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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002368-MR

MELIA FELEDY HORD APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA ISAAC, JUDGE
ACTION NO. 01-CI-02559

QUEBECOR WORLD, INC;
JOHN ROSQUIST APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER[1] AND DIXON, JUDGES; KNOPF, SENIOR JUDGE.[2]

DIXON, JUDGE: In December 2000, Appellant, Melia Feledy Hord, was suspended and ultimately terminated from her position as a regional controller for the Que-Net Media Division of Appellee, Quebecor World, Inc., for inappropriate workplace behavior. In 2001, Hord filed an action in the Fayette Circuit Court against

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[1] Judge David Barber concurred in this opinion prior to the expiration of the term of his office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Quebecor and its Lexington plant supervisor, John Rosquist, claiming workplace discrimination, sexual harassment and retaliatory termination. In a series of orders, the trial court granted summary judgment in favor of Quebecor and Rosquist on all claims. Because we believe there is no genuine dispute of material fact, we affirm the trial court.

In 1999, Hord moved to Lexington, Kentucky, to assume the position of regional controller overseeing all of Quebecor’s operations in the eastern United States. In fact, Hord took over the controller responsibilities of her husband, Chuck Hord, who was terminated from Quebecor in December 1999.

On November 3, 2000, Troy Reed, the husband of Hord’s co-worker Vickie Reed, visited the Lexington facility. Hord ran up to Reed and jumped up on him, wrapping her legs around his waist. Witnesses stated that Hord proceeded to bounce up and down and make sexual noises. She thereafter made some comment that the excitement was causing her breasts to leak, since she was still nursing an infant.

Although no one who witnessed the incident made a formal complaint, Hord’s superiors eventually learned of what happened and initiated an investigation. On December 11, 2000, Will Miers, Vice-President of Human Resources, and Cheryl Born, Vice-President of Finance and Division Controller, arrived at the Lexington facility. After interviewing Hord and the other

witnesses to the incident, Miers and Born met with Que-Net Media President, Jack Schuh. The three determined that Hord's behavior was highly improper considering her level of corporate responsibility, and was a violation of Quebecor's sexual harassment policy. Hord was suspended and subsequently terminated.

In July 2001, Hord filed a Complaint in the Fayette Circuit Court asserting six separate claims against Quebecor and Rosquist: (1) common law wrongful discharge; (2) retaliation in violation of KRS 344.280; (3) disparate treatment/discriminatory termination in violation of KRS 344.040; (4) disparate treatment/pay discrimination in violation of KRS 344.040; (5) hostile workplace sexual harassment; and (6) intentional infliction of emotional distress/tort of outrage.

In June 2002, the trial court granted summary judgment in favor of Quebecor and Rosquist as to Count I (common law discharge) and Count IV (disparate treatment/pay discrimination). In October 2002, the trial court entered an order granting summary judgment as to both defendants on Count VI (intentional infliction of emotional distress) and as to Rosquist only on Count II (retaliatory discharge). In addition, Hord stipulated during a pretrial conference that she no longer wished to bring an individual claim against Rosquist for discriminatory termination (Count III).

Quebecor thereafter moved for summary judgment on the remaining Counts II, III, and V, which the trial court initially denied on December 16, 2004. Although Judge Clark subsequently granted Quebecor's motion to reconsider and set aside the December 16th order, he also recused from the case based upon a prior disclosure to counsel.[3] Following the transfer of the case to another division of the Fayette Circuit Court, Quebecor renewed its motion for summary judgment on Counts II, III, and V, which was granted in November 2005.[4] This appeal ensued.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). *See also Lewis v. B & R Railroad Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001). The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible

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[3] On April 6, 2004, Judge Clark sent a letter to counsel for both parties disclosing that his son played on a baseball team with the Hords' son. Judge Clark stated that he had engaged in conversation with Chuck Hord on several occasions without realizing who he was. The information did not come to Judge Clark's attention until he was reviewing a team roster and recognized the Hords'names.

[4] Rosquist also filed a motion for summary judgment on Count V, which was not opposed. By agreed order of the parties, summary judgment was granted in July 2005.

that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). The party seeking summary disposition bears the initial burden of establishing that no genuine issue of material fact exists and the burden then shifts to the party opposing the motion to present “at least some affirmative evidence showing that there is a genuine issue of fact for trial.” *Id.* at 482.

In order to prevail against a properly supported motion for summary judgment in a discrimination case, it is incumbent upon the plaintiff to identify “cold hard facts” from which an inference of racial or sexual discrimination can be drawn. *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 700 (Ky. App. 1991). Further, because KRS 344.040, the pertinent provision of the Kentucky anti-discrimination statutes, closely mirrors similar language in Title VII of the Federal Civil Rights Act, we reiterate the often-cited directive of the Supreme Court of Kentucky in *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992), that federal anti-discrimination case law should serve as guidelines in interpreting Kentucky anti-discrimination legislation. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). With these standards in mind, we will undertake an examination of the propriety of the trial court's

decision to grant summary judgment in favor of Quebecor on Hord's remaining claims for retaliation, discrimination, and sexual harassment.

Retaliation

Count II of Hord's complaint alleged that her termination from Quebecor was a direct and proximate result of her making a complaint to management about Rosquist's misconduct. Hord contends that Quebecor used the November 3rd incident as pretext for the retaliatory discharge.

To establish a *prima facie* case of retaliation, Kentucky law requires a plaintiff to show that (1) he engaged in a protected activity; (2) the defendant knew that the plaintiff had done so; (3) adverse employment action was taken; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004); *Handley* at 701, *citing De Anda v. St. Joseph Hospital*, 671 F.2d 850(5th Cir. 1982). If the employer articulates a legitimate, non-retaliatory reason for the decision, the employee must show that the discriminatory motive was a substantial and motivating factor behind the adverse employment action. *Handley*, 827 S.W.2d at 701; *First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185, 187-188 (Ky. 1993).

Hord asserts that on November 15th she filed a complaint about Rosquist's conduct and incompetence with Born and Miers, and then was terminated just weeks later. She claims that this is evidence that the company condoned her misconduct until she filed the complaint about Rosquist. However, "temporal proximity alone will not support an inference of retaliatory discrimination when there is no other compelling evidence." *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000).

Notwithstanding, even if Hord had established a *prima facie* case, Quebecor articulated a legitimate, non-discriminatory reason for terminating Hord. Hord does not dispute the incident with Reed's husband, which occurred in the workplace and in front of other co-workers. An employee's violation of an employer's policies is a legitimate, non-discriminatory reason for discipline which satisfies the employer's burden of production. *Pierce v. Commonwealth Life Insurance Co.*, 40 F.3d 796 (6th Cir. 1994).

As there was no genuine issue of material fact, Quebecor was entitled to summary judgment as a matter of law on Hord's claim of retaliation.

Discriminatory Termination

Count III of Hord's complaint alleged that Quebecor's termination of her employment was discriminatory on the basis of sex in violation of KRS 344.040, and that Quebecor treated her

"in a disparate and excessively harsh manner compared to its treatment of other similarly situated male employees."

To establish a *prima facie* case of sexually discriminatory discipline, Hord must establish that (1) she is a member of a protected class, and (2) that she was treated differently than similarly situated non-minority employees for the same or similar conduct. *See Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992). Hord fails to satisfy the second prong of this test.

In order to establish the similarly-situated element, Hord must show that the comparable employees were "similarly situated in all respects." Specifically, the comparable employees "must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would diminish their conduct or the employer's treatment of them for it." *Mitchell* at 583.

Although the standard is certainly stringent, "[r]equiring that the plaintiff establish these similarities is simply common sense, as '[d]ifferent employment decisions, concerning different employees, made by different supervisors . . . sufficiently account for any disparity in treatment, thereby preventing an inference of discrimination.'" *Snipes v. Illinois Department of Corrections*, 291 F.3d 460, 463 (7th Cir. 2002),

quoting Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617 (7th Cir. 2000). Further, the high standard is necessary "to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." *Silvera v. Orange County School Board*, 244 F.3d 1253, 1259 (11th Cir. 2001), *cert. denied,* 534 U.S. 976 (2001).

Hord alleged that other male employees who had also engaged in instances of sexual misconduct were not disciplined or terminated. However, the record reveals that not only were the alleged acts of misconduct not similar in nature to Hord's own misconduct, but that the persons responsible for the decision to terminate Hord, i.e., Miers, Born and Schuh, were in no manner involved in any disciplinary actions involving those employees.[5]

As a matter of law, evidence about how different managers on different occasions in different locations responded to complaints about other employees allegedly accused of misconduct is insufficient to prove that Quebecor and its current management intentionally discriminated against Hord on the basis of gender. Without specific evidence to support her claim of discriminatory treatment, summary judgment was proper.

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[5] In fact, it is important to point out that Hord's allegations about the male employees in question involved conduct that occurred between 1995-1998 at a prior company, World Color Press, before Quebecor took over that company in 1999, and before Miers and Born had any management role.

Unisign, Inc. v. Commonwealth Transportation Cabinet, 19 S.W.3d 652 (Ky. 2000).

SEXUAL HARRASSMENT

Count V of Hord's complaint alleged that the work environment at the Lexington facility was "permeated by the intimidating, hostile, abusive and sexually demeaning conduct of Rosquist." Hord also charged that Quebecor was aware of Rosquist's conduct and failed to make any efforts to discipline him or rectify the situation.

To successfully establish a cause of action predicated upon hostile work environment, a plaintiff must demonstrate: 1) that the conduct in question was unwelcome; 2) that the harassment was based upon gender; 3) that the harassment was sufficiently pervasive or severe so as to "alter the conditions" of the plaintiff's employment; and 4) that a reasonable basis exists for imputing the conduct of a fellow employee to the employer. *Meyers*, 840 S.W.2d at 821; *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir. 1992), *cert. denied*, 506 U.S. 1041 (1992). *See also Ammerman v. Board of Education of Nicholas County*, 30 S.W.3d 793 (Ky. 2000); *Clark v. United Parcel Service, Inc.*, 400 F.3d 341 (6th Cir. 2005).

It must be emphasized that not only must the conduct be extreme and based upon the plaintiff's gender, it must also

pass the test of objectivity. A determination as to the existence of an objectively hostile or abusive work environment

> 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.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S.Ct. 2275, 2283, 141 L.Ed.2d 662 (1998), the United States Supreme Court reiterated its conclusion that to be actionable "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." This requires that trial courts examine the totality of the circumstances, the frequency of the conduct, whether it is physically threatening or humiliating, and whether it in fact interferes with an employee's work performance:

> These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes and occasional teasing." ··· We have made it clear that the conduct must

> be extreme to amount to a change in the terms and conditions of employment . . . . [Citations omitted.]

Id. at 788, 118 S.Ct. at 2283-84.

Hord's claims of sexual harassment and hostile workplace are based upon her allegations that Rosquist was rude and abrasive, he spoke harshly to her, that he was authoritative and dictorial, that he tried to limit her dealings with other managers in the day-to-day operations, and that he failed to properly manage the Lexington facility. And in fact, the record is replete with emails and memos that Hord sent to management during 1999 and 2000 criticizing Rosquist, and complaining of his incompetence and poor attitude. Hord's repeated complaints culminated into the November 15th complaint to Miers and Born.

However, there is simply no evidence that Rosquist's conduct, even if true, was based upon gender. In fact, according to the deposition testimony of both Hord and her husband, Rosquist acted in the same manner to male and female co-workers alike. Chuck Hord even stated that he experienced the same conflicts and problems with Rosquist when he was controller that Hord now alleges.

We note the absence of any genuine issue as to the facts alleged to have created a hostile work environment at Quebecor. Taking as true the incidents recited by Hord in support of her complaint, we are convinced that she failed to

establish a *prima facie* case of sexual harassment. There is no question that a history of personal animosity and hostility existed between Hord and Rosquist. Hord evidently blamed Rosquist for the fact that her husband was terminated from Quebecor. However, it was not until after she was terminated that she claimed Rosquist's conduct created a hostile work environment based on sexual harassment.

Thus, we conclude that Hord's own testimony established that there simply was no evidence of a pattern of gender-based conduct so pervasive and severe as to have interfered with the conditions of her employment. *See Scott v. Central School Supply*, 913 F. Supp. 522 (E.D. Ky. 1996) Viewing the totality of the work environment at Quebecor from the perspective of Hord's own testimony, we find that she cannot meet the criteria for an actionable claim based upon hostile work environment. Accordingly, summary judgment in favor of Quebecor on Count V was proper.

The order of the Fayette Circuit Court granting summary judgment in favor of Quebecor on the remaining claims in Hord's complaint is affirmed.

ALL CONCUR.

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