

Supreme Court - Civil

DISCRIMINATION: "Criminal" conduct tort claims are recharacterization of sexual harassment, subject to HRA exclusivity... no equitable tolling for untimely harassment claim... Jones affirmed.

Amber Knight claims that while working as a waitress at the Pollard Hotel in Red Lodge, night auditor James Kennedy subjected her to comments & actions of a sexually harassing nature including commenting about her body and relationship with her boyfriend, asking about her personal life, slapping her on the bottom, and cornering her. She quit in 8/98. Kennedy continued to stalk her and she obtained a restraining order, which he allegedly violated. She filed a complaint with the HRC, which requested her personnel file and a response from owner David Knight and Pollard management. Knight responded that Kennedy and managers named in the complaint no longer worked at the Pollard and he was therefore unable to obtain their statements. He provided Arthur's and Kennedy's files. Kennedy's contained no reference to any of the alleged incidents involving Arthur. Arthur failed to provide a rebuttal, and HRC dismissed. She did not file objections and did not file an action in court within 90 days. However, in 4/01 she sued Knight and his corporations alleging failure to provide a safe place to work, negligent retention & supervision of Kennedy, intentional & negligent infliction of emotional distress, and sexual harassment under the HRA. Judge Jones dismissed on summary judgment, concluding that the tort claims are barred by HRA exclusivity and the sexual harassment claim was barred by the statute of limitations. Arthur appeals.

Jones correctly concluded that Arthur's tort claims are a recharacterization of her sexual harassment claim and are barred by HRA exclusivity. She asserts that Kennedy's actions went beyond mere sexual harassment, escalating to criminal conduct such as sexual assault, stalking, and intimidation. However, the fact that sexually harassing conduct may also constitute criminal conduct does not necessarily mean that it is not sexual discrimination as contemplated by the HRA. Her allegations that Kennedy made inappropriate comments, followed her about the dining room, cornered her, and slapped her on the buttocks, if true, clearly establish "verbal or physical conduct of a sexual nature" which constitutes sexual harassment. *Harrison* (Mont. 1990). Moreover, much of the alleged conduct occurred after she left the Pollard.

Jones correctly concluded that Arthur's sexual harassment claim was barred by the 90-day statute at §49-2-509(5). Arthur asserts that it should be tolled by equitable estoppel. She contends that Knight concealed or misrepresented material facts when he stated that he had no knowledge of her complaints regarding Kennedy and there was no documentation in the files of her complaints, including her meeting with management in 4/98. However, she knew that management knew of her complaints because she had personally informed them at the 4/98 meeting and other times. Also, as the alleged victim, she had knowledge of Kennedy's conduct and the response or lack of it by management to her complaints. Thus she could testify to facts

essential to her claim independent of Knight and management. Indeed, her initial written complaint with HRC detailed her knowledge.

Gray, Cotter, Leaphart, Regnier, Rice.

Arthur v. Pierre Ltd. (Pollard Hotel), 04-120, 11/1/04.

L.B. Cozzens & Paul Odegaard (Cozzens, Warren & Harris), Billings, for Arthur; James Halverson (Herndon, Sweeney & Halverson), Billings, for Defendants.