RENDERED: JULY 27, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001564-MR

G. DENISE BROWN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 98-CI-007076

BROWN & WILLIAMSON TOBACCO CORPORATION;
HENRY FRICK; and JOAN KILLEN — APPELLEES

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

BEFORE: BUCKINGHAM, COMBS, and SCHRODER, Judges.

COMBS, JUDGE: The appellant, G. Denise Brown ("Brown"), appeals entry of summary judgment by the Jefferson Circuit Court in favor of the appellees, who include Brown and Williamson Tobacco Corporation ("B&W"), Henry Frick ("Frick"), and Joan Killen ("Killen"). Brown alleges that the appellees subjected her to discriminatory harassment on the bases of race and sex, unlawful retaliation, and constructive discharge. After our review of the record on appeal, we affirm.

Brown was employed as the Manager of Diversity and Affirmative Action within the Human Resources department of B&W

from May 28, 1997, to July 2, 1998. During her tenure, she conducted diversity workshops, prepared affirmative action plans, and acted as a consultant on equal employment opportunity matters. Brown reported directly to Frick, who was the Vice President of Human Resources at B&W. Killen had been employed as Human Resources Director for American Tobacco Company until it was acquired by B&W in 1994. She was retained by B&W to assist in transitional matters arising from the acquisition, and she worked with Brown on a number of occasions. On July 2, 1998, Brown submitted a letter of resignation to B&W. She had accepted a job at Tricon Global Restaurants, Inc., in its Human Resources department.

On December 17, 1998, Brown filed a complaint against B&W, Frick, and Killen, alleging that during the course of her employment, she had been subjected to gender and racial discrimination and/or harassment, retaliation, and constructive discharge, all in violation of the Kentucky Civil Rights Act ("KCRA"), Kentucky Revised Statutes ("KRS") 344.010, et seq.. She further alleged that this conduct made the defendants jointly and severally liable for the torts of outrageous conduct and/or intentional infliction of emotional distress under Kentucky common law.

On April 13, 1999, all parties stipulated that the discrimination and harassment claims against Frick and Killen were precluded as a matter of law. On April 20, 1999, the trial court entered an order stating that Frick and Killen could not be held liable in their individual capacities for retaliation under

KRS 344.280. The outrageous conduct and emotional distress claims were dismissed by agreed order on December 23, 1999. On March 22, 2000, the trial court granted summary judgment for B&W on all remaining claims. Brown appeals from the summary judgment disposing of all claims against B&W and from the summary judgment dismissing the retaliation claims against Frick and Killen.

We begin our analysis by noting our standard of review:

> On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law.

Turner v. The Pendennis Club, Ky. App., 19 S.W.3d 117, 119 (2000). Additionally, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Id. at 483, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). To overcome a motion for summary judgment in a discrimination case, a plaintiff must produce "cold hard facts" from which an inference of race or sex discrimination can be drawn. See Kentucky Center for the Arts v. Handley, Ky. App., 827 S.W.2d 697, 700-01 (1991).

KRS 344.040 provides, in pertinent part, that:

> It is an unlawful practice for an employer:

> (1) ... to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race ... [or] sex ...;
>
> (2) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's race ... [or] sex....

The language of this statute generally mirrors the language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.; therefore, it "should be interpreted consonant with federal interpretation." Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 821 (1992).

In her brief, Brown does not raise any arguments concerning disparate discriminatory treatment on the part of B&W; rather, she argues that she was the victim of racial and gender harassment because of a "hostile work environment" at B&W. In granting summary judgment for B&W, the circuit court apparently concluded that Brown failed to establish a *prima facie* case of racial or gender harassment. To establish a cause of action for racial or gender harassment, a plaintiff must demonstrate harassment so "severe or pervasive" as "'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Meyers, supra, at 821, quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). Not only must the conduct be extreme; it must also pass the test of objectivity:

> 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 [and the KCRA's] purview.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). (Emphasis added.) Whether an environment is objectively hostile or abusive:

> ... can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id. at 23. Yet another criterion is as follows:

> [A]ll that the victim of racial [or gender] harassment need show is that the alleged conduct constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to do his or her job.

Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988).

While it is clear from Brown's testimony that she subjectively perceived her work environment at B&W as hostile or abusive, she has not demonstrated that a reasonable person would or could reach the same conclusion after "looking at all the circumstances." Brown puts particular emphasis on events that took place during and following a diversity training session which she conducted with Killen at a B&W plant in Macon, Georgia.* A member of the audience asked Killen whether it would

*In Union Underwear Co., Inc. v. Barnhart, 1999-SC-0091-DG, 2001 Ky. LEXIS 82 (Apr. 26, 2001), the Kentucky Supreme Court held that the KCRA does not have extraterritorial application. We recognize that this recent decision may appear to be implicated here since a number of the alleged incidents occurred in other states. However, because our disposition of this case (continued...)

be acceptable to tell ethnic jokes with friends when he was not at work. According to Brown, Killen told the worker that it would be "okay" to tell ethnic jokes under certain circumstances. Brown disagreed with this statement and took the position that the telling of ethnic jokes was never acceptable. After the session, Brown and Killen apparently engaged in a heated argument about this incident. Brown testified that Killen became very angry and stated: "I have a lot of influence with Henry [Frick] and I can make it very difficult for you to be successful in this environment and I will do that." The day after the training session concluded, Brown and Killen drove to Atlanta. During the trip, the two apparently began arguing again. At one point, Killen allegedly stated that, "I have a friend that allows me to use the 'N' word." Brown took issue with this statement, claiming that Killen then told her that she was "too black" and that she could "never be successful at Brown and Williamson."

This episode stands alone as the only evidence in this case from which a reasonable person could draw any inference of racial animus toward Brown. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998), provides the correct analysis of this exchange: "'simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" (Internal citations omitted.) Although she has recited a number of perceived slights and abuses, the

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[*](...continued)
turns on other issues, we will not address the possible academic ramifications of Union Underwear.

overwhelming majority of incidents which Brown feels to be representative of a hostile environment cannot withstand the test of a legal analysis of "hostile environment." She has not demonstrated that these incidents were perpetuated on her because of her status as an African-American female. See Bowman v. Shawnee State Univ., 220 F.3d 456, 464 (6th Cir. 2000).

When Brown first began working at B&W, she participated in an annual compensation review at B&W's plant in Hanmer, Virginia. During the review, a statistical analysis revealed that the salaries of two African-American employees were slightly below the median for their particular employment group when compared to other B&W employees. Brown stated in her brief that "she believed there was a disparity of pay issue involving two managerial level black employees that was unlawfully discriminatory." Brown testified that after she made her belief known to Michele Esselman (Compensation Manager for B&W), Esselman made the following comment to Killen: "Who does she think she is? She's been here two weeks and she's making recommendations on salary adjustments. She must have a personal agenda."

Although Brown stated in her deposition that she considered that statement to be a "racial comment," the bare-bones content of the statement itself recites that it was made because of Brown's short tenure at B&W rather than as a result of any racial or gender-based sentiment. Indeed, other portions of Brown's testimony suggest that she did not consider the statement to have been racially motivated when she first heard about it.

Moreover, Brown's testimony indicates that she actually did not believe that the disparity in pay was "unlawfully discriminatory" and that all involved parties had agreed to raise the salaries of the two employees.

From Brown's point of view, this incident -- and others like it -- are indicative of a "hostile work environment" at B&W. Her understandably subjective viewpoint, however, fails from a legal perspective to demonstrate the objectively abusive harassment necessary for a cause of action under Title VII and the KCRA. The cases cited by Brown as comparable to her situation involve a heightened level of racial and/or gender animus that is wholly lacking in the record before this court. As an example, Brown cites Williams v. General Motors Corp., 187 F.3d 553 (6th Cir. 1999), as supportive of her contentions. The Bowman court, supra, analyzed the facts before it in terms of Williams in a manner applicable to the present case:

> ... the conduct in this case is not nearly as severe or pervasive as the harassment in Williams or in other cases where the court found that the conduct in question was not severe or pervasive enough to constitute a hostile environment.

Bowman, supra, at 464. (Emphasis added.) In Williams, the allegations included derogatory and profane remarks directed at the plaintiff, offensive comments directed at women in general, and the physical exclusion of the plaintiff from certain workplace areas. Williams, supra, at 559. No similar behavior can be found in this case.

Although it is apparent from the record that Brown had serious personality conflicts with her co-workers at B&W,

"[p]ersonal conflict does not equate with discriminatory animus." Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791 (6th Cir. 2000), quoting Barnett v. Dep't of Veterans Affairs, 153 F.3d 338, 342-43 (6th Cir. 1998). Brown's allegations -- while undoubtably reflecting her own personal discomfort -- fail to qualify as objectively hostile or abusive or to allow for an inference of racial or gender animus. Accordingly, we agree that summary judgment was properly granted for B&W on the issue of "hostile work environment."

Brown also contends that the circuit court improperly granted B&W summary judgment on her claim of retaliation. KRS 344.280 provides, in pertinent part, as follows:

> It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:
>
> (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; or
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> ***
>
> (3) To obstruct or prevent a person from complying with the provisions of this chapter or any order issued thereunder;
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> ***
>
> (5) To coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by KRS 344.360, 344.367, 344.370, 344.380, or 344.680.

In making out a *prima facie* case of retaliation against an employer, a plaintiff must show that:

> 1) she engaged in a protected activity, 2) she was disadvantaged by an act of her employer, and 3) there was a causal connection between the activity engaged in and the employer's act.

Handley, supra, at 701.

The record reveals that Brown did not experience an adverse employment decision while she was employed by B&W. She was not fired, demoted, or transferred; she never suffered a reduction in salary or in reduced job responsibilities. On the contrary, she actually received a merit pay increase during her employment. Although Brown proffers a number of incidents as evidence of retaliation, none of them constitutes the "significant change in employment status" that would suffice to demonstrate an adverse employment decision. See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998)

In light of Burlington Industries, Inc. v. Ellerth, supra, Faragher v. City of Boca Raton, supra, and Morris v. Oldham County Fiscal Court, supra, we recognize that proof of "severe or pervasive" retaliatory harassment may be used in lieu of an adverse employment decision to support a claim of retaliation. See Morris, supra, at 792. Even assuming for the purposes of this appeal that Brown had objected to some type of "unlawful practice" on the part of B&W, we cannot find that she endured retaliation -- either by an employment decision or by harassment -- because of her objection. Accordingly, we cannot find that the circuit court erred in granting B&W summary judgment on Brown's claim of retaliation.

Brown also asserts that the circuit court incorrectly determined that KRS 344.280 precludes individuals from being held liable for retaliation. We agree with her contention based upon the clear language of the statute and the persuasive reasoning of the Sixth Circuit Court of Appeals in Morris:

> This section [KRS 344.280] does not "mirror" 42 U.S.C. § 2000e-3(a), the analogous retaliation provision of Title VII, which forbids retaliation by "an employer." Rather, § 344.280 forbids retaliation by "a person." The Kentucky retaliation statute plainly permits the imposition of liability on individuals.

Morris, supra, at 794. (Emphasis added.) Although the circuit court erred in reciting its reasoning for entry of summary judgment in favor of Frick and Killen, we find such error harmless since we must agree with the ultimate result. The facts of this case are not congruent with any claim that Frick or Killen actually retaliated against Brown in a discriminatory manner. Indeed, had they done so, they would have been liable personally. The facts do not support that allegation. Accordingly, any error by the circuit court was harmless.

In her last argument, Brown contends that the circuit court improperly found as a matter of law that she was not constructively discharged by B&W.

> In cases involving constructive discharge, the commonly accepted standard is whether, based upon objective criteria, the conditions created by the employer's actions are so intolerable that a reasonable person would feel compelled to resign.

Turner, supra, at 121. Based upon our previous determinations, we hold that Brown has failed to state intolerable working

conditions that would constitute a constructive discharge. Thus, we affirm the decision of the circuit court as to this issue as well.

Based upon the foregoing reasons, we affirm the decision of the Jefferson Circuit Court.

ALL CONCUR.

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