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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5006-09T1

MONECK WALLACE and
TINA STEWART,

Plaintiffs-Appellants,

v.

MERCER COUNTY YOUTH DETENTION
CENTER,

Defendant-Respondent.

Submitted September 14, 2011 - Decided October 12, 2011

Before Judges Graves and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-764-08.

Law Offices of the Attorneys Hartman, attorneys for appellants (Katherine D. Hartman, on the brief).

Arthur R. Sypek, Jr., Mercer County Counsel, attorney for respondent (Lillian L. Nazarro, Assistant County Counsel, on the brief).

PER CURIAM

Plaintiffs Moneck Wallace and Tina Stewart appeal from the May 10, 2010 order granting summary judgment to their employer, the Mercer County Youth Detention Center (MCYDC). They appeal only the dismissal of count one of their complaint, alleging a

hostile work environment arising from persistent sexual harassment by a fellow employee under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.[1] Plaintiffs claim that a co-worker, Jerel Livingston, committed acts of sexual harassment that, although promptly reported, were not properly addressed by the detention center. Plaintiffs also contend that both supervisors and employees were uninformed about how to find the Mercer County's sexual harassment policy, which is contained in the Mercer County Policy Prohibiting Discrimination, Harassment or Hostile Environments in the Workplace (Policy). They also assert that inadequate sexual harassment training of supervisors, coupled with unclear monitoring and investigative procedures, rendered it ineffective.

The trial judge determined that plaintiffs had presented a prima facie case for sexual harassment, but granted summary judgment, finding that the MCYDC could not be held vicariously liable because Livingston was not a supervisor of either plaintiff and because Mercer County had a sexual harassment

[1] Appellants do not appeal the dismissal of the remaining counts in their complaint alleging retaliation (count two), failure to investigate (count three) and negligent hiring and supervision (count four) on the part of defendant MCYDC. We, therefore, address only the claim asserted in the first count of plaintiffs' complaint.

policy in place. Because the trial judge misconstrued pertinent case law and material issues of fact exist, we reverse.

The depositions of the witnesses revealed the following facts. At the time of the alleged harassment, Wallace worked the 11:00 a.m. to 7:00 p.m. shift, while Stewart worked the 3:00 p.m. to 11:00 p.m. shift with Livingston. Wallace claimed that, on several occasions, Livingston attempted to pursue her sexually. Although she expressed to him that she was not interested, Livingston continued to request her phone number and repeatedly made comments about how he was sexually attracted to her. On one particular occasion, he made kissing noises close to her face.

Stewart claimed that Livingston repeatedly made comments about her buttocks and how he would love to kiss her neck. She discouraged these comments, but he continued to make them. On March 8, 2006, both Stewart and Livingston were required to work an additional late shift from 11:00 p.m. to 7:00 a.m. At one point, Livingston rubbed up against Stewart's leg, first rubbing her outer-thigh and then trying to proceed to her inner-thigh. Stewart pushed Livingston away and retreated to the bathroom. She stayed in the bathroom for the duration of her hour-long break. When she returned, Livingston was taking his break. She locked the door to ensure that she would not have to interact

with him for the remainder of the shift. After this incident, Stewart claimed that when she walked by Livingston he stared at her and sometimes moaned in a sexual manner.

Both women filed an incident report with their supervisor, Gloria Hodges. Hodges then passed the reports along to the MCYDC assistant superintendent. Hodges admitted that Livingston was given copies of both plaintiffs' reports so that he could respond to the allegations. During the following week, Livingston continued making inappropriate comments to Stewart and snickered at Wallace repeatedly in an antagonistic manner. Stewart claimed that she ate lunch in her car both before and after filing the incident report to avoid Livingston's unwelcome comments.

Plaintiffs' incident reports were later sent to Mercer County's personnel department by email on April 24, 2006. The County administration did not contact them until May 19, 2006. Aixa Aklan, the assistant personnel director for Mercer County at that time, was assigned to investigate the sexual harassment claims. Her only sexual harassment training consisted of a state-sponsored class that she had attended approximately ten years before her deposition in 2009 and a class on human resources law that she attended while in college.

After interviewing plaintiffs, Livingston, and others, Aklan prepared an investigation report, which concluded that there "wasn't enough information to sustain what [she] was investigating." With regard to Stewart, Aklan provided the following five reasons for her determination:

> 1. Did not report incident immediately and only when asked by the Supervisor on 4/13/06.
> 2. Exchange of cell phone was omitted in Stewart interview.
> 3. Information regarding friendship with Wallace was withheld.
> 4. Expressed that she did not want him terminated.
> 5. No witnesses were present at time of alleged wrongdoing.

Aklan supported her failure to sustain Wallace's report by five reasons as well:

> 1. Did not file a report immediately after the fact.
> 2. Had discussion with his ex-wife regarding previous incidents involving Livingston.
> 3. Gave account of other employee's involvement, when only two came forth.
> 4. Friendship with Stewart.
> 5. No witnesses were present at the time of the alleged incident.

Aklan further testified that her conclusions were also based on the fact that she had offered information to one of the individuals about how to obtain confidential employee assistance

counseling. She was "not too sure if they followed up on it."[2] Aklan also stated that the County's sexual harassment policy was disseminated to supervisors by hard copy or email, but acknowledged that she was unsure if it was included in the County's employee handbook or posted on the County's website when these incidents occurred.

The trial judge found that both plaintiffs had proven a prima facie case of sexual harassment,[3] but concluded that MCYDC could not be held vicariously liable for Livingston's conduct.

On appeal plaintiffs raise the following issues:

> I. THE COURT IMPROPERLY GRANTED SUMMARY JUDGMENT RELYING ON UNPUBLISHED DECIS[IO]NS AND IGNORING APPELLATE DIVIS[IO]N PRECEDENT THAT AN EMPLOYER CAN BE LIABLE FOR CO-WORKER SEXUAL HAR[]ASSMENT UNDER PRINCIPLES OF NEGLIGENCE.
>
> II. SUMMARY JUDGMENT IS INAPPROPRI[]ATE BECAUSE THERE ARE NUMEROUS QUESTIONS OF FACT SUPPORTING PLAINTIFFS' THEORY THAT THE COUNTY OF MERCER [] DID NOT EXERCISE DUE CARE TO AVOID A HOSTILE WORK ENVIRONMENT.

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[2] Aklan admitted that she was not entitled to information concerning whether either of the individuals had sought and/or received this counseling.

[3] To state a claim for hostile work environment sexual harassment, a plaintiff must show that "the complained-of conduct (1) would not have occurred <u>but for</u> the employee's gender; and it was (2) <u>severe or pervasive</u> enough to make a (3) <u>reasonable woman</u> believe that (4) the conditions of employment are altered and the <u>working environment is hostile or abusive</u>." <u>Lehmann v. Toys 'R' Us, Inc.</u>, 132 <u>N.J.</u> 587, 603-04 (1993).

A. The County has a formal policy, however that policy was not disseminated in a meaningful way.

B. The County did not have effective formal and informal complaint structures and did not have procedures for promptly and thoroughly investigating and remediating claims.

C. The County did not provide mandatory training for supervisors and man[a]gers and nor did they make such training available to all other employees.

D. The County did not employ effective monitoring mechanisms to determine [i]f the policies and complaint structures could be trusted.

As we have often recognized, an appellate court reviews a grant of summary judgment de novo, applying the same standard governing the trial court under Rule 4:46. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). Generally, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c). In

evaluating this appeal, we "accept plaintiff[s'] version of the facts as true and give plaintiff[s] the benefit of all reasonable inferences from the facts." Cerdeira v. Martindale-Hubbel, 402 N.J. Super. 486, 491 (App. Div. 2008).

Plaintiffs argue that, based on our decision in Cerdeira v. Martindale-Hubbell, supra, the trial judge should have applied the negligence theory set forth in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993) and Gaines v. Bellino, 173 N.J. 301 (2002) to deny summary judgment to MCYDC.[4] See Cerdeira, 402 N.J. Super. at 494. In granting summary judgment, the trial judge explained that "[t]he hostile work environment framework requires that the offending individual be a supervisor, because employers normally do not invest non-supervisors with the authority that might be used to harass another employee[.]" He then accepted the MCYDC's assertion that for an employer to be liable for co-worker sexual harassment, "the plaintiff must prove that the employer was, (1) aware of the harassing conduct, and (2) failed to respond." The judge found that the MCYDC should not be liable because plaintiffs' supervisor instructed them to file incident reports immediately upon learning of

[4] Plaintiffs also assert that the trial judge improperly relied on unpublished opinions, Rule 1:36-3, when he granted summary judgment in favor of defendant on the grounds that Livingston was not a supervisor and the MCYDC had a sexual harassment policy.

Livingston's purported behavior and an investigation followed, which included interviews of Stewart and Wallace.

In Lehmann, supra, the Court held that "employer liability for supervisory hostile work environment sexual harassment shall be governed by agency principles." 132 N.J. at 619. Although the Court did not set forth a precise standard for negligence regarding sexual harassment claims, the Court explained that

> a plaintiff may show that an employer was negligent by its failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and/or monitoring mechanisms. We do not hold that the absence of such mechanisms automatically constitutes negligence, nor that the presence of such mechanisms demonstrates the absence of negligence. However, the existence of effective preventative mechanisms provides some evidence of due care on the part of the employer.
>
> Employers that effectively and sincerely put five elements into place are successful at surfacing sexual harassment complaints early, before they escalate. The five elements are: policies, complaint structures, and that includes both formal and informal structures; training, which has to be mandatory for supervisors and managers and needs to be offered for all members of the organization; some effective sensing or monitoring mechanisms, to find out if the policies and complaint structures are trusted; and then, finally, an unequivocal commitment from the top that is not just in words but backed up by consistent practice.
>
> Similarly, given the foreseeability that sexual harassment may occur, the absence of

> effective preventative mechanisms will present strong evidence of an employer's negligence.
>
> [Id. at 621-22 (internal quotation marks and citations omitted).]

In Cerdeira, supra, we held that

> [a]lthough Lehmann involved supervisory sexual harassment, we do not read the Court's recognition of a negligence-based theory of liability arising from an employer's failure to have effective preventive mechanisms in place as limited to claims of supervisory harassment. To do so could potentially discourage employers from adopting proactive sexual harassment policies that are well-publicized and directed to all employees.
>
> [402 N.J. Super. at 494.]

The plaintiff in Cerdeira, who never filed a formal report, alleged a two-year pattern of sexual harassment by a co-worker from another department. Id. at 489. A mail room supervisor noticed inappropriate photographs sent to the plaintiff by the co-worker and urged her to report the incident. Ibid. The plaintiff reported the harassing behavior to her supervisor, who immediately contacted the head of human resources, who then met with the plaintiff fifteen minutes later. Ibid. The human resources director also met with other supervisory employees to discuss the conduct of the harassing co-worker. Ibid. The alleged harasser was immediately suspended and fired two days later. Ibid. The employer had a code of conduct prohibiting

harassment generally, but the code did not explicitly mention sexual harassment. Id. at 490. It had also distributed sexual harassment memos at some point in the early nineties, which the plaintiff claimed she never saw before the litigation. Id. at 490. The plaintiff filed a complaint against the employer and her co-worker, alleging a hostile work environment in violation of the LAD. Ibid. The employer moved for summary judgment after discovery, arguing that it could not be liable because the harassment was perpetrated by a co-worker and not a supervisor. Ibid. The trial court agreed and found that the negligence theory regarding effective sexual harassment policies did not apply under such circumstances. Ibid. We reversed the trial court's grant of summary judgment and extended the negligence theory asserted in Lehmann regarding vicarious liability of employers to harassment by co-workers. Id. at 494.

These facts are similar to those in Cerdeira, although plaintiffs here complied with the Policy's requirement to file formal reports within 180 days. The trial judge mistakenly relied on Livingston's status as a co-worker rather than a supervisor when granting summary judgment to MCYDC.

When applying the Lehmann standard in the context of co-worker harassment, the trial court must focus on the "preventative mechanisms" put in place by the employer.

Cerdeira, supra, 402 N.J. Super. at 494; see also Lehmann, supra, 132 N.J. at 622. Plaintiffs argue that there were "no monitoring mechanisms in place to determine if the sexual harassment policies and complaining mechanisms were effective and judging by the chain of events in this case had they been monitored, it would have been determined that they were woefully inadequate." Aklan testified at her deposition that the only monitoring systems in place were policies and training.

Aklan found the plaintiffs' claims of sexual harassment were unsubstantiated, even though the details of the claims fit neatly into the Policy's definition of sexual harassment as set forth on pages three and four. On page four, the Policy gives specific examples of sexual harassment, which include:

> Generalized gender-based remarks and comments
>
> > Unwanted physical contact such as intentional touching, grabbing, pinching, brushing against another's body or impeding or blocking movement.
> >
> > Verbal or written sexually suggestive or obscene comments, jokes or propositions including letters, notes, e-mail, invitations, gestures or inappropriate comments about a person's clothing.
> >
> > Visual contact, such as leering or staring at another's body, gesturing, displaying sexually suggestive objects, cartoons, posters, magazines or pictures of scantily-clad individuals.

> Explicit or implicit suggestions of sex by a supervisor or manager in return for a favorable employment action such as hiring, compensation, promotion, or retention.
>
> Suggesting or implying that failure to accept a request for a date or sex would result in an adverse employment consequence with respect to any employment practice such as performance evaluations or promotional opportunity.
>
> Continuing to engage in certain behaviors of a sexual nature after an objection has been raised by the target of such inappropriate behavior.

The Mercer County administration's determination that plaintiffs' claims were unsubstantiated is at odds with the trial judge's conclusion that plaintiffs had presented a prima facie case of sexual harassment. Mercer County provided no written policy explaining the criteria for evaluating whether sexual harassment claims are well-founded. One of Aklan's reasons for finding that both plaintiffs' claims were unsubstantiated was that "[n]o witnesses were present at the time of the alleged incident." The fact that the harassment occurred when no one else was present, however, is not unusual. Other reasons cited by Aklan, such as not wanting the harasser terminated or not immediately reporting the behavior, are equally unpersuasive. Given her minimal training in the area of

sexual harassment, Aklan's unconvincing reasons are not unexpected.

The Supreme Court has held that the components of an effective anti-harassment policy are: 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. Gaines v. Bellino, 173 N.J. 301, 313 (2002). Thus, "the existence of a sexual harassment policy alone is insufficient to establish the affirmative defense to vicarious liability in a hostile work environment claim." Velez v. Jersey City, 358 N.J. Super. 224, 235 (App. Div. 2003) (citing Gaines, supra, 173 N.J. 301). The Court has clarified that the circumstances relevant to determining whether an employer can enjoy the benefit of a "safe haven" from vicarious liability due to an employee's harassment of others are: (1) periodic publication of the employer's anti-harassment policy, (2) the presence of an effective and practical grievance process for employees to use, and (3) training for workers, supervisors, and managers concerning how to recognize and eradicate unlawful harassment. Id. at 314 (citing Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 120-21 (1999)).

Livingston allegedly engaged in behavior similar to examples found in the County's sexual harassment policy. Plaintiffs presented evidence that supervisors were not adequately trained on how to handle sexual harassment complaints. They presented evidence supporting the contention that both employees and supervisors received the same level of sexual harassment training, which consisted of only a ten-question quiz at the time of hiring. Further, one MCYDC employee, who worked as a supervisor since 1996, claimed that he received sexual harassment training only once, no more recently than 2003. A jury could reasonably find that someone working as a supervisor at the MCYDC for more than thirteen years should have received more frequent sexual harassment training.

Moreover, plaintiffs presented evidence that detention center supervisors did not comply with the Policy's requirements. The Policy contains a section entitled "Confidentiality," which dictates that "confidentiality will be maintained throughout the investigatory process." Detention center supervisors allowed Livingston to read plaintiffs' reports, thereby alerting him to his accusers' identities and their precise allegations before the investigation began, evidencing that the supervisors were unclear as to how to handle the matter.

In addition, plaintiffs submitted their incident reports on April 13, 2006, yet they were not sent to County administration until April 24, 2006, even though the Policy provides that the supervisors should "immediately advise the County's Affirmative Action Officer and Chief, Division of Employee Relations of the complaint." An eleven-day delay does not meet the definition of "immediately." Furthermore, plaintiffs were not contacted by administration until almost one month after their reports were submitted to the County's personnel office. Although the Policy provides that either the supervisor or the complainant should report the sexual harassment to administration, defendant's position is that plaintiffs should have gone to administration directly. Plaintiffs, however, acted in conformance with the Policy when they reported their complaints to supervisors; once they did, it was the supervisors' responsibility to inform administration immediately.

Although Aklan and her supervisor testified that they directed the MCYDC supervisors to separate Stewart and Wallace from their alleged harasser during the investigation, plaintiffs presented evidence that Livingston was scheduled to work shifts with both plaintiffs before the investigation was completed. Livingston allegedly continued making suggestive comments to Stewart up until a week after she filed her incident report.

We find that plaintiffs raised several issues of material fact regarding the dissemination of the sexual harassment policy, the adequacy of sexual harassment training provided to supervisors in the MCYDC and to employees in the Mercer County personnel department, the effectiveness of the sexual harassment policy and associated investigatory procedures, the lack of any discernable criteria to be used when evaluating whether or not a sexual harassment claim is substantiated, and monitoring procedures used to the evaluate the sexual harassment policy's effectiveness.

Accordingly, a jury must determine whether the MCYDC was negligent in implementing, carrying out, or monitoring its sexual harassment policy. Should the jury find that the MCYDC was negligent, it must then address the question of whether the MCYDC's negligence was causally related to any harm suffered by plaintiffs. See Cerdeira, supra, 402 N.J. Super. at 493-94.

Reversed and remanded for further proceedings consistent with this opinion.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION