IN THE COURT OF APPEALS

TERESA DAVIS and hAuNsDbEaRnSdO N CHAN)CERY
FRANK DAVIS, C.A. NO. 03A01-9705-
)
Plaintiffs-Appellants)
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)
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vs. HON. WILLIAM)E. LANT
CHANCELLOR)
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)
)
MODINE MANUFACTURIANFGF ICROM.E,D AND)REMANDE
CHRISTOPHER VESTULA and MIKE)
SWEE,)
)
Defendants-Appellees)

DAVID A. STUART, Stuart & Van Riper, C

RALPAH. MORRIS and WENDY L. NUTT, Brit
SlovaCkh,icago, and EDWARD G. PHILLIPS,
Rodge&rsMorKgnaox,ville, for AMpapneulflaecet uMroidnign

O P I N I O N

M c M u r r a y , J

P l a i n t i f f , J e f f e s a D a v i s , b r o u g h t t h i s a c t i o n a g a i n s t M o d i n e M a n u f a c t u r i n g C o m p a n y , V e s t u l a[1], a n d M i k e S w e e , a l l e g i n g u n l a w f u l s e x u a l d i s c r i m i n a t i o n u n d e r T e n n e s s e e H u m a n R i g h t s A c t , T e n n . C o d e A n n . § 4 - 2 1 - 1 0 1 [2] . M o d i n e m o v e d f o r s u m m a r y j u d g m e n t u p o n a l l c l a i m s . V s e t u l a d i d n o t m o v e f o r s u m m a r y j u d g m e n t a n d t h i s a p p e a l[3] . T h e i s s u e p r e s e n t e d c o n c e r n s w h e t h e r t h e c h a n c e l l o r e r r e d i n g r a n t i n g s u m m a r y j u d g m e n t . W e a f f i r m t h e c h a n c e l l o r .

I n e a r l y 1 9 9 5 , t h e p l a i n t i f f , a p p r o x i m a t e l y 1 6 y e a r s , s u c c e s s f u l l y s o u g h t e m p l o y m e n t w i t h M o d i n e . A s p a r t o f h e r p o s i t i o n , M o d i n e t r a n s p o r t e d p l a i n t i f f , a l o n g w i t h e m p l o y e e s i n c l u d i n g d e f e n d a n t V s e t u l a , t o p l a n t f o r a t r a i n i n g m i s s i o n .

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[1]This defendant's name is misspelled "Vestula" in the complaint. The correct spelling is "Vsetula." The other named defendant, Mike Swee, was apparently never served with process and is not a party to this appeal.

[2]Plaintiff's husband, Frank Davis, has a derivative claim for "depriv[ation] of his wife's services and her acts of love and affection."

[3]The judgment was made final as to Modine in accordance with Rule 54.02, Tennessee Rules of Civil Procedure.

Plaintiff was an hourly employee of Modine's Clinton, Tennessee. Vestula was a salaried engineer the transfer of a new product manufact plant to the Clinton plant in the one of salaried employee. While in McHenry, the local hotel at Modine's expense.

During the day, the employees were invo equipment and manufacturing processes used which were going to be implemented at the night, the first night of the trip, the dinner together. They used a rental van transportation to the Clinton, Tennessee. On this day, the night they split up and a different restaurants.

The events which led to this lawsui night April 5, 1995. That evening, the thr Clinton employees to raive a reboat casino. Vs the evening in the hotel lounge with a plant, like Sweeney. They returned from the casi 10:30 PM, and the plaintiff fronted in. After calling her husband, she went to bed a

She was awakened shortly thereafter b door. She heard a voice which sets the 'rse, cogen

for her to let Plaintiff steus tai fyieeldleVd t
if she did not let them in, they hwSould
also stated that "I wanst to see you in you
looked through the peephole and saw Vsetu
his head if they were horns, bellowing
at the door. He was obviously intoxicat
that she was terrified that he would bre
her. Plaintiff stated that the incide
minutes, and then Vsetula went away.

Vsetula testified that he spkeinto the eve
hotel lounge with Scwheed, Onhdiowa go Bulls b
game on television. He stated that bet
drank three or four pitchers of beer an
schnapps. Around midnight, they decided to
rooms to see how they had done gambling
reached after getting off the elevator

Vsetula stated that he knocked on the
plaintiff to open the door and talk to
gambling. The plaintiff told him to go aw
knock on the next hotel door, that of R
Modine employee. Hatwkipes doids neither, so

[4]Mike Swee accompanied Vsetula up to the rooms. The plaintiff testified that she heard Vsetula talking to someone else, but that she neither heard nor saw the other person from inside her room.

returned the hotel lounge. Vsetula deni
the plaintiff's nightie and charging t
he did admit he was being loud and boi

After Vsetula left her door, plaintif
stated that he had just come beating o
very scared. She stated that Hawkins responded, by
and that Vsetula was pounding on his door. Hawkins
After talking to Hawkins, plaintiff calle
what happened. Mr. Davis insisted that
available flight. After talking to his w
several Modine officers, told them wha
that they send her home immediately.

The plaintiff, afraid to stay in her
remainder of the night in a female co-emplo
morning, Modine made arrangements for
accompanied by Richard Hawkins, thus l
several days early.

Modine initiated an investigation of the incident u
plaintiff's arrival back in Clinton. Plai
airport by the Clinton superintendent, the
manager who was Vsetula's supervisor, summoned
manager. Statements of all the employees w

training session were taken. Mr. and Mrs.
officials the afternoon of plaintiff's
Mr. Davis demanded that he be given a
the plant officials complied.

The plaintiff testified that she
nervous about the incident, and
eventually sought psychological counseling from Dr. De
a licensed clinical psychologist. D
plaintiff suffering from post-traumatic s
depressive disorder, in addition to ("abnorm
crossing of being in the midst of an open[5]
claustrophobia ("a dread of being in clos
places") which she opined was caused b
recommended that the plaintiff be put on a medi
from work.

It appears that after the plaintiff
took some vacation time. She came bac
1995 and worked a half day. From May 12, 199
Dr. Dennis' letter recommending a medical
1995 the plaintiff was placed on a medica
work. On August 10, 1995, she gave noti
her job with Modine effective August 11,

[5]Webster's Third New International Dictionary (1993).

"specirfeiacson" she wrote "found another her deposition that the reason she lef other employment.

The plaintiff testified that when she Clintpolnant, several co-workers told he regardhienrg and the McHenry trip. In he states:

> I lrnaed that various rumors regar happeinedMcHenry were wcoirrkc.urlaOmnoierng at wasthaIt had been rVspetulaby.MrAnother r was that I had been caught in bed w Anotheurmor was that I had bought especiaflbry the trip and that I dese happenbedcause I wasnaflhrtng buPlant maangertsold me that they believed me happeinedMcHenry, and I asked my em steptso inform the work force of what to put a stop to the rumors, but my do so.

OnJune 14, 1995, before she returned suitnAnderson County aChaeciery Sexurat, ha anddiscriminaitgst Modine and Vsetula. Vsetuwlaas guilty of outrageous conduct Modinweas vicariousflorVsleitaublae's actions respondeat. suTpheericohrancellor found that of plaintiff's assertions to be true, ofaction aMgiadien, stand consequently gran summary judgment.

We now turn to the question of whether grants summary judgment under the Tenne (THRA) Our Supreme Court has stated th plaintiff's claim under the THRA is identic Title VII of the Federal. Campbell v. Fhltosr iAdc Steel Corp, 919 S.W.2d 2169, 963 (Tenn. 1996). Therefore, our have turned to federal Title VII cases harassment cases. Spicer v. Beaman, 93 o7t tSl.iWn.g2 884, 888 (Tenn. 1996). Court denoted that "it disputtheaotthb the Federal and State acts appl discriminated on the existence of a hostile work environment, such as the claim at bar.

The Campbell court set forth the followin

> To prevail on a hostile environment claim sexual harassment case, an employee mus that (1) the employee is a member o (2) the employee was subjected to unwelcom harassment; the harassment occurs because of the employee's gender; (4) the harassme condition or privilege" of employment; employer knew, should have known and the ha failed respond with appropriate c action.
>
> * * *
>
> [c]onduct that is not severe or pervas create an objectively hostile or abusive work ment—an environment that a reasonab hostile or abusive—is beyond Title
>
> * * *

> In determining whether an environme
> abusiave or not must consider the total
> circumstances. While no single factor is
> conclusiovnes, iderations relevant to th
> include but are not limited to, the fr
> discrimina tnodruyct; its severity; whe
> physically threatening or humiliati
> sive utterance; whether it unreason
> an employee's work performance; and
> psychological well-being.

Campbell, 919 S.W.2d at 31-32 (citations o

In this case, the 1995 April 15, Mr. Henry incident
occurrence of alleged harassment about
Under these circumstances, accepting a
as true, we do not think this solitary
create an objectively hostile or abusive
consider it significant that during th
incidean tl,ocked rhortiemla dobo between the pla
Vsetula. In addition, the plaintiffs were admitt
McHenfroyr a work training tmioscrieon, aftheer
theemployees had been off-duty for ma
company premises.

The plaintiffs pcooirnrte cotualtystihnagtle incide
sufficiesnetvleyre, be" maiaytable as sexual h
despitthee fact the tcaonduct was Mncoctlerlelpaenatve
Boarodf Regents of S,ta9t2e1 USn.iWv.e2rdsi6t8y4, 6

1996). In McCelleland, however, the defenda
significantly more severe than in the

The McCleland defendant, a university
room notwithstanding that he had been
not wearing a shirt, forcibly removed th
was covering herself with, and made a d
breast. Id. at 686. McCleland. The court specifically
the defendant was alleged to pry
conduct, including physical
as

While we do not suggest a hostile work
on sexual harassment hinges on physical
this case, the defendant neither saw nor
remained behind locked door. In summary, wh
action to be irresponsible and thoughtles
ultimately be found personally liable, it is
alone, to create an objectively hostil
ment for which his employer is liable.

We further find that the plaintiff
that Modine "failed to respond and appr
corrective action." Modine must be
investigation of the incident as soon as it
Company officials interviewed and took

partiensvolvedr. sevAfatl meetings with Vse
suspenhdiend for two weeks, forcing him
vacattiomne over that period. Modine off
ifsuch an incident ever happened agai
fired, and the notes regarding the incid
permanent employee personnel file.

In addition, Modine acceded to Mr. Da
wife be sent home immediately after th
givean week off Whitmpany. allowed her t
medicaelave of nearly three imnonthsps. a On
meetiantg the plant where Vsetula apologi
herhusband, intdiacaitdienngot intend to harm
her.

Theplaintiff complains about the pres
ingamong her co-workers at the plant,
contribtuotead hostile work environment.
requested company officials to gather
ina meeting and explainnwhyant hcatpipcemesdh
arguwesould have ended the rumors. Modi
stating that company policy was to kee
itsdecisions reganrodifngitdsiswcoirpkleirs. Pu
thispolicy, Modine noftfinotiaatlos adnindounce
punishment of Vsetula to the entire pl

Regarding employer's duty to take corr

Campbell court stated:

> Title VII does not impose strict liabilit
> hostile environment claims. Even i
> lishes the existence of a hostile w
> plaintiff will not recover under Title
> proof demonstrates employer the either knew
> should have known of the hostile harassment
> prompt and appropriate remedial act
>
> Title VII does not precisely defin
> appropriate remedial action; " however,
> employers are required to take step
> latest to terminate the harassment, ...
> remedial action is reasonable and a
> depending on the circumstances of e

Campbell, 919 S.W.2d at 32-33 [emphasis in
omitted].

We are of the opinion that, under th
case, a trier of fact could only reasona
took prompt and appropriate action, reason
latest to terminate the harassment. The THRA's
among other things, is "to prohibit di
and not to restrict the employer's ri
business decision. Bornusc. v. Western Co. Auto Supply, 69 S.W.2
95, 97 (Tenn. App. 1984). We think Mo
a plant meeting to discuss what had hap
reasonable and legitimate business dec

In a meeting between Vs. stuuplear, vihsiosr, the pl
resourmcaensager and the plant superintend

apparently attempted to make sure Vset
ness of his conduct. The human resource
meeting in the form of an internal mem

> ...All the facts point to sue, harassme
> possibly sexual harassment.
>
> Gerald commented that from Chris['s
> this is a much different issue than
> perspective. This has high murch lemp or tance
> to Teresa. Iting, when you are out of t
> represent Modine, you must have to the percep
> of your actions Vs what is received. A
> can put Modine in jeopardy.
>
> Gerald add[ed] that you made some ba
> judgment, noting out and getting drunk is
> interest of anybody, particularly when
> supervisory roll [sic]. We must pr
> happen again. I'm not sure you real
> serious this could have been, you a
> have been sued and still could be s

Plaintiffs argue that the above sta
one referring to "a supervisory party-room [oen
admission and raise a question of fsahcotulads t
beheld vicariously liable for Vsetula'
has long been-established rule that for a
held vicariously liable, three upon the dsoucpterriinoer,
for an employee's acnttifions, must the prove i tha
employee was acting within the course
when the injury Hoacmcruircrke dv.. Spring Co. 7 Oi8ty M
S.W. 2 383, 386 (Term 1986), Farmers Mut.
American Mut. Liability Ins. 2 Wn. 2d 903, 937
1992).

Ordinarily the question of whether an e
within the course and scope of his employ
the jury; however, where from the deposition of the employee's s
is of such a "marked and decided chara
could reach one but conclusion when undisputed fact
judgments in proper cases. Crearing v., 67 Sy. W. 2d 77, 80 (
1990). Home Stores, Inc. v. S. Parker 619, 62
1942). Tennessee, F8a4r0m Sr. W. 2d at 936-7.

In this case, a reasonable person c
was acting in the scope of his employment
occurred past midnight, off a company parking lot. Vesmi
been drinking on his own time and mone
plaintiff recognized that "it was after work
employees were free to spend their time as th
cannot be held liable under the supervision of the
case.

The plaintiffs also challenge the award of discret
costs as judged against them. They candi
that the award of discretionary costs is
trial court, Loicking v. National Union, 809 Fir
S. W. 2d 283 (Tenn. 1991). Odis Div. Corp. Sunbeam at
845 S. W. 2d 215 (Tenn. 1992). Tomlin's affidavits of
is reversed and remanded to the trial c

tiffs and brief comment. The plaintiff states have included this issue on appeal for this court to reverse the award of dis remanders or all claim't'ifs of claims for trial disposition of the issue relating to the judgment, therefore, renders the issue

The judgment of the trial court is a and the case remanfduerdt hfeorr ascutcihonne caess smaaryy. Costs on appeal are assessed to the ap

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Don T. McMurray, Jud

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Houston M. Goddard, Presiding Judge

_____
Herschel P. Franks, Judge

IN THE COURT OF APPEALS

TERESA DAVIS and hAuNsDbEaRnSdON CHAN)CERY
FRANK DAVIS, C.A. NO. 03A0)1-9705-
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Plaintiffs-Appellees)
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vs. HON. WILLIAM)E. LANT
CHANCELLOR)
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)
)
)
MODINE MANUFACTURIANFGFICROM.E,D AND)REMANDE
CHRISTOPHER VESTULA and MIKE)
SWEE,)
)
Defendants-Appellants)

JUDGMENT

This appeal came odn utpoonbertehcoard from
Chancery Court of Anderson, brairegfusmeanntd of cou
Upon consideration thereof, this Court i
no reversible error in the trial court

The judgment of the trial court is a
and the case remanded for such fyrtherreacs
Costs on appeal are assessed to the ap

PER CURIAM