

ANGELINA M. BRISENO, Plaintiff, VS. JOHNNY McDANIEL, et al., Defendants.

Civil Action No. 3:02-CV-2634-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION

2004 U.S. Dist. LEXIS 19690

September 30, 2004, Decided

September 30, 2004, Filed

DISPOSITION: Defendant MDI's motion for summary judgment granted in part and denied in part; MDI's motion in limine denied as moot.

judgment and denies the motion *in limine* without prejudice as moot.

I

COUNSEL: [*1] For Angelina M. Briseno, Plaintiff: Gabriel H Robles, Robles Law Firm, Dallas, TX.

Briseno sues her former coworker and supervisor, McDaniel, and her former employer, MDI, alleging employment discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* and state-law claims for intentional infliction of emotional distress, assault and battery, false imprisonment, and negligent hiring, retention, and supervision.

For Johnny McDaniel, Defendant: Alicia G Burkman, Law Office of Alicia G Burkman, Dallas, TX.

For Milburn Distributions, Inc., Defendant: John L Ross, Thompson Coe Cousins & Irons -- Dallas, Dallas, TX. Lisa A Royce, Thompson Coe Cousins & Irons -- Dallas, Dallas, TX.

In August 2000 MDI hired Briseno to work at its warehouse in Grand Prairie, Texas. n1 McDaniel was her coworker, and Brent Milburn ("Milburn") was the Warehouse Manager. Two weeks after Briseno started her employment, McDaniel began harassing her virtually on a daily basis by blowing kisses, professing his love for her, grabbing her, and kissing her without her consent. In October 2000 McDaniel sent Briseno a love note written on the back of a company order form.

JUDGES: SIDNEY A. FITZWATER, UNITED STATES DISTRICT JUDGE.

OPINION BY: SIDNEY A. FITZWATER

OPINION:

MEMORANDUM OPINION AND ORDER

In this action by plaintiff Angelina Briseno ("Briseno") against her former coworker and supervisor, defendant Johnny McDaniel ("McDaniel"), and her former employer, Milburn Distributions, Inc. ("MDI"), alleging sexual harassment and related state-law claims, the court must decide on MDI's motion for summary judgment whether a reasonable trier of fact could find that MDI terminated Briseno's employment because she rejected McDaniel's sexual advances, whether MDI can establish the *Ellerth/Faragher* affirmative defense to Briseno's hostile work environment claim, whether Briseno's state-law claims are precluded under Texas law, and whether MDI can be held liable under Texas law for McDaniel's conduct as a company [*2] vice-principal. MDI also moves *in limine* to exclude certain opinion testimony. For the reasons that follow, the court grants in part and denies in part the motion for summary

n1 The court recounts the evidence favorably to Briseno, as the nonmovant, and draws all reasonable inferences in her favor. *See Clift v. Clift*, 210 F.3d 268, 270 (5th Cir. 2000). Defendants deny Briseno's allegations, and the court suggests no view concerning how the trier of fact will resolve them.

[*3]

In June 2001 Milburn transferred from Grand Prairie to the company's headquarters in Phoenix, Arizona. MDI promoted McDaniel to Grand Prairie Warehouse Manager. From June 2001 until Briseno was terminated in August 2002, McDaniel was her supervisor. Although temporary employees worked at the warehouse at various

times, it was common for McDaniel and Briseno to be the only two employees present.

After he was promoted, McDaniel continued to tell Briseno that he loved her, and he informed her that she would not be penalized if she dated him. At various times he grabbed her, hugged her, kissed her neck, and attempted to bring her close to his body. In a July 2001 incident, McDaniel picked Briseno up off the ground as she held on to a metal rack. Her ring became caught in the rack as McDaniel attempted to carry her away. The ring broke, and her finger became swollen and discolored. She attempted to call the police but stopped when McDaniel threatened her and her children. In October 2001 McDaniel requested that Briseno go into his office under the pretense of discussing a work-related matter. He shouted at her when she hesitated. Once inside, McDaniel grabbed and hugged her. He then placed [*4] his hands underneath her shorts and, despite her resistance, entered his finger into her vagina, causing extreme pain. McDaniel then threw Briseno against a wall, and she ran out of his office.

On numerous occasions, McDaniel exposed and fondled himself in front of Briseno while making lewd comments and gestures. At other times, McDaniel directed Briseno to enter his office, ostensibly for work-related reasons, only to threaten to fire her if she did not obey his instructions. He blocked her in his chair, prevented her from leaving his office, and grabbed her and threw her into the chair, leaving bruises on her arms. Once, after being forced to sit in his chair, McDaniel attempted to kiss her vagina over her clothing and let her go only after she resisted and struggled.

In November 2001 Briseno disclosed to Tom Burke ("Burke"), MDI's Operations Manager, that McDaniel had mistreated and verbally abused her. She did not allege that she was sexually harassed or subjected to unwanted touching, because she was afraid of McDaniel's prior threats against her and her children. In February 2002 Briseno telephoned Burke at MDI's headquarters to complain of McDaniel's harassment. Burke was [*5] unavailable, and Briseno left a message with his secretary requesting that he call her back regarding a very important matter. Burke's secretary requested that Briseno call back later. Briseno telephoned again that day, and the secretary advised Briseno that Burke was not in the office. The following day, McDaniel confronted Briseno and asked if she had spoken to Burke. He told her that Burke had informed him that she had attempted to contact headquarters, and he warned her against contacting him, saying, "If you point the finger at me with somebody in Arizona, you know what's going to happen to you." P. App. 46.

Briseno received satisfactory marks on her annual job evaluation in August 2002, but McDaniel advised her that if she wanted higher ratings, she should have sex with him or go to his house with him. The same month, Burke conducted an evaluation of the Grand Prairie facility, n2 Briseno accompanied her son to a doctor's appointment and learned that he had been diagnosed with cancer. When she returned to work, she asked Burke whether she could obtain insurance coverage for her son. Burke advised her that he and McDaniel had decided to terminate her employment. When asked why [*6] she was terminated, Burke told her that her son's diagnosis would likely compromise her ability to perform her job.

n2 MDI maintains that the court should disregard portions of Briseno's affidavit in which she states that Burke arrived in Grand Prairie three days before her termination and that recount discussions with Burke from August 26, 2002 until August 29, 2002, when she was terminated. MDI asserts that these statements contradict, without explanation, her prior deposition testimony that she met Burke only two times: once in November 2001 and once at the meeting where her employment was terminated. The court denies MDI's objection as moot. Assuming *arguendo* that the statements should be disregarded, *see Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984), considering them does not alter the court's decision or reasoning.

Briseno sues MDI for sexual harassment under Title VII, sues both MDI and McDaniel for intentional infliction of emotional distress, assault and battery, [*7] and false imprisonment, and sues MDI for negligent hiring, retention, and supervision. MDI moves for summary judgment. n3

n3 MDI objects to the declaration of Rafael Paredes on the ground that it contains hearsay statements and is improperly executed under 28 U.S.C. § 1746. The court overrules the objection as moot because, regardless whether the declaration is admissible or inadmissible, it does not alter the result or reasoning of this opinion.

II

MDI moves for summary judgment on Briseno's *quid pro quo* claim, n4 contending that Briseno has not adduced any evidence establishing a nexus between her discharge and McDaniel's harassment and has not

adduced any evidence that MDI's proffered reasons for termination are pretext.

4 Despite the Supreme Court's apparent view in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998), that the term "tangible employment action" is preferable to the term "quid pro quo," see *id.* at 753-54, the Fifth Circuit continues to categorize sexual harassment discrimination claims under the rubrics *quid pro quo* and hostile work environment. See, e.g., *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 409 (5th Cir. 2002) ("For the sake of clarity, we reiterate our established methodology for analyzing supervisor sexual harassment cases under Title VII. First we determine whether the complaining employee suffered a tangible employment action.' If he has, the claim is classified as a quid pro quo' case; if he has not, the claim is classified as a hostile environment' case." (footnotes omitted)), cert. denied, 537 U.S. 1188, 154 L. Ed. 2d 1020, 123 S. Ct. 1254 (2003). The court will therefore do likewise.

[*8]

A

To establish a *quid pro quo* sexual harassment claim, "the plaintiff must show that [she] suffered a tangible employment action' that resulted from [her] acceptance or rejection of [her] supervisor's alleged sexual harassment." *Lo Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 481 (5th Cir. 2002) (quoting *Castano v. AT&T Corp.*, 213 F.3d 278, 283 (5th Cir. 2000)). "When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998); see *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998). The employer is strictly liable in such cases. See *Ellerth*, 524 U.S. at 759-65. A tangible employment action consists of "significant change[s] in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing [*9] a significant change in benefits." *Id.* at 761.

After establishing that the employer engaged in a tangible employment action,

the road branches toward a second stop at which the court must determine whether the tangible employment action suffered by the employee resulted from [her] acceptance or rejection of [her] supervisor's alleged sexual harassment. If the employee cannot show such nexus, then [her] employer is not vicariously liable under Title VII for sexual harassment by a supervisor; but if the employee can demonstrate such a nexus, the employer is vicariously liable per se and is not entitled to assert the one and only affirmative defense permitted in such cases since *Ellerth* and *Faragher*.

Castano, 213 F.3d at 283-84 (citations and footnotes omitted).

MDI does not dispute that Briseno suffered an adverse employment action in the form of termination. The question is whether Briseno has adduced evidence that would permit a reasonable trier of fact to find that her refusal of McDaniel's sexual overtures resulted in her termination.

B

MDI contends that Burke was solely responsible for making the decision to terminate [*10] Briseno's employment. It maintains that, because McDaniel did not participate in the decision or even recommend her termination, and because Briseno never informed anyone at MDI of the harassment, she cannot establish a nexus between her termination and her rejection of the harassing conduct. The court disagrees.

In a *quid pro quo* sexual harassment action, "the fact that the harasser was the decisionmaker for the tangible employment action gives rise to an inference that the harasser's discriminatory animus motivated that action." *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998). That the decisionmaker was not also the harasser, however, is not fatal to plaintiff's claim. See *id.* at 1248. It simply means that the plaintiff cannot avail herself of the inference of causation created by a common identity of a harasser and a decisionmaker. *Id.* Briseno must therefore adduce evidence that would permit a reasonable trier of fact to find that McDaniel's discriminatory animus resulted in Burke's decision to terminate her employment. See *id.* *Wilson v. Sysco Food Servs. of Dallas, Inc.*, 940 F. Supp. 1003, 1012 (N.D. Tex. 1996) [*11] (Buchmeyer, C.J.) (denying summary judgment where evidence showed that harasser was involved in decision to terminate plaintiff).

Briseno avers that Burke told her that he and McDaniel had discussed her employment and decided to

terminate her. She also points to Burke's declaration, in which he states that, in determining whether to discharge Briseno, he reviewed McDaniel's notes from a meeting with her, which indicated that she became hostile and disrespectful. This evidence would permit a reasonable trier of fact to conclude that McDaniel participated in the decision to discharge Briseno and that his discriminatory animus influenced the decision. MDI argues that Burke's independent investigation of the circumstances justifying Briseno's termination severs the causal nexus between McDaniel's harassment and the adverse employment action. The degree to which this investigation was independent, however, is a question of fact. See *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) (Title VII retaliation claim) ("If [the decisionmaker] based his decisions on his own independent investigation, the causal link between [the] allegedly retaliatory intent and [plaintiffs'] [*12] terminations would be broken. If, on the other hand, [the decisionmaker] did not conduct his own independent investigation, and instead merely rubber stamped' the recommendations . . . , the causal link between [plaintiffs'] protected activities and their subsequent terminations would remain intact. The degree to which [the decisionmaker's] decisions were based on his own independent investigation is a question of fact which is yet to be resolved at the district court level." (citations and footnotes omitted)). Briseno has adduced sufficient evidence to create a genuine issue of fact whether McDaniel participated in and influenced the decision. n5

n5 MDI also asserts that it is entitled to summary judgment because Briseno has not shown that McDaniel recommended that she be discharged. The court disagrees that Briseno must meet this obligation. See *Wilson*, 940 F. Supp. at 1012 (denying summary judgment where harasser controlled employee's job performance criteria variables and was involved in decision to terminate employee).

[*13]

C

MDI maintains that a claim for *quid pro quo* sexual harassment is essentially a claim for retaliation and argues under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), that Briseno has failed to raise a genuine issue of material fact on the issue of pretext. MDI asserts that it is entitled to summary judgment because Briseno has not adduced evidence that MDI's legitimate grounds for terminating her are pretexts for a retaliatory discharge. Briseno does not challenge MDI's reliance on the *McDonnell Douglas*

framework and instead contends that she has adduced sufficient evidence of pretext. n6

n6 Because Briseno does not dispute application of the *McDonnell Douglas* pretext framework, the court assumes *arguendo* that it applies.

MDI asserts that it discharged Briseno because she repeatedly made shipping errors and was insubordinate. It points to evidence that McDaniel reprimanded Briseno for shipping errors in March 2001 and July 2001. Burke also reviewed [*14] McDaniel's notes from a meeting with Briseno indicating that she became hostile and disrespectful. Burke confirmed through another employee that Briseno had been upset and had spoken loudly to McDaniel. Briseno maintains, however, that, at the time of her termination, Burke advised her that she was discharged, not because of work quality and insubordination, but because her son's medical condition would likely cause her to be an unreliable employee. A reasonable trier of fact could find that Burke has been inconsistent in his stated reason for firing Briseno. "The trier of fact can infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). Viewing this evidence in the light most favorable to Briseno, the court holds that a reasonable trier of fact could find that MDI's proffered reasons for terminating Briseno did not in fact motivate MDI to discharge her. Briseno has therefore created a genuine issue of fact whether the reasons on which MDI relied are pretexts for *quid pro quo* sexual harassment.

The court denies MDI's [*15] motion for summary judgment as to this component of Briseno's employment discrimination claim.

III

The court next considers whether MDI is entitled to summary judgment dismissing Briseno's hostile work environment claim.

A

MDI contends that it is entitled to summary judgment on any claim of hostile environment during the period when Briseno and McDaniel were coworkers (August 2000 to June 2001) because Briseno has adduced no evidence that MDI knew or should have known about the harassment. Briseno responds that she does not assert an "independent" claim for harassment before McDaniel's promotion to Warehouse Manager. The court concludes that Briseno's hostile environment

claim is based solely on harassment that occurred after the promotion. MDI's motion is therefore denied in this respect as moot.

B

MDI seeks summary judgment concerning the period when McDaniel was Briseno's supervisor on the basis that it has established the two-pronged *Ellerth/Faragher* affirmative defense.

In a hostile environment case, to hold an employer vicariously liable for a supervisor's actions, the conduct must be severe or pervasive. *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 409 (5th Cir. 2002), [*16] cert. denied, 537 U.S. 1188, 154 L. Ed. 2d 1020, 123 S. Ct. 1254 (2003). "If the conduct was severe and pervasive, the employer is vicariously liable unless the employer can establish both prongs of the conjunctive *Ellerth/Faragher* affirmative defense." *Id.* Because MDI will bear the burden at trial of proving this defense, to be entitled to summary judgment on this issue it "must establish beyond peradventure all of the essential elements of the . . . defense." *Bank One, Tex., N.A. v. Prudential Ins. Co. of Am.*, 878 F. Supp. 943, 962 (N.D. Tex. 1995) (Fitzwater, J.) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)).

The first prong of the *Ellerth/Faragher* affirmative defense requires the employer to demonstrate that it "exercised reasonable care to prevent and correct promptly any . . . sexual harassment." *Casiano*, 213 F.3d at 284. The second element requires the employer to show that "the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* MDI contends that Briseno unreasonably failed to take [*17] advantage of the company's preventive or corrective opportunities to avoid harm. The court disagrees.

Although it is undisputed that Briseno did not report McDaniel's conduct to anyone at MDI until she was discharged, Briseno has introduced evidence that she attempted to report the harassment in a telephone call to Burke in February 2002. She avers that she aborted this attempt because McDaniel threatened her if she reported his behavior to anyone at MDI corporate headquarters.

An employee who fails to report harassment because of embarrassment, ordinary fear, or a general concern for retaliation does not act reasonably. See *Reed v. MBNA Marketing Sys., Inc.*, 333 F.3d 27, 35 (1st Cir. 2003); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) ("A generalized fear of retaliation does not excuse a failure to report sexual harassment."). An employee's inaction may be found to be reasonable, however, when it is prompted, *inter alia*, by specific

threats of retaliation. See *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 526 (3th Cir. 2001) (holding that jury finding that visiting professor's failure [*18] to avail himself of available remedies was not unreasonable given department head's repeated threats of retaliation and influence at university); *Reed*, 333 F.3d at 37 (reversing summary judgment where jury could reasonably find that employee did not report harassment because she was "cowed by [a] threat and reasonably so"). In light of McDaniel's threat against Briseno, a reasonable trier of fact could find that her failure to report harassment was reasonable. See, e.g., *Mota*, 261 F.3d at 526. The court therefore holds that MDI has not shown beyond peradventure that Briseno's failure to report or otherwise prevent further harassment was unreasonable, n7 and it denies MDI's motion with respect to Briseno's hostile environment claim.

n7 Because MDI cannot satisfy the second element of the affirmative defense, it is unnecessary to address whether MDI can establish that it took reasonable care to prevent and correct sexual harassment.

IV

The court considers next whether MDI is [*19] entitled to summary judgment on Briseno's state-law claim of negligent hiring, retention, and supervision.

MDI contends that this cause of action is barred by the *Texas Workers Compensation Act* ("TWCA") because the Act exempts employers from common law liability based on negligence and gross negligence. n8 Briseno responds that TWCA-preclusion is inapplicable because her injuries were neither work-related n9 nor suffered in the course and scope of her employment.

n8 MDI states that it maintained workers' compensation insurance for employees at all times during Briseno's employment.

n9 Briseno appears to posit that work-related injuries are those that "would be expected to occur in the course and scope of her employment." P. Br. at 33. She cites no authority for this definition. The TWCA does not define work-related injury, and the Texas Supreme Court has not interpreted the term. See *Payne v. Galen Hosp. Corp.*, 28 S.W.3d 15, 19, 43 Tex. Sup. Ct. J. 1167 (Tex. 2000). Texas courts have used the terms "work-related" and "in the course and scope of employment" interchangeably when discussing compensability and exclusivity under

the TWCA. *Id.* (citing *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 959, 42 Tex. Sup. Ct. J. 358 (Tex. 1999) (per curiam); *Lewis v. Lewis*, 944 S.W.2d 630, 630, 40 Tex. Sup. Ct. J. 359 (Tex. 1997) (per curiam); *Hoffman v. Trinity Indus., Inc.*, 979 S.W.2d 88, 89 (Tex. App. 1998, per. *dism'd by agr.*); *Dickson v. Silva*, 880 S.W.2d 785, 788 (Tex. App. 1993, writ denied)). Absent authority indicating that Briseno has properly defined the term "work-related injury," the court follows the apparent practice in Texas courts that a work-related injury is one that arises in the course and scope of employment.

[*20]

The TWCA exempts an employer from common law liability for negligence and gross negligence for an employee's injuries sustained in the course of employment, except in death cases for certain exemplary damages. *See Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 739, 24 Tex. Sup. Ct. J. 96 (Tex. 1980). The dispositive question at the summary judgment stage is whether there exists a genuine issue of material fact that Briseno incurred her injuries in the course and scope of her employment. An injury is not within the scope of employment if it arises from a third person's personal reason and is not directed at the employee because of employment. *Walls Reg'l Hosp. v. Bomar*, 9 S.W.3d 805, 806-08, 43 Tex. Sup. Ct. J. 203 (Tex. 1999) (per curiam); *see Medina v. Herrera*, 927 S.W.2d 597, 607, 39 Tex. Sup. Ct. J. 627 (Tex. 1996).

In *Walls Regional Hospital* nurses brought a negligent hiring claim against their employer hospital based on sexually harassing conduct of a doctor whom the hospital had credentialed. *Walls Reg'l Hosp.*, 9 S.W.3d at 806. Like Briseno, the nurses complained of sexually harassing conduct that occurred exclusively at the workplace and during working hours. *Id.* at 807. [*21] The court stated:

All the incidents described in the summary judgment record occurred while plaintiffs were doing their jobs and [the doctor] was doing his. Plaintiffs do not contend that [he] ever accosted them privately outside the Hospital, nor do they contend that he came to the Hospital because they were there. On the contrary, plaintiffs contend and the summary judgment record establishes, that [the doctor] harassed plaintiffs because they happened to be at work at the same time he was.

Id. The court concluded that the nurses' injuries occurred in the course and scope of employment and did not fall within the personal animosity exception. *See id.* at 807-08. The court also held that the negligence claims asserted against the hospital were preempted by the TWCA. *Id.* at 808. Briseno attempts to distinguish *Walls Regional Hospital* by noting that the Texas Supreme Court intimated that noncompensable claims may not be precluded by the exclusive remedy provision of the TWCA. *See id.* at 806. This attempt, however, overlooks that the court, on facts materially similar to the instant case, held that the negligence [*22] claims were compensable and were therefore barred. The court therefore concludes that Briseno's claim for negligent hiring, retention, and supervision is barred by the TWCA. n10

n10 Having determined that Briseno's negligence claim is precluded, the court need not reach MDI's other arguments.

V

MDI moves for summary judgment dismissing Briseno's state-law claims for assault and battery, false imprisonment, and intentional infliction of emotional distress.

A

MDI argues that the TWCA bars Briseno's intentional tort claims. It contends that Briseno has not presented evidence that it requested or otherwise directed McDaniel to engage in the harassing conduct, and it posits that, without such a showing, Briseno's claims do not satisfy the intentional injury exception to the exclusive remedy provisions of the TWCA. Briseno maintains that the TWCA does not preclude her intentional tort claims because the injuries she suffered were not work-related.

The TWCA does not preclude an employee's claim against her employer [*23] for injuries resulting from an employer's intentional act. *Medina*, 927 S.W.2d at 600-01; *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406, 28 Tex. Sup. Ct. J. 349 (Tex. 1985) ("*Reed Tool II*"). Assaults by an employer on an employee are included in this intentional injury exception. *See Reed Tool II*, 689 S.W.2d at 406. It is unclear, however, what constitutes an intentional tort "by an employer." In *Medina* the Texas Supreme Court discussed the limits of the intentional injury exception:

In [*Richardson v. The Fair, Inc.*, 124 S.W.2d 885 (Tex. App. 1939, writ *dism'd*)], the court expressly distinguished

between unprovoked assaults committed by co-employees, for which the Act may provide coverage . . . , and a "malicious assault committed under the direction and at the command of the [corporate] employer . . .," which is excepted from the Act's coverage under [*Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556 (Tex. 1916)]. 124 S.W.2d at 886. Professor Larson similarly concludes that the intentional tort exception, which is generally recognized in other jurisdictions, should apply to corporate [*24] employers only where the "assailant is, by virtue of control or ownership, in effect the alter ego of the corporation," or where the corporate employer specifically authorizes the assault. 2A LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 68.00, § 68.21 (1990). The mere fact that an employer may be liable for conduct under a theory of respondeat superior, according to Professor Larson, should not impute the conduct itself to the employer so as to trigger the exception from workers' compensation coverage. *Id.* Likewise, the mere fact that the tortfeasor holds a supervisory position over the claimant should not trigger the exception. *Id.* § 68.22.

Medina, 927 S.W.2d at 601. Despite the court's discussion, it did not resolve the issue:

While we have on several occasions noted that the Act does not provide coverage for an employer's intentional torts, we have never before discussed the distinctions outlined above, nor have we articulated a rule for determining when conduct of a corporate agent will be attributable to the corporation for purposes of applying the exception. While this issue is [*25] important, we decline to resolve it today[.]"

Id.

MDI cites *Horton v. Montgomery Ward & Co.*, 827 S.W.2d 361, 365 (Tex. App. 1992, writ denied), to contend that the TWCA precludes an intentional tort claim against an employer unless the plaintiff demonstrates that the employer requested or otherwise directed commission of the tort. *HORTON*, however, involved an employee who made a claim against the

employer based upon an intentional tort committed by a coworker. See *Horton*, 827 S.W.2d at 363. *Horton* did not involve an intentional tort committed by a vice-principal of the corporation. A vice-principal is the alter ego of the corporation within the scope of acts the company expressly or impliedly authorized the vice-principal to transact. See *Fort Worth Elevators Co. v. Russell*, 123 Tex. 128, 70 S.W.2d 397, 400 (Tex. 1934), overruled on other grounds by *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 30 Tex. Sup. Ct. J. 273 (Tex. 1987). Briseno has adduced evidence that creates a genuine issue of material fact whether McDaniel was the vice-principal of MDI regarding the operation of the Grand Prairie facility. See *infra* [*26] § V(B). Imputation of the intentional torts of a vice-principal as an act "of the corporation" is consistent with the Texas Supreme Court's discussion in *Medina*. See *Medina*, 927 S.W.2d at 601; *Urdiales v. Concord Techs. Del. Inc.*, 120 S.W.3d 400, 406-07 (Tex. App. 2003, pet. denied).

Moreover, as to Briseno's cause of action for intentional infliction of emotional distress, the Texas Supreme Court has held that the TWCA does not preclude such a claim where the injury is the result of a continuing course of harassment rather than a particular exciting event. See *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 611, 42 Tex. Sup. Ct. J. 907 (Tex. 1999). Briseno has adduced evidence that would permit the reasonable finding that her injuries arose from a course of repetitive harassment over a period of two years, and MDI does not contend that her injuries result from any ascertainable event. On similar facts, the Texas Supreme Court held that such injuries were not compensable under the TWCA and therefore not precluded. *Id.* Accordingly, the court holds that Briseno's intentional tort claims are not precluded by the TWCA.

B

MDI maintains that it is entitled [*27] to summary judgment because McDaniel did not undertake tortious conduct within the scope of his authority or in furtherance of MDI's business. It contends in the alternative that, as a matter of law, it has no *respondeat superior* liability for the intentional torts of its employee. Briseno responds that McDaniel is a vice-principal of MDI and that the company can be held vicariously liable for his conduct.

The status of vice-principal of a company "includes persons who have authority to employ, direct, and discharge servants of the master, and those to whom a master has confided the management of the whole or a department or division of his business." *Id.* at 618. A person's "status as a vice-principal of the corporation is sufficient to impute liability to [the employer] with regard to his actions taken in the workplace." *Id.*

Imputation of liability to the employer does not require that the vice-principal act within the scope of employment. *See id.*

MDI promoted McDaniel to manager of the Grand Prairie facility in June 2001. McDaniel was the only Warehouse Manager, and he reported to company officials in Phoenix. A reasonable trier of fact could find [*28] that, although Burke periodically traveled to Grand Prairie to assess operations, McDaniel typically operated the facility with little or no direct supervision. McDaniel also exercised authority to fire temporary workers. n11 Briseno has adduced sufficient evidence to create a genuine issue of fact whether McDaniel was a vice-principal of MDI. The court therefore declines to grant summary judgment on this ground.

n11 There is some indication that McDaniel was also authorized to terminate "permanent" employees. Although Burke actually terminated Briseno, MDI notes that McDaniel could have discharged Briseno himself. *See D. Br.* at 3 n.3.

C

MDI also moves for summary judgment on Briseno's intentional tort claims on the ground that they are preempted by the Texas Commission on Human Rights Act ("TCHRA"), *Tex. Labor Code Ann. § 21.001-21.556* (Vernon 1996 & Supp. 2004-05). n12 The court disagrees. *See Waters v. Lone Star Lubrication, Inc.*, 2004 WL 1119702, at *2 (N.D. [*29] Tex. May 19, 2004) (Solis, J.) (citing *Jackson v. Creditwatch, Inc.*, 84 S.W.3d 397, 403 (Tex. App. 2002, pet. granted); *Ledesma v. Allstate Ins. Co.*, 68 S.W.3d 765 (Tex. App. 2001, no pet.); *Gonzales v. Willis*, 995 S.W.2d 729, 739 (Tex. App. 1999, no pet.)). In *Ledesma* the court held that the TCHRA does not preclude state-law claims but instead prevents a plaintiff from maintaining separate suits under the TCHRA and the state-law claims. *Ledesma*, 68 S.W.3d at 774-75. Accordingly, the court denies MDI's motion for summary judgment on this ground.

n12 Briseno responds that her claims are based on the federal statutory scheme of Title VII and therefore cannot be preempted by state law. Although she is correct that federal statutes cannot be preempted by state law, the issue

before the court is whether the TCHRA, a state law, preempts state common law causes of action.

D

In a September 20, 2004 letter to the court, MDI cites the Texas Supreme Court's recent decision in *Hoffman-LaRoche, Inc. v. Zellwager*, 5.W.5d, 2004 Tex. LEXIS 733, 47 Tex. Sup. Ct. J. 981, 2004 WL 1908322 (Tex. Aug. 27, 2004), and argues that Briseno cannot recover for intentional infliction of emotional distress because it is a virtual carbon copy of her Title VII sexual harassment claim. The court declines to grant summary judgment based upon this letter: First, MDI did not, as required by N.D. Tex. Civ. R. 56.7, seek the court's permission to submit the letter. *See id.* ("Except for the motions, responses, replies, briefs, and appendixes required by these rules, a party may not, without the permission of the presiding judge, file supplemental pleadings, briefs, authorities, or evidence."). Second, because the Texas Supreme Court decided *Hoffman-LaRoche* after the briefing concluded on MDI's summary judgment motion, MDI is presenting a new argument that Briseno has not had an opportunity to brief. MDI may present this argument at trial in support of a motion for judgment as a matter of law.

VI

MDI moves *in limine* under *Fed. R. Evid. 702* to exclude opinion testimony of Norma Bartholomew ("Bartholomew"), a licensed professional counselor [*31] intern. It asserts that Briseno did not designate Bartholomew as an expert under the court's scheduling order and *Fed. R. Civ. P. 26*. Briseno responds that she intends to call Bartholomew as a fact witness, not as an expert. The court therefore denies MDI's motion *in limine* without prejudice as moot. Because the court is denying the motion *in limine* as moot, it need not address MDI's alternative request to bifurcate the trial.

The court grants in part and denies in part MDI's motion for summary judgment and denies MDI's motion *in limine* to exclude opinion testimony of Bartholomew as moot.

SO ORDERED.

September 30, 2004.

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE