant's daily work activities." Aguas, supra, 220 N.J. 528.

Plaintiff contends that for a period of time Mitchell was assigned to train her, and the record suggests he was overseeing her progress. Although Williams's status as a supervisor vis-a-vis plaintiff is less clear, we deem it prudent in light of the recently expanded definition of supervisor to remand the matter so that the roles of Cruzado, Mitchell and Williams can be properly explored and evaluated in light of the new definition. But because there is no evidence Martinho falls under the definition of supervisor, defendant cannot be held vicariously liable for his alleged actions.

In summary, because there are questions of fact under both the claim for negligence and for vicarious liability, the trial court erred when it granted summary judgment to defendant and dismissed plaintiff's claim for hostile work environment sexual harassment.

We have carefully considering plaintiff's arguments that the trial court erred by dismissing her claims for quid pro quo sexual harassment and disparate treatment. We conclude these arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In addition, plaintiff cannot claim in the circumstances of this case that defendant is liable to her for constructive termination of her employment. After the time alleged by plaintiff that the sexual harassment occurred, she was rehired and took a position as a permanent employee. She decided that she would leave the employment at a time when sexual harassment had not occurred and after she was provided information about defendant's anti-harassment policy and complaint procedure. She cannot claim after accepting the position as a permanent employee that it was the earlier sexual harassment that compelled her to leave the job. Her damages are limited to those arising during the period of alleged harassment when she was a temporary employee.

Affirmed in part and reversed in part. We do not retain jurisdiction.