RENDERED: APRIL 1, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001756-MR
AND
NO. 2009-CA-001875-MR

MARY COWAN — APPELLANT

v.

APPEALS FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CI-02981

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY; AND
PAT BLAIR, IN HER INDIVIDUAL
CAPACITY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND COMBS, JUDGES; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, SENIOR JUDGE: Mary Cowan appeals from the Fayette Circuit Court's summary judgment on her sexual harassment claim against the Board of Trustees of the University of Kentucky and Pat Blair. She also appeals from the court's denial of her subsequent Kentucky Rules of Civil Procedure (CR) 60.02 motion for relief from that judgment. Upon review, we find no grounds for reversal or vacatur of the trial court's decision in either case. Therefore, we affirm as to both orders.

Appellant's sexual harassment suit stemmed from a single incident involving a nonsupervisory coworker. Appellant was hired as a temporary employee in the custodial services department of the University of Kentucky's Physical Plant Division (PPD) in 2006, and was assigned to perform custodial duties in the university's engineering building. While working in the building on March 27, 2007, Appellant was approached by Billy Haynes, who was a refrigeration supervisor in the PPD's air conditioning/refrigeration department. According to Appellant, Haynes grabbed her and pulled her so close to him that her "breasts were pressed up against his chest" and she could feel his erection. Appellant asked Haynes if he was looking for a coworker named Vanessa Downey, who had apparently been seeing Haynes, and he subsequently left the room. The incident left Appellant "shocked" and "shaking," but she did not immediately tell anyone at the University what had happened. Two days later, she told a coworker named Antoinette Bernard that Haynes had physically accosted her. In response, Bernard told Appellant that she had had a similar experience with Haynes only a

few days earlier. After her conversation with Appellant, Bernard told Blair, the PPD's personnel supervisor, about these incidents.

On March 30, 2007, Appellant was called into a meeting with Blair and Dan Abbott, who supervised the custodial staff. There, Appellant gave them her account of what had happened. According to Appellant, Blair called Haynes a "sexual predator" and told her that she would meet with Haynes and Terry Allen, a vice-president in the University's Institutional Equity and Equal Opportunity Office, to further investigate the incident. The following week, Appellant met with Allen and gave a written statement describing her encounter with Haynes. Haynes was also interviewed, and he was subsequently suspended from work pending further investigation.

On April 13, 2007, Allen sent an e-mail to Blair recommending that Haynes be immediately separated from his employment because he had violated the University's policies against sexual harassment. On April 16, 2007, Haynes chose to take early retirement in lieu of being terminated and he was permanently banned from campus. Appellant had no further encounters with Haynes at work. She later left her employment with the University after allegedly sustaining a work-related injury.

On June 17, 2008, Appellant filed a *pro se* complaint in Fayette Circuit Court against the University's Board of Trustees, Blair, and Haynes in which she alleged that she had been subjected to unlawful sexual harassment and sexual discrimination in violation of the Kentucky Civil Rights Act, KRS Chapter

344. Appellant specifically alleged that she and other individuals had been subjected to unwanted sexual advances by University personnel and that the University had failed to take sufficient action to protect its employees from such predatory actions. Appellant also presented claims of battery and intentional infliction of emotional distress against Haynes and alleged *respondeat superior* liability on the part of the University for Haynes' actions. In response to Appellant's complaint, Appellees asserted as a defense that they had in place a policy prohibiting sexual discrimination and harassment in the workplace and that they had taken affirmative steps in response to any complaints of sexual harassment in this case. Appellees further asserted that any actions by Haynes were outside of the scope of his employment with the University.[2]

No action was taken in the case for nearly four months until Hon. Denise Brown entered an appearance as Appellant's attorney. Appellant was then deposed by Appellees. No other steps were taken in the case from July 17, 2008, until July 24, 2009, and Appellant made no efforts to conduct discovery or to otherwise prosecute her claim. On July 24, 2009, Appellees filed a motion for summary judgment along with supporting evidence that included Appellant's deposition, Appellant's written statement concerning the subject incident, the aforementioned e-mail from Terry Allen to Pat Blair recommending Haynes' termination, and an affidavit from Blair. Appellees contended that they were entitled to summary judgment on sovereign immunity grounds and because

[2] Haynes was named as a defendant in Appellant's complaint, but he was never served and has not been included as an appellee. Therefore, the claims raised against him in the complaint are not part of this appeal.

Appellant could not make a *prima facie* case that Appellees were negligent or otherwise legally deficient in responding to her claim of sexual harassment. The motion was scheduled to be heard on August 21, 2009.

One week prior to that scheduled hearing, attorney Brown filed a motion to withdraw as Appellant's counsel and asked the trial court to grant Appellant an extension of time in which to respond to the motion for summary judgment. This motion was also scheduled to be heard on August 21, 2009, but on the day of the hearing no one appeared on behalf of Appellant and no response to the motion for summary judgment was filed or otherwise provided. The trial court subsequently granted Appellees' motion. The court did not address Brown's motion to withdraw.

On August 31, 2009, attorney Brown once again filed a motion to withdraw as counsel along with an affidavit in which she maintained that "[o]n August 12, 2009, [Appellant] contacted counsel and advised that she did not wish for counsel to continue on the matter and that she would attend court on the specified date." The affidavit also indicated that Brown was unable to make it to court at the time the motions were scheduled to be heard "due to construction on I-64." The affidavit further provided that Brown had advised Appellant of the court's decision and that Appellant had affirmed "that she was aware of the motion and court date."

The next activity in the case occurred on September 15, 2009, when Hon. J. Robert Cowan entered an appearance as Appellant's new counsel.

Attorney Cowan subsequently filed a motion asking the trial court to reconsider the order of summary judgment pursuant to CR 60.02 on the grounds that Appellant did not have a fair opportunity to present her claim. The trial court denied the motion, and Appellant now presents appeals from both the trial court's order of summary judgment and its order denying her motion for CR 60.02 relief.

In considering Appellant's appeals, we shall first determine whether the trial court erred in entering summary judgment against Appellant as to her KRS Chapter 344 sexual harassment claim. If no error occurred in this regard, we shall then determine whether she was nonetheless entitled to relief from that judgment pursuant to CR 60.02. The standards for reviewing a trial court's entry of summary judgment are well established and were concisely summarized by this Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

> 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." 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 that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."

Id. at 436 (internal footnotes and citations omitted). Because summary judgments involve no fact-finding, we review the trial court's decision *de novo*. *3D Enters.*

Contr. Corp. v. Louisville & Jefferson County Metro. Sewer Dist., 174 S.W.3d 440, 445 (Ky. 2005); *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Appellant's sexual harassment claim against the University and Blair essentially amounts to an assertion that they failed to take appropriate responsive action once they became aware that Appellant had been sexually accosted by Billy Haynes. In order to establish a *prima facie* claim of hostile work environment and sexual harassment by a nonsupervisory coworker, a plaintiff must show that:

> (1) she was a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based upon sex; (4) the harassment unreasonably interfered with the plaintiff's work performance or created a hostile or offensive work environment that was severe and pervasive; *and* (5) the employer knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action.

Fenton v. HiSAN, Inc., 174 F.3d 827, 829-30 (6th Cir. 1999);[3] *see also Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 347-48 (6th Cir. 2005); *Ammerman v. Bd. of Educ. of Nicholas County*, 30 S.W.3d 793, 798 (Ky. 2000); *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 820-21 (Ky. 1992). "Sexual or racial harassment by a co-worker is not a violation of Title VII unless the employer knew or should have known of the harassment and failed to take action." *Kirkwood v.*

[3] Kentucky courts have historically interpreted the civil rights provisions of KRS Chapter 344 consistently with federal anti-discrimination laws. *See Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495 (Ky. 2005); *Brooks v. Lexington-Fayette Urban County Hous. Auth.*, 132 S.W.3d 790, 802 (Ky. 2004). Accordingly, we may take federal law into account as persuasive, if not controlling, authority in considering this appeal. *See Jefferson County v. Zaring*, 91 S.W.3d 583, 586 (Ky. 2002); *Kentucky Commission on Human Rights v. Commonwealth, Dept. of Justice*, 586 S.W.2d 270, 271 (Ky. App. 1979).

Courier-Journal, 858 S.W.2d 194, 199 (Ky. App. 1993); *see also Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 338 (6th Cir. 2008).

There is no question here that the evidence presents a *prima facie* harassment claim as to the first three elements referenced above since Appellant was clearly subjected to unwelcome sexual harassment. It is perhaps even arguable that the incident in question was severe enough to satisfy element four. However, Appellees presented evidence in their motion for summary judgment that supported a viable claim for judgment as a matter of law as to element five, thus requiring Appellant to produce evidence in response to show that there were genuine issues of material fact on this issue that could only be resolved by trial.

As noted above, element five requires a plaintiff's asserting coworker sexual harassment to show that "the employer knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action." *Fenton*, 174 F.3d at 830. It has been noted that "[t]he most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified." *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001). By doing so, "the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace." *Id.*

Here, the evidence presented – largely through Appellant's own deposition testimony – shows that Appellees took immediate action to address Appellant's complaints once they became aware of them, and their investigation of

the subject incident ultimately led to Haynes's retiring in lieu of being terminated and his being banned from campus entirely. Frankly, even if Appellant had submitted a response to Appellees' summary judgment motion, we question whether she could have demonstrated a genuine issue of material fact on this issue in light of her deposition testimony and the other facts noted above. The University had written policies regarding sexual harassment that had been provided and explained to all employees, and there is no indication that Appellant was ever subjected to other instances of sexual harassment while employed by the University or that the University was aware of other instances of inappropriate conduct by Haynes prior to March 30, 2007. Moreover, the one occasion on which such conduct occurred resulted in immediate action upon Appellee's learning of the incident and the offending party's leaving his employment less than three weeks later. It is difficult to see how Appellees could have responded in a more appropriate fashion. In any event, given these facts, it was incumbent upon Appellant to produce evidence to show that genuine issues of material fact remained as to the appropriateness of Appellees' response to her harassment. *See Lewis*, 56 S.W.3d at 436 (internal footnotes and citations omitted); *Hartford Ins. Group v. Citizens Fid. Bank & Trust Co.*, 579 S.W.2d 628, 630-31 (Ky. App. 1979). She failed to do so (for whatever reason). Therefore, summary judgment was appropriate.

Appellant argues that summary judgment was otherwise inappropriate because she was not afforded an adequate opportunity to conduct discovery

beforehand. However, the record refutes this contention. While it is true that "summary judgment may not properly be entered before the respondent has had an opportunity to complete discovery … [i]t is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so." *Hartford Ins. Group*, 579 S.W.2d at 630. This case languished for over a year without any efforts whatsoever on the part of Appellant or her prior counsel to conduct discovery through interrogatories, requests for admissions, or depositions. Appellant notes that no order had been entered by the trial court setting a discovery cut-off date, but this fact did not bar Appellees from filing a properly supported motion for summary judgment nor did it eliminate any obligation on the part of Appellant to adequately respond to said motion. While there is no definitive timeframe within which a party is compelled to complete (or even to begin) discovery, it is fair to say that discovery should be commenced by a plaintiff within a year of a lawsuit being filed. Indeed, we have previously held that six months was sufficient time for a party to at least initiate some discovery prior to a grant of a motion for summary judgment. *See id.* A defendant should not be held hostage by a plaintiff's complete failure to pursue her action. Therefore, we conclude that Appellant was afforded an adequate opportunity to conduct discovery in this case prior to entry of summary judgment.

Having concluded that summary judgment was appropriately entered, we now must consider whether Appellant was nonetheless entitled to relief pursuant to CR 60.02. Appellant specifically argues that her case merited relief

from the trial court's entry of summary judgment pursuant to CR 60.02(a) and (f), which provide as follows:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds:
>
> (a) mistake, inadvertence, surprise or excusable neglect [or] … (f) any other reason of an extraordinary nature justifying relief.

The standard of review of an appeal involving the denial of a CR 60.02 motion is whether the trial court abused its discretion. *Kurtsinger v. Bd. of Trustees of Kentucky Ret. Sys.*, 90 S.W.3d 454, 456 (Ky. 2002). Absent such abuse, "[t]he trial court's exercise of discretion will not be disturbed." *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Appellant argues that "the circumstances in this case surely satisfy either CR 60.02(a) or (f), in that the failure of [her] counsel to attend the hearing on the motion for summary judgment effectively prevented Mary from presenting her arguments to the court." As noted above, neither Appellant nor her former attorney appeared at the hearing on Appellees' summary judgment motion or filed anything challenging that motion. Brown submitted an affidavit to the trial court in which she indicated that Appellant no longer wanted her representation and that Appellant would handle the summary judgment motion herself. Appellant disputes this version of events and asserts that she never wished to terminate Brown's

services and that she believed Brown would handle the motion. Appellant also contends that any failure to conduct discovery beforehand was not because of any disinterest on her part but because her attorney had failed to attend to the case and to move it along in an expeditious manner. Thus, Appellant essentially asks for relief from summary judgment because of the dilatory actions of her counsel.

However, it is well established that attorney error or negligence is imputable to the client and is not a ground for relief under CR 60.02(a) or (f). *Vanhook v. Stanford-Lincoln Co. Rescue Squad, Inc.,* 678 S.W.2d 797, 799 (Ky. App. 1984). In *Vanhook*, this Court addressed a situation in which a plaintiff sought relief pursuant to CR 60.02 because her attorney had failed to show for trial, as a result of which her case was dismissed. Although we noted that Vanhook would have been entitled to a verdict and judgment and that she was effectively denied her day in court by the unexplained absence of their attorney, we nonetheless affirmed the dismissal. In doing so, we held that there was "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. " *Id.* at 800, quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S. Ct. 1386, 1390, 8 L. Ed. 2d 734 (1962). We further noted that reaching the opposite result "would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have

notice of all facts, notice of which can be charged upon the attorney. ” *Id.*, quoting *Link*, 370 U.S. at 634, 82 S. Ct. at 1390 (internal citations and quotation marks omitted).

Accordingly, even though the ultimate result may be a harsh one, and even though we are sympathetic to Appellant's claim that she was not adequately represented by counsel, CR 60.02 simply does not provide grounds for relief from the trial court's entry of summary judgment in this case. Therefore, the trial court did not abuse its discretion in denying Appellant's motion pursuant to that rule.

For the foregoing reasons, the Fayette Circuit Court's order of summary judgment in favor of Appellees and its order denying Appellant's motion for CR 60.02 relief are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Robert Cowan
Lexington, Kentucky

BRIEF FOR APPELLEES:

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