

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

LAURA RECTOR,	:	APPEAL NO. C-070619
Plaintiff-Appellant,	:	TRIAL NO. A-0502671
vs.	:	<i>JUDGMENT ENTRY.</i>
ETHICON ENDO-SURGERY, INC.,	:	
and	:	
JOHNSON & JOHNSON, INC.,	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court.¹

Raising three assignments of error, plaintiff-appellant Laura Rector, a former employee of defendant-appellee Ethicon Endo-Surgery, Inc., appeals from the entry of summary judgment in favor of Ethicon and its corporate parent, Johnson & Johnson, Inc., on Rector’s claims of quid pro quo sexual harassment, breach of an implied contract of employment, and promissory estoppel.

Rector was employed by Ethicon from 1991 until 2005. In 2004, Rector was the director of Global Bariatric Market Development at Ethicon. The division developed and marketed products for the treatment of obesity. She began to investigate opportunities for

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

promotion by speaking with a general manager of the bariatrics unit. Rector hoped to be promoted to the position of Executive Director.

Rector also approached Ethicon's president, Robert Salerno, who told her that he planned to provide her with opportunities to "fly higher." Rector consulted Anne Kuhn, vice president of human resources. Kuhn had no authority to unilaterally promote Rector, but sought to be an advocate on her behalf. During their discussions, Rector told Kuhn that she had received offers of employment from other firms.

In August 2004, Ian Lawson was transferred to Cincinnati from a Canadian subsidiary of Johnson & Johnson to conduct a restructuring of the bariatric division. Lawson, a vice president, became Rector's immediate supervisor.

Since Lawson was still looking for a house in Cincinnati, Rector invited him to take a car tour of Cincinnati neighborhoods and to go to dinner. On September 21, 2004, Lawson and Rector toured the area and had dinner in a Hyde Park restaurant. The dinner discussion focused on business matters. Rector contended that Lawson had praised her work and had promised her a promotion. She also alleged that Lawson had then made an unwelcome sexual advance, placing his hand on her bare leg.

Starting in late October 2004, during meetings to discuss reorganization of the department, Lawson became irritated by what he characterized as Rector's unprofessional meeting behavior, poor interactions with her colleagues, and complaints to his office assistant. Rector emailed Lawson to apologize and to indicate her desire to work on the division reorganization. Yet, Rector alleged, Lawson informed her that she was no longer under consideration for promotion.

In late November 2004, Rector sought the counsel of her former mentor, Jon Dwight, an Ethicon vice president. During their discussion about Rector's future in the

company, Rector revealed Lawson's sexual advance and begged Dwight not to report the matter. Dwight nonetheless immediately reported the incident to Ethicon's president.

On December 13, 2004, Lawson and a human-resources vice president met with Rector. They praised her marketing expertise, but noted that other team members had had trouble working with her. They informed Rector that her position in bariatrics was being eliminated, and that she was being reassigned to a new position as Director of Strategic Marketing in the General Surgery/Gynecology division, a position where she could develop her leadership skills.

Unbeknownst to Ethicon, however, Rector had already decided to seek employment outside Ethicon. On December 8, 2004, she emailed a person who was assisting her with finding another job, asking for help "find[ing] something in Indy" because "I have decided to proceed with an action against [Ethicon]."

On December 23, 2004, ten days after being informed of the transfer, and three months after the September 21 dinner, Rector made a formal complaint to Ethicon about sexual harassment by Lawson. Rector resigned from Ethicon on March 10, 2005.

Rector then filed this action, alleging that she had been sexually harassed by Lawson, had suffered retaliation after complaining of the harassment to other superiors, and had relied to her detriment upon certain promises of promotion made by various Ethicon managers that had caused her to pass up offers of employment at other companies. After deposing Rector and her former supervisors, Ethicon moved for summary judgment on all claims. On August 20, 2007, the trial court, in a detailed 12-page decision, granted Ethicon summary judgment and dismissed Rector's claims. This appeal followed.

Because summary judgment presents only questions of law, an appellate court reviews the entry of summary judgment de novo.² Summary judgment is proper pursuant to Civ.R. 56(C) when (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence viewed most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.³ When, as here, the party moving for summary judgment discharges its initial burden of identifying the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims, the nonmoving party may not rest on mere allegations and denials in the pleadings, but must submit some evidentiary material showing a genuine dispute over the material facts on the issues for which it bears the burden of production at trial.⁴

In her first assignment of error, Rector contends that the trial court erred in entering summary judgment on her sexual-harassment claim. Quid pro quo sexual harassment occurs where an employee's submission to or rejection of unwelcome sexual conduct is used as the basis for promotion or other employment decisions.⁵ Quid pro quo sexual harassment "is directly linked to the grant or denial of a tangible economic benefit."⁶ It occurs where there is a demonstrable nexus between the employee's submission to or rejection of unwelcome sexual conduct and an adverse employment action.⁷

² See *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258.

³ See *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

⁴ See *id.*; see, also, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798.

⁵ See *Harmon v. Belcan Engineering Group, Inc.* (1997), 119 Ohio App.3d 435, 437, 695 N.E.2d 783, citing *Western-Southern Life Insurance Co. v. Fridley* (1990), 69 Ohio App.3d 190, 194, 590 N.E.2d 325, motion to certify record overruled (1991), 57 Ohio St.3d 709, 566 N.E.2d 681.

⁶ See *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, 176, 2000-Ohio-128, 729 N.E.2d 726; see, also, *Harris v. Forklift Systems, Inc.* (1993), 510 U.S. 17, 21, 114 S.Ct. 367.

⁷ See *Burlington Industries Inc. v. Ellerth* (1998), 524 U.S. 742, 753, 118 S.Ct. 2257.

To prevail on a quid pro quo claim of sexual harassment, Rector must demonstrate (1) that she was a member of a protected class, (2) that she was subjected to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors, (3) that the harassment complained of was based on sex, (4) that her submission to the unwelcomed advances was an express or implied condition of receiving job benefits, or that her refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment, and (5) the existence of respondeat superior liability.⁸

Rector contends that Lawson made an unwelcome sexual advance when, at their dinner on September 21, 2004, he placed his hand on her bare leg, squeezed the leg, and leaned forward and watched her intently, ultimately forcing Rector to physically remove his hand. She claims that Lawson had conditioned a promotion on her submission to his sexual advance.

In granting Ethicon's motion for summary judgment, the trial court held that Rector had failed to meet her burden of proof with respect to whether Lawson had made a sexual advance.⁹ We overrule Rector's assignment of error, however, on separate grounds. Rector's quid pro quo claim must fail because she cannot demonstrate that there was a nexus between her refusal to submit to Lawson's claimed advance and the alleged job detriment—the withdrawal of promises of promotion. Rector provided no objective evidence that she had suffered any detriment because she turned down Lawson's sexual advance.

Rector claimed that she had explicitly asked Lawson for the lead marketing role at the September 21, 2004 dinner. She stated that Lawson had responded that "he thought I was the best fit for the job. He told me he thought I had 'a great natural leadership style

⁸ *Harmon v. Belcan Engineering Group, Inc.*, 119 Ohio App.3d at 437, 695 N.E.2d 783 (citations omitted).

⁹ See, e.g., *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist No. 04AP-941, 2005-Ohio-6367, ¶77-79.

and vision' and that there were 'no limits on how far I could go at [Ethicon].' ” Rector claimed that this had constituted a binding promise by Lawson that she would be promoted to a position that “consisted of some form of combination of her role and [another manager’s] role.”

But Rector admitted that several times before the dinner and before any sexual advance by Lawson, she and Lawson had discussed moving the other manager out of the department and giving her some of his duties. She also admitted that Lawson had not promised her any specific title, position, salary level, benefits, or specific responsibilities at the dinner. Rather, they merely discussed possible increased responsibilities and pay in the future. Rector thanked Lawson by email the following day for discussing her “potential future opportunities.” Lawson responded to Rector that he would take 60 days to evaluate the capabilities of the department’s employees before he would be in a position to “clarify roles[,] responsibilities and structure” of the reorganized department.

The evidence presented further indicates that despite Rector’s refusal to submit to Lawson’s alleged sexual demands, she did not suffer any a tangible job detriment. Lawson informed Rector, before an October 15, 2004 staff meeting, that, as they had discussed previously, the other manager would be moving to a different department, and that Rector and one other employee would be assuming greater responsibilities. Lawson informed Rector that while she would not receive the title “Executive Director,” she would assume most of the prior manager’s responsibilities. Lawson also obtained a 4.5% salary increase for Rector.

The evidence presented in support of the motion for summary judgment, construed most strongly in Rector’s favor, does not demonstrate that she suffered a tangible job detriment as a result of turning down Lawson’s advances. Rather than

retaliating against Rector, Lawson took steps to give Rector more responsibility in the corporation and to increase her pay. The first assignment of error is overruled.

In her third assignment of error, Rector argues that the trial court erred in entering summary judgment on her claim for promissory estoppel. Because Rector has failed to make a showing sufficient to establish that any of her supervisors at Ethicon had made specific promises of promotions and continued employment—an essential element of her promissory-estoppel claim—summary judgment was properly entered on that claim.

“Under the doctrine of promissory estoppel, an employer may be prevented from discharging an employee if the employer has made promises upon which an employee has reasonably relied.”¹⁰ To prevail, the employee must demonstrate that her employer should have reasonably expected the employee to rely upon its representation, and that the expected action or forbearance actually resulted and was detrimental to the employee.¹¹ “Praise regarding job performance or discussion of future career development [is] insufficient to establish promissory estoppel. The statement must be a specific promise of continued employment.”¹²

Salerno’s statement of praise for Rector’s work—that she had an opportunity to “fly higher” at Ethicon—could not be construed as a promise of continued employment or promotion. And Kuhn’s statement that she would “advocate in finding the right promotional opportunity” for Rector could not be reasonably relied upon as a promise of promotion. Kuhn, although a vice president in the human-resources office, did not have the authority to promote Rector. Lawson’s statements, summarized in our resolution of

¹⁰ *Dolan v. St. Mary’s Memorial Home*, 153 Ohio App.3d 441, 2003-Ohio-3383, 794 N.E.2d 716, ¶126, citing *Trader v. People Working Cooperatively, Inc.* (1994), 104 Ohio App.3d 690, 695, 663 N.E.2d 335; *Lehmann v. AAA Cincinnati* (Mar. 26, 1999), 1st Dist. No. C-980163.

¹¹ See *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 483 N.E.2d 150, paragraph three of the syllabus.

¹² *Dolan v. St. Mary’s Memorial Home* at ¶126, citing *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 543 N.E.2d 1212, paragraph three of the syllabus.

the first assignment of error, similarly cannot be construed as a promise of promotion. And Rector's response to them indicates that she did not construe them as promises upon which she could reasonably rely. Rector's September 22, 2004 email to Lawson, sent the day after the Hyde Park dinner, acknowledges that Lawson's discussions pertained only to "potential future opportunities." Construing the statements of Kuhn, Salerno, and Lawson most strongly in favor of Rector, we cannot say that their statements presented specific promises of promotions and continued employment. The third assignment of error is overruled.

Rector's second assignment of error, in which she claims the lower court erred by granting summary judgment to Ethicon on her retaliation claim, is also overruled. In order to state a prima facie retaliation claim, Rector must demonstrate that (1) she engaged in a protected activity, (2) Ethicon knew of her participation in the protected activity, (3) it engaged in retaliatory conduct, and (4) there was a causal link between the protected activity and the retaliatory action.¹³

On December 13, 2004, Rector was informed that she was being transferred to the Ethicon's General Surgery/Gynecology division. Rector asserted that she had engaged in protected conduct when, in late November, she had discussed Lawson's behavior with Dwight. She claimed that the transfer had been in retaliation for her indirect complaint against Lawson. Ethicon argued that Rector had not engaged in protected conduct until she had prepared a formal complaint on December 23.

Even assuming that Rector had engaged in a protected activity by complaining of sexual harassment before the December 13 transfer, she could not demonstrate that Ethicon had engaged in retaliatory conduct, or that there had been a causal link between her complaint of sexual harassment and the transfer. In her new position, Rector retained

¹³ See *Willie v. Hunkar Laboratories, Inc.* (1998), 132 Ohio App.3d 92, 107-108, 724 N.E.2d 492.

the title of director, she continued to report directly to a vice president, her salary remained the same, and there was no change in her benefits. Rector could not demonstrate that Ethicon's actions had materially affected her terms and conditions of employment.¹⁴ The second assignment of error is overruled.

Therefore, the trial court's entry of summary judgment is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HENDON and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 31, 2008

per order of the Court _____
Presiding Judge

¹⁴ See *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App. 3d 715, 727, 729 N.E.2d 813.