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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

H.P.,

Plaintiff and Appellant,

v.

ANAHEIM UNION HIGH SCHOOL
DISTRICT,

Defendant and Respondent.

G047249

(Super. Ct. No. 30-2010-00406177)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Affirmed.

Edward N. Morris; The Krolikowski Law Firm and Adam J. Krolikowski for Plaintiff and Appellant.

Stutz Artiano Shinoff & Holtz, Daniel R. Shinoff, Paul V. Carelli, IV, and Jeanne Blumenfeld for Defendant and Respondent.

* * *

Plaintiff H.P. sued defendant Anaheim Union High School District and Christopher Ontiveros, a former teacher in the district, for damages arising from a sexual relationship she had with Ontiveros while a student at a district school. The complaint sought recovery against defendant on causes of action for negligence and failure to perform a mandatory duty. Plaintiff withdrew the mandatory duty claim and the trial court dismissed the negligence count after granting defendant's motion for summary judgment. Plaintiff attacks the dismissal of her negligence claim against defendant, arguing a triable issue of material fact exists on whether the district's supervisory and administrative employees breached their duty to protect her from having a sexual relationship with Ontiveros. We conclude her contention lacks merit and affirm the judgment.

FACTS

Defendant hired Ontiveros as a teacher in 2000. He was assigned to teach at Oxford Academy (Oxford). His wife also taught at Oxford. After being hired, Ontiveros signed a document acknowledging his responsibilities about reporting child abuse. Kathy Scott, Oxford's principal, described Ontiveros as an "individualist," but it is undisputed Ontiveros had no prior record of discipline and he had consistently received good evaluations.

Defendant has a safety plan, plus a policy prohibiting sexual harassment, and distributes a handbook to both students and their parents covering its policies. The district did not have a written policy prohibiting a student and a teacher from being in a classroom with the door closed, but Scott recommended Oxford staff avoid this situation, particularly with a student of the opposite sex.

Plaintiff, born in 1991, attended Oxford. Ontiveros taught one of her

classes in the 2008-2009 school year and he was her homeroom instructor at the beginning of the following year.

During the 2008-2009 school year, plaintiff had a strained relationship with her parents and suffered from an eating disorder. In January 2009, she began experiencing difficulty getting to school on time and remaining awake in class. Scott and Kortney Tambara, a school counselor, discussed these problems with plaintiff and her mother, K.S.P. Scott suggested home schooling, but both plaintiff and K.S.P. rejected the idea.

In March, Scott reduced plaintiff's schedule. Because her school day ended early and it coincided with Ontiveros's free period, plaintiff began spending time in his classroom. Plaintiff told Ontiveros about her medical and family problems.

Ontiveros suggested to plaintiff that she live with his family and she eventually told her mother about the proposal. K.S.P. met with Scott, informed her of Ontiveros's suggestion, and inquired about the Ontiveros family. Scott responded she knew of no reason to believe they were not good people.

The parties presented conflicting evidence on whether, during this meeting, Scott told K.S.P. that she supported the proposed change in plaintiff's living arrangement. According to defendant, Scott said K.S.P. had to make the decision on where plaintiff would live, and K.S.P. responded that she felt it would be better for her daughter to live with the Ontiveros family. Plaintiff, on the other hand, submitted a portion of K.S.P.'s deposition where K.S.P. testified she had concerns about the proposal, but her concerns were quelled by "the principal['s] . . . strong[] recommend[ation] . . . my daughter stay[] with Mr. Ontiveros'[s] family."

Nonetheless, it is undisputed Scott questioned K.S.P. about why she was willing to allow plaintiff live with the Ontiveroses and that, in a later meeting with Mr. and Mrs. Ontiveros, Scott told them she believed the proposed change in plaintiff's living arrangement was inappropriate. The Ontiveroses expressed resentment and told Scott

that it was their personal decision and her objection interfered with their private time. At her deposition, Scott testified she notified the district's superintendent about the situation, explaining she "didn't know what authority I had to say they could or could not" proceed with the proposal. In his deposition, Ontiveros testified he never discussed this matter with Scott, any other member of the school's administration, or anyone with the district.

After plaintiff's father agreed to the proposal, Ontiveros prepared a document setting forth the parties' expectations for the change in plaintiff's living arrangement. At a meeting in late April, Ontiveros, his wife, and K.S.P. signed the document. Plaintiff moved to the Ontiveros's home, sleeping in a recreational vehicle parked behind the residence. She stayed there approximately 20 nights, intermittently returning home for visits. During this time, Ontiveros conducted late night study sessions with plaintiff in the family's home.

In plaintiff's deposition, she testified that during the spring semester the school's custodian saw her in Ontiveros's classroom after school on approximately 10 occasions. Ron Hoshi, Oxford's assistant principal, testified at his deposition the custodian reported seeing plaintiff working alone in Ontiveros's classroom and he reminded plaintiff she could not be in a classroom unattended. It is undisputed Scott frequently visited Ontiveros's classroom and never found the door locked. In a declaration, Scott stated that in her walks around the Oxford campus she never found plaintiff and Ontiveros in his classroom with the door closed.

One day in late May, plaintiff received a note from Ontiveros. It stated that during the previous night's study session, he got "hard[] and . . . horny" and he could not stop thinking about her. According to plaintiff, she turned the note over and wrote on the back of it, "I don't know what to say." Later, she told Ontiveros the note made her uncomfortable and then moved back home. It is undisputed plaintiff did not inform anyone with the district about Ontiveros's note.

Near the end of the school year, while they were alone in Ontiveros's classroom, plaintiff and Ontiveros used a cell phone camera to photograph body parts with their clothes on. Plaintiff claimed Ontiveros suggested the poses. After the year ended, Ontiveros took plaintiff to a local college campus for a tour. Upon their return, he took her to his classroom where he kissed her.

In the 2009-2010 school year, since she was beginning to apply for college, plaintiff began staying in Ontiveros's classroom after school and working on application materials. Occasionally, other students would also enter the classroom.

The school custodian informed Scott he saw plaintiff working alone in Ontiveros's classroom. Scott told plaintiff not to work unattended in a teacher's classroom and suggested she use the computers in the school's main office or the counselor's office. Scott also advised Ontiveros that plaintiff should not be allowed to work in his classroom by herself.

During this time, Ontiveros and plaintiff began having sexual relations late in the afternoon in his classroom. Plaintiff testified the acts included Ontiveros kissing her, fondling her, removing her clothes, plus digitally penetrating and orally copulating her. It was undisputed Ontiveros took steps to ensure no one observed their activities. Plaintiff testified at her deposition he timed the acts to avoid conflicts with his wife's schedule, checked to see if anyone was nearby, and locked the classroom door.

The couple also took trips to malls, piers, and other locations. Plaintiff testified Ontiveros planned the outings so as to avoid suspicion by parking his car off campus and telling her "what time I should go to his car, [and] which [route] I should take when I go to his car." She began receiving more text messages from Ontiveros, most of them sent at night.

One afternoon in late September or early October, K.S.P. came to the school looking for plaintiff. She went to Ontiveros's classroom and, although the lights were on, found the door locked. Ontiveros then opened the door. He appeared startled.

Plaintiff was also in the room. In her deposition, K.S.P. testified she later asked her daughter for an explanation, but plaintiff failed to provide one. It is undisputed K.S.P. did not immediately inform any district employee about the classroom incident.

K.S.P. testified she began checking messages on plaintiff's cell phone. On October 12, K.S.P. contacted Scott, informing her that she had discovered inappropriate text messages from Ontiveros to plaintiff. Later that day, Scott and Tambara met with K.S.P. and plaintiff. Plaintiff showed Scott one of the text messages and reluctantly gave Scott her cell phone. She acted as if she did not want to get Ontiveros in trouble. Plaintiff later admitted that before turning over the phone, she deleted all of the text messages she had sent to Ontiveros. Scott confirmed the text messages were sent from Ontiveros's cell phone. With Tambara's assistance, Scott transcribed Ontiveros's messages to plaintiff. They also viewed the photographs of Ontiveros and plaintiff stored on the phone.

Scott contacted child protective services and directed Ontiveros to report to the district office. The district reported the matter to the police, placed Ontiveros on administrative leave, and later terminated him. It is undisputed plaintiff never reported Ontiveros's misconduct to school personnel, Scott never saw him engage in sexual or other inappropriate conduct with plaintiff or any other student, and that she did not learn of Ontiveros's physical relationship with plaintiff until after the police arrested him.

DISCUSSION

1. Standard of Review

Summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The party seeking summary

judgment has the burden of persuading the court that the foregoing standard has been met. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

For a defendant, it has the “burden of showing that a cause of action has no merit” either because “one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2).) “In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the opposing party.” (*LPP Mortgage, Ltd. v. Bizar* (2005) 126 Cal.App.4th 773, 776.) ““All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment.”” (*Ibid.*) “On appeal we conduct a de novo review, applying the same standard as the trial court.” (*Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1326.)

2. *Plaintiff’s Negligence Cause of Action*

The question is, does a triable issue of fact exist on whether defendant’s supervisory or administrative personnel knew or reasonably should have known about Ontiveros’s propensity to engage in sexual misconduct with plaintiff.

The law is settled that defendant cannot be held liable for Ontiveros’s sexual misconduct under a theory of respondeat superior because it was outside the scope of his employment as a teacher. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 865; *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 441, 451-452.) However, under Government Code section 815.2 a school district can be vicariously liable for its supervisory or administrative employees’ breach their duty to protect students from foreseeable injury at the hands of a third person. (*C.A. v. William S. Hart Union High School Dist.*, *supra*, 53 Cal.4th at pp. 868-870.) “Ample case authority establishes that school personnel owe students under their supervision a

protective duty of ordinary care, for breach of which the school district may be held vicariously liable. [Citations.] If a supervisory or administrative employee of the school district is proven to have breached that duty by negligently exposing plaintiff to a foreseeable danger of molestation by . . . [a district employee], resulting in . . . injuries, and assuming no immunity provision applies, liability falls on the school district” (*Id.* at pp. 865-866.)

Plaintiff argues a triable issue of fact exists concerning whether the supervisory personnel at Oxford failed to recognize what she describes as obvious signs of a romantic relationship developing between her and Ontiveros and failed to proactively monitor that relationship. She claims “knowledge of a teacher’s ‘propensities’ to engage in sexual activity with a student as demonstrated by past sexual improprieties is not a prerequisite for district liability.” We agree. As the Supreme Court held in *C.A.*, liability can arise where a school district’s “supervisory or administrative employee[s] . . . expos[e] a plaintiff to a foreseeable danger of molestation by [a district employee]” (*C.A. v. William S. Hart Union High School Dist.*, *supra*, 53 Cal.4th at p. 865.) Thus, “if individual District employees responsible for . . . supervising teachers knew or should have known . . . that [a teacher] posed a reasonably foreseeable risk of harm to students under his supervision, . . . the employees owed a duty to protect the students from such harm. [Citations.]” (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1855.)

But the record fails to support plaintiff’s assertion “[t]his is a case where a reasonable principal and school administration generally were on notice that student-teacher sexual activity was likely to take place” It is undisputed defendant had implemented a district safety policy and expressly “prohibit[ed] the unlawful sexual harassment of any student by any employee,” which included “[u]nwelcoming sexual advances . . . and other verbal, visual or physical conduct of a sexual nature” Also, prior to Ontiveros’s involvement with plaintiff, there was nothing to suggest he had a

propensity to engage in sexual misconduct with students. He had no prior discipline record and routinely received good evaluations.

While the district did not have a written policy prohibiting teachers from being alone with a student in a classroom, Scott recommended teachers avoid this situation especially in dealing with a student of the opposite sex. Scott frequently walked around the campus and had never observed Ontiveros in his classroom with the door closed, much less locked. When Scott or Hoshi learned from the custodian that plaintiff was in Ontiveros's classroom alone, they informed her that she could not be in a classroom unsupervised. Scott also counseled Ontiveros on this matter.

The decision to change plaintiff's living arrangement was a personal decision reached between plaintiff's parents and the Ontiveroses. There is a conflict over what Scott said to K.S.P. when informed of Ontiveros's proposal, but it is undisputed Scott told Mr. and Mrs. Ontiveros she thought it was a bad idea. They disagreed and accused Scott of interfering with their private time. Scott advised the superintendent about the situation and acknowledged she was unaware of any authority that prohibited the families from implementing the proposal.

When Ontiveros gave plaintiff the note informing her of his sexual interest with her, she wrote a response on the back of the note and returned it to him. They privately discussed the note and plaintiff admitted she never informed school officials about her receipt of it. Ontiveros's further misconduct with plaintiff occurred in private. Their initial physical involvement was after the school year ended when the campus was vacant. In the fall, Ontiveros took steps to hide their sexual activity and off-campus excursions. Plaintiff even acknowledged complicity in his deceptive practices, obeying his directions on how and where to meet when they went on "dates."

In plaintiff's opening brief, she cites to several "warning signs" she claims should have caused Oxford's administrative personnel to suspect the possibility of a sexual relationship developing between her and Ontiveros. There are problems with this

analysis. First, many of the purported “warning signs” involved conduct that either did not occur at school, were beyond the administration’s control, or were not reasonably discoverable. Second, we note many of the factual claims plaintiff asserts in her opening brief are not supported by the record.

Plaintiff argues Ontiveros was “defiant of administrative authority.” Scott described Ontiveros as an “individualist” and the two did spar over his decision to conduct a study session with students at his home. But the record fails to support the other alleged acts of defiance. Nor do these purported facts give rise to a concern Ontiveros had a propensity to engage in sexual activity with a student. In addition, it was undisputed Ontiveros routinely received good evaluations as a teacher and no prior record violating school rules.

In addition, the record shows Ontiveros’s wife and plaintiff’s parents agreed to his proposal to have plaintiff live with his family. Scott told Ontiveros and his wife that she thought this was a bad idea, but they responded, in effect, that it was none of her business. There is no evidence school officials were informed about where plaintiff slept or about the late night study sessions Ontiveros conducted with plaintiff.

Plaintiff suggests school officials had a duty to monitor her living arrangement with the Ontiveroses, but cites no authority for this proposition. Further, the decision to change plaintiff’s living arrangement was made between her parents and the Ontiveroses. Scott urged the Ontiveroses not to go through with it and informed the superintendent about the proposed change in plaintiff’s living arrangement. But she did not know of authority to block its implementation. Even Ontiveros acknowledged he never sought permission from the district.

As for plaintiff’s health problems and family issues, the record establishes Scott and Tambara discussed these matters with plaintiff and her mother, made a recommendation on how to handle the matter, and reduced plaintiff’s schedule. The

suggestion that the administration's efforts to help plaintiff contributed to Ontiveros's purported sexual misconduct of plaintiff is not supported by the record.

Plaintiff asserts Tambara, the school counselor, knew about the close relationship Ontiveros had with her before she moved to his family's home. The record fails to support this claim. During her deposition, Tambara was asked if she "learn[ed] that there was a close relationship between [plaintiff] and Mr. Ontiveros" during the 2008-2009 school year. Tambara responded, "I learned that there was – I don't know about [a] close relationship, but I knew that there was – he wanted to help her." Questioned further on this subject, Tambara explained that "after I sent the e-mail . . . that I told you I had sent to the teachers, [Ontiveros] had asked if we could do a fundraiser for [plaintiff]. . . ." Given the administration's concern for plaintiff's health and well-being, the mere fact Ontiveros suggested a fundraiser in response to Tambara's e-mail would not trigger any suspicion that he wanted to molest plaintiff.

Next, plaintiff cites the e-mails and text messages between her and Ontiveros. While it is undisputed "Ontiveros did exchange e-mails with [p]laintiff," and that "[t]here was a school policy not to send e-mails on school e-mail [accounts] that were 'sexually suggestive,'" the evidence reflects Ontiveros sent the inappropriate messages to plaintiff from his personal cell phone. Furthermore, most of them were sent at night when neither he nor plaintiff was at school. Thus, there was no way for school officials to learn about them until K.S.P. informed Scott. Once Scott learned about Ontiveros's inappropriate text messages to plaintiff, she immediately took action to remove him from the school.

Other purported "warning signs" plaintiff cites include allowing Ontiveros "to have long private periods in the classroom with" her, either during lunch or after classes ended, and the school's "custodian report[ed] to the principal that, on numerous occasions, he has observed . . . [plaintiff] . . . alone in . . . [Ontiveros's] classroom." Again, the record fails to support the breadth of these claims. Scott's declaration stated

she never found the door to Ontiveros's classroom closed and it is undisputed that during her frequent walks around campus she never found his classroom door locked.

The record indicates the school's custodian saw plaintiff in Ontiveros's classroom alone after school during both spring and fall semesters. Both Scott and Hoshi counseled her about this behavior. In addition, Scott spoke to Ontiveros about the matter. While plaintiff testified she ate lunch in Ontiveros's classroom, other students also did so on occasion. Finally, as for the sexually suggestive photographs and the physical contact between Ontiveros and plaintiff, this occurred when others were not around or where Ontiveros took precautions to preclude discovery of their activity.

Thus, we conclude plaintiff has failed to establish a triable issue of fact exists concerning whether defendant's supervisory and administrative personnel knew or reasonably should have known Ontiveros had a propensity to engage in sexual misconduct with either her or students in general. The trial court did not err in granting defendant's motion for summary judgment on her negligence cause of action.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs of suit on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.