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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000993-MR

LYDDIA CASEY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 95-CI-000113

ST. ELIZABETH MEDICAL CENTER — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, GARDNER AND KNOPF, JUDGES.

GARDNER, JUDGE: Lyddia Casey (Casey) appeals from a summary judgment of the Kenton Circuit Court in her action against Saint Elizabeth Medical Center, Inc. (SEMC) to recover damages arising from sexual harassment, retaliation, and disability discrimination. We affirm.

Casey was hired by SEMC in 1981, where she served as a cook and later as a technician in the Supplies, Processing and Distribution Department (SPD). In 1986, Casey began working in the Par Level Department (Par Level) stocking and delivering non-medical supplies. In or around 1989, it was determined that SPD and Par Level were duplicating functions and that efficiency could be improved if the departments were consolidated. The

changes were implemented, which required Casey to undertake new responsibilities in either the decontamination or dispatch units.

On November 4, 1991, Casey filed a written complaint with SEMC's Human Resources Department, wherein she set forth seven instances of sexual harassment which she allegedly experienced between May 1988 and June 1991.[1] The matter was investigated by Tom Horton (Horton), SEMC's Vice President for Human Resources, and Mike Arthur (Arthur), another Vice President. On November 20, 1991, they reported to Casey that action had been taken to correct the alleged problems.

As part of the consolidation of SPD and Par Level, Casey was required to begin training in November 1993 to work in the decontamination unit. Casey complained that working around blood and other bodily fluids made her physically ill and exacerbated what she described as a severe stress-related illness. Casey submitted a doctor's statement which she argued supported her contention that she was unable to work in the decontamination unit, but SEMC determined that the statement did not support Casey's claim. Casey was given the opportunity to transfer to the dispatch unit, but stated that she might be late to work because the early starting time interfered with her child care arrangements.

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[1]Casey alleged that: 1) a co-worker put his arm on her shoulder; 2) a co-worker put a paper towel down a female co-worker's shirt; 3) Playboy magazines were seen in the work area; 4) a male employee had a habit of dropping his pants to tuck in his shirt; 5) she was called a "Par Level wench" by co-workers; 6) she found a note on her desk on which the pre-printed words "Picked with Pride" were altered in handwriting to say "F---ed with Pride," and 7) her male supervisor told her to "bend over, I'll give you a ride," after she asked for a ride on a cart.

The parties were unable to resolve the problems relating to Casey's work assignments, and her employment was terminated on December 15, 1993. She then filed a grievance and appeal with SEMC, which was denied on January 31, 1994.

On January 23, 1995, Casey filed the instant action in Kenton Circuit Court. She alleged therein the following: 1) that SEMC created a hostile work environment which constituted sexual harassment under Kentucky Revised Statute (KRS) 344; 2) that SEMC retaliated against her for filing a sexual harassment complaint with SEMC management[2]; and 3) that she had a disability which prevented her from working in the decontamination unit and that SEMC discriminated against her by terminating her.

SEMC then sought a summary judgment. In granting the motion, the trial court held that sexual harassment could not be found because the wrongful conduct as alleged was not severe and pervasive, and that Casey's psychological well-being was not harmed by the conduct. It further found that much of the alleged wrongful conduct was not sexual in nature. As to the claim of retaliation, the court found that no adverse action had been taken against Casey and that there was no causal link between the November 4, 1991 complaint to SEMC and the alleged retaliation. Finally, the court found that Casey had not presented any medical evidence to SEMC prior to her discharge from employment which supported her claim of disability, and that a medical report

[2]Fifteen instances of retaliatory conduct have been alleged, ranging from an instance where Casey was given a verbal reprimand for overstocking a closet to the failure of a supervisor to remain at work after having ordered Casey to work overtime.

obtained after her termination was not unequivocal. SEMC's motion for summary judgment was granted, and this appeal followed.

Casey first argues that the trial court erred in granting summary judgment on the issue of sexual harassment/ hostile work environment. She maintains that the court erred in failing to consider the alleged acts of retaliation as part of its sexual harassment/hostile work environment claim and the retaliatory conduct claim are actually a single cause of action which should have been treated as such. Having closely examined the facts and the law, as well as the written and oral arguments of counsel, we find no error on this issue.[3]

KRS Chapter 344 clearly addresses sexual harassment claims and retaliatory conduct claims as separate causes of action. "Suits for sexual harassment in the workplace may be brought under KRS 344.040. This statute prohibits discrimination 'against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the

[3]SEMC argues that we should apply the standard for summary judgment under Federal Rule of Civil Procedure (FRCP) 56, rather than the less stringent standard set forth in Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). It maintains that since Kentucky law in employment discrimination cases mirror Title VII, and because Kentucky law is to be interpreted in accordance with federal interpretation of Title VII, we should apply the federal summary judgment standard rather than the state summary judgment standard. We are award of no basis in law for reaching the conclusion argued by SEMC. KRS Chapter 344 was enacted by the Kentucky legislature, and actions arising thereunder are addressed in Kentucky courts and under Kentucky law. Steelvest, is binding precedent which we are compelled to follow, and we will not take this opportunity to disregard that mandate nor to apply extra-jurisdictional standards found neither in Kentucky law nor in Kentucky civil rules.

individual's . . . sex. . . ." Hall v. Transit Authority of Lexington-Fayette Urban County Government, Ky. App., 883 S.W.2d 886 (1994). Conversely, KRS 344.280 provides the basis for a retaliatory conduct claim, stating in relevant part that,

> It shall be an unlawful practice for a person . . . (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter. . . .

KRS 344.450 provides that any person injured by an action in violation of Chapter 344 may institute a civil cause of action to recover actual damages sustained. Thus, retaliatory conduct is a separate and distinct claim from sexual harassment.

We cannot conclude that the trial court erred in its disposition of either claim. On the claim of sexual harassment, the court properly examined whether the alleged conduct was severe or pervasive, and whether Casey's psychological well-being was harmed by the conduct. The United States Supreme Court has addressed this standard in Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)[4] stating that,

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the

[4]Since Kentucky's statute is similar to the federal statute, the Kentucky Supreme Court, in Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814 (1992), held that KRS 344.040 "should be interpreted consonant with federal interpretation." Id., at 821.

> conduct has not actually altered the conditions of the victim's employment, and there in no Title VII violation.

What precisely constitutes severe or pervasive conduct has been addressed, for example, in Stacy v. Shoney's Incorporated, 955 F. Supp. 751 (E.D. Ky. 1997), wherein the court stated as follows:

> > The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women. . . . It is not designed to purge the workplace of vulgarity. Drawing the line is not always easy. On the one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.
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> Baskerville v. Culligan International Co., 50 F.3d 428, 430-431 (7th Cir. 1995), (citations omitted).
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> In determining whether or not the harassing conduct is 'sufficiently severe or pervasive' to constitute actionable sexual harassment, the court considered the following factors:
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> (1) the frequency of the discriminatory conduct;
> (2) its severity;
> (3) whether it is physically threatening or humiliation, or a mere offensive utterance; and
> (4) whether it unreasonably interferes with an employee's work performance.
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> Harris v. Forklift Systems, Inc., 510 U.S. at 22-24, 114 S.Ct. at 371. The Court finds that the conduct of [the defendant], while immature, inappropriate, and boorish, does not constitute offensive conduct actionable

> as harassment, especially in light of the alleged actions of harassers sued in the cases cited below, which various courts found did not give rise to a claim of hostile environment sexual harassment. See, e.g., Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) (Sixth Circuit did not find actionable sexual harassment where (1) male supervisor referred to a female manager as 'whore,' 'cunt,' 'pussy,' and 'tits' and stated 'all that bitch needs is a good lay,' and (2) the Company forced her to sit with female hourly employees during meetings, forbid her taking clients to lunch, and tolerated posters of scantily clad women in work areas), cert. denied, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987); Baskerville v. Culligan Intern. Co., 50 F.3d 428 (7th Cir. 1995) (held the following did not constitute sexual harassment: supervisor called the plaintiff 'pretty girl', made grunting sounds like 'um-um' when plaintiff wore a leather skirt, stated 'all pretty girls run around naked', and stated that 'with so many pretty girls', he 'didn't want to lose control'), cited by Black v. Zering Homes, Inc., 104 F.3d 822 (6th Cir. 1995) (held comments directed to the plaintiff including, 'Nothing I like more in the morning than sticky buns', and "Hey weren't you there [at the biker bar] Saturday night dancing on the tables?', and references to property parcels as 'Hootersville' and 'Twin Peaks', did not give rise to a sexual harassment claim); Koelsch v. Beltone Elec. Co., 46 F.3d 705 (7th Cir. 1995) (held supervisor who stroked plaintiff's leg on one occasion, grabbed her buttocks on a separate occasion, told her that he found her attractive, and twice asked her out on dates, did not commit acts which were actionable);. . . .

Examining the facts at bar under the elements set forth in Stacy and in light of the cited cases where boorish behavior was found not to constitute sexual harassment, we find no basis

for tampering with the trial court's conclusion that Casey could not prevail on this issue.[5]

Similarly, the facts as alleged by Casey, if taken as true, do not rise to the level of retaliatory conduct necessary to sustain a claim under Chapter 344. As the trial court noted, the retaliatory conduct must relate to "ultimate employment decision." The United States 5th Circuit Court of Appeals has stated as follows on this question.

> Consistent with the retaliation instruction, our court has stated that 'Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.' Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995). 'Ultimate employment decisions' include acts 'such as hiring, granting leave, discharging, promoting, and compensating'. Id. at 782 (citing Page v. Bolger, 645 F.2d 227, 233 (4th Cir.), cert. denied, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981)).

Matthern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).

The acts which Casey maintained were retaliatory simply do not relate to ultimate employment decisions. She does not allege that her employment was terminated in retaliation for filing the November 4, 1991 complaint. Rather, she maintained that fifteen separate harassing acts occurred as a result of the filing of the complaint, and that those acts should be considered along with the seven acts set forth in the complaint as part of her overall claim of sexual harassment. When viewed in their

[5]Casey conceded at oral argument that sufficient evidence did not exist on the sexual harassment claim to present the issue to the jury.

totality, and in light of Matthern's requirement that they relate to ultimate employment decisions, we cannot conclude that the court erred in granting summary judgment on this issue. See generally Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

Casey also briefly argues that the trial court erred in concluding that the medical report of Dr. Bernales was not unequivocal in its assessment of Casey's alleged stress-related illness and inability to work in the decontamination unit. She maintains that the report states in clear and unambiguous language that she "would be adversely affected in her ability to carry out job related activities," and that accordingly her termination on the basis of this disability ran afoul of KRS Chapter 344. This argument is misplaced in that the report of Dr. Bernales was submitted several weeks after Case's termination. It is uncontroverted that no medical evidence was tendered to SEMC prior to Casey's termination which supported Casey's claims of stress-related illness or an inability to work in the decontamination unit. KRS 344.040 provides that it is unlawful to discharge an employee if the employee is a "qualified individual with a disability. . . ." See generally Blanton v. Inco Alloys International, Inc., 108 F.3d 104 (6th Cir. 1997). As Casey was not shown to be disabled, it follows that she could not have been discharged as a result of disability. Accordingly, we find no error.

For the foregoing reasons, we affirm the summary judgment of the Kenton Circuit Court.

ALL CONCUR.

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