

RENDERED: SEPTEMBER 10, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000686-MR  
AND  
NO. 2009-CA-000821-MR

LEE T. SPARKS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL  
FROM SIMPSON CIRCUIT COURT  
v. HONORABLE JANET J. CROCKER, JUDGE  
ACTION NO. 06-CI-00280

WAL-MART STORES, INC.

APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING

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BEFORE: FORMTEXT TAYLOR, CHIEF JUDGE; COMBS AND NICKELL,  
JUDGES.

TAYLOR, CHIEF JUDGE: Lee T. Sparks brings Appeal No. 2009-CA-000686-  
MR and Wal-Mart Stores, Inc., (Wal-Mart) brings Cross-Appeal No. 2009-CA-  
000821-MR from a January 15, 2009, judgment of the Simpson Circuit Court upon

a jury verdict for Wal-Mart dismissing Sparks' claim for unpaid wages. We affirm Appeal No. 2009-CA-000686-MR and affirm Cross-Appeal No. 2009-CA-000821-MR.

Sparks began his employment as a relief pharmacist for Wal-Mart in June 1992, working in twelve or thirteen different stores. Then, in September 1993, Sparks was hired as pharmacy manager for a Wal-Mart store located in Franklin, Kentucky. Sparks continued his employment as pharmacy manager in Franklin until retiring in December 2008.

Sparks' compensation as pharmacy manager was based upon a 45-hour-work week or 90 hours every two weeks. In 2005, Sparks became aware that he had been allegedly underpaid for a period of time dating back to 2000. On August 30, 2006, Sparks filed a complaint against Wal-Mart in the Simpson Circuit Court alleging that Wal-Mart underpaid him some \$27,920.85 in wages and had retaliated against him for filing an administrative complaint with the Kentucky Department of Labor prior to the lawsuit.<sup>1</sup> As to his claim for unpaid wages, Sparks maintains that between November 2000 and September 2005 Wal-Mart erroneously based his salary upon 85-hours biweekly, rather than 90 hours. Sparks pointed out that a new district manager discovered the error in September 2005 and increased his pay prospectively, but not retrospectively. Wal-Mart asserted that Sparks was a salaried "exempt" professional who was expected to work at least 90

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<sup>1</sup> In the complaint filed in the Simpson Circuit Court, Lee T. Sparks also alleged that Wal-Mart Stores, Inc., had engaged in discrimination and fraud. These claims were dismissed pursuant to Wal-Mart's motion for summary judgment and were not appealed.

hours every two weeks. The trial court eventually rendered summary judgment dismissing Sparks' retaliation claim, and submitted Sparks' claim for unpaid wages to the jury. The jury found that Wal-Mart did not withhold wages from Sparks. Thereupon, the circuit court dismissed Sparks' complaint. These appeals follow.

APPEAL NO. 2009-CA-000686-MR

Sparks contends the trial court erred by denying his motion for directed verdict upon the unpaid wages claim. It is well-established that if reasonable men could not differ regarding the conclusion to be drawn from the evidence a directed verdict is proper. *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963).

Sparks specifically asserts that Wal-Mart should have been equitably estopped from denying that he was underpaid from November 2000 through September 2005, thus entitling him to a directed verdict. In support thereof, Sparks asserts that Wal-Mart "should not be permitted to correct his pay going forward [from September 2005] in acknowledgment of its error, then be allowed to deprive him of the pay for all periods that it was erroneously calculated" (November 2000 through September 2005). Sparks argues that Wal-Mart conceded its error by prospectively increasing his salary in September 2005 to reflect the 90-hour biweekly base pay and, thus, should be estopped from denying such underpayment retrospectively.

Equitable estoppel essentially precludes a party from asserting "a right inconsistent with a position previously taken by him or her . . . ." 31 C.J.S.

*Estoppel and Waiver* § 146 (2008). Equitable estoppel has three essential elements:

(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts.

*Smith v. Howard*, 407 S.W.2d 139, 143 (Ky. 1966)(citation omitted).

In the case *sub judice*, Sparks was not entitled to a directed verdict because the evidence is conflicting upon the third element of equitable estoppel – whether Wal-Mart possessed “knowledge, actual or constructive, of the real facts.” At trial, Wal-Mart adamantly disavowed that Sparks was underpaid between November 2000 and September 2005. In fact, Wal-Mart presented the testimony of Sparks’ previous district manager, who testified that Sparks was informed in 2000 that his pay would be based upon 85-hours biweekly. Considering the evidence, we hold that reasonable men could differ on which version of the facts was true and thus, agree with the circuit court that Sparks was not entitled to a directed verdict based upon equitable estoppel. *See Smith*, 407 S.W.2d 139.

Sparks also argues that the trial court erred by excluding certain evidence at trial. Specifically, Sparks complains that the trial court improperly excluded evidence of other litigation involving Wal-Mart and employees as to pay disputes. In support thereof, Sparks alleges Wal-Mart “opened the door” to

introduction of this evidence when it characterized itself as a “good corporate actor” and asserted that Sparks’ claim was merely an example of “no good deed going unpunished.”

To preserve a ruling excluding evidence for appellate review, it is well-established that such evidence must be offered into the record by proffer or avowal. Kentucky Rules of Evidence (KRE) 103(a)(2). Without such a proffer or avowal, no evidentiary foundation is present to permit meaningful appellate review of the trial court’s ruling.

In his brief, Sparks failed to cite to the record where a proffer or avowal was made; we have reviewed the trial videotapes in an effort to locate same. As a result of our efforts, we did find that Sparks generally characterized the excluded evidence during an argument concerning its admissibility before the trial court. However, the characterization was so vague that we are unable to discern the content of the excluded evidence. Moreover, Sparks merely referred to the excluded evidence during the argument but did not intentionally provide a proffer or avowal of same for the record. In any event, Sparks failed to adequately preserve the evidentiary ruling excluding such evidence by proffer or avowal. Accordingly, we are unable to review same.

Sparks additionally contends the trial court improperly excluded evidence of the amount of a pretrial settlement offer made by Wal-Mart to Sparks. To fully understand this contention of error, some background information is necessary. At trial, Sparks was permitted to testify that a Wal-Mart regional

manager promised he would “take care of [Sparks].” Upon cross-examination, Wal-Mart was permitted to question Sparks about his attitude at a pretrial settlement conference. In particular, Wal-Mart sought to show that Sparks was upset at the conference and uttered profanities. Wal-Mart specifically questioned Sparks as to whether he was “pissed off” and made two profane statements at the conference; he flatly denied same. Thereafter, Sparks sought to introduce evidence of the amount of Wal-Mart’s settlement offer to explain his reasons for such profane statements, even though he denied making the statements. Sparks argued that Wal-Mart had “opened the door” to admission of such evidence. The trial court ruled that evidence of the amount of the settlement offer was inadmissible.

As a general rule, offers to compromise or settlement offers are not admissible to prove liability for a claim. KRE 408. As an appellate court, we review the exclusion of evidence pursuant to an abuse of discretion standard. *Clephas v. Garlock, Inc.*, 168 S.W.3d 389 (Ky. App. 2004). An abuse of discretion occurs when the trial court’s ruling is arbitrary, unreasonable, unfair, or unsupported by sound legal principle. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000). If an abuse of discretion has occurred, we must then determine whether the abuse amounts to prejudicial error. The error is prejudicial if absent the excluded evidence, there exists a reasonable possibility that the jury’s verdict would have been different. Kentucky Rule of Civil Procedure 61.01; KRE 103; *Crane v. Com.*, 726 S.W.2d 302 (Ky. 1987).

From our review of the evidence, the settlement offer was properly excluded under KRE 408. Even if the trial court abused its discretion in excluding evidence of the amount of the settlement offer, we cannot conclude that such exclusion amounted to prejudicial error. During Sparks' cross-examination by Wal-Mart, Sparks specifically denied uttering the profane statements at the settlement conference. Thus, it was Sparks' testimony to the jury that he did not utter the profanities. As such, it is nonsensical for Sparks to argue that the amount of the settlement offer should have been admitted to explain why he uttered the profanities, even though he claimed he did not utter them. In sum, we hold that there does not exist a reasonable possibility that the outcome of the jury trial would have been different and that the trial court did not commit prejudicial error in excluding the evidence.

Sparks further maintains that the trial court erred in rendering summary judgment dismissing his claim for retaliation. Sparks specifically asserts that after he filed the administrative complaint with the Department of Labor, Wal-Mart retaliated in the following ways: (1) the district manager who was alleged to have underpaid Sparks was reassigned to the Franklin store where Sparks worked, (2) the district manager was rude to Sparks during an evaluation, and (3) the district manager required him to work a few hours on the morning of a family wedding.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v.*

*Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). To establish a *prima facie* case of retaliation, it must be demonstrated that (1) plaintiff was engaged in a protected activity, (2) plaintiff was disadvantaged by an act of his employer (i.e., suffered an adverse employment action), and (3) a causal connection existed between the activity engaged in and the employer's act. *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697 (Ky. App. 1991).

In the case *sub judice*, Sparks did not demonstrate that he suffered an adverse employment action as a result of filing the administrative complaint. The mere act of reassigning Sparks' previous district manager to the Franklin store is not in and of itself an adverse employment action. Also, Sparks' allegation that the manager was rude to him on one occasion and required him to work on the day of a family wedding does not rise to the level of adverse employment action. Furthermore, the district manager testified he was unaware that Sparks had filed an administrative complaint and thus, could not have retaliated against him for such action. Sparks did not dispute the manager's testimony. As Sparks did not demonstrate that he suffered any adverse employment action as a result of filing the administrative complaint, he cannot establish a *prima facie* case for retaliation. As such, the trial court did not err by dismissing his claim for same.

Finally, Sparks alleges that the trial court erred by limiting the amount of recoverable unpaid wages based upon the five-year statute of limitations found in Kentucky Revised Statutes (KRS) 413.129(22). The circuit court determined that Sparks was not entitled to recover unpaid wages that accrued before August

30, 2001, five years before filing of the complaint. As the jury found that Wal-Mart did not underpay Sparks and considering our disposition of the previous issues raised in this appeal, we view this issue as moot.

CROSS-APPEAL NO. 2009-CA-000821-MR

Wal-Mart filed a protective Cross-Appeal in this action. Therein, Wal-Mart asserts that the trial court erred in concluding that Sparks' wage claim presented a triable fact issue. As we have affirmed Sparks' appeal in favor of Wal-Mart, the cross-appeal is rendered moot.

For the foregoing reasons, we affirm Appeal No. 2009-CA-000686-MR and affirm Cross-Appeal No. 2009-CA-000821-MR.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT  
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