RENDERED: JULY 8, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000331-MR

SUE BACH — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CI-03485

TERRY GARCIA CREWS; THOMAS P. HOCK; PROFESSIONAL TRANSIT MANAGEMENT, LLC; TRANSIT AUTHORITY OF LEXINGTON; AND LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEES

OPINION AND ORDER
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KELLER AND VANMETER, JUDGES.

KELLER, JUDGE: Sue Bach (Bach) appeals from two orders of the Fayette Circuit Court granting summary judgment and dismissing her claims of retaliation against the Appellees, Lexington-Fayette Urban County Government (LFUCG),

Terry Garcia Crews (Crews), Thomas P. Hock (Hock), Professional Transit Management, LLC (PTM), and Transit Authority of Lexington (LexTran). We refer to Crews, Hock, PTM, and LexTran collectively as the LexTran Appellees. For the following reasons, we affirm.

FACTUAL BACKGROUND

Bach's retaliation claims stem from two incidents: (1) her termination from LexTran, and (2) LFUCG's "rescission" of her job offer. We set forth both incidents below.

1. LexTran Termination

In 1981, LexTran hired Bach as the executive secretary for Pat Hamric (Hamric). Hamric was an employee of ATE Management & Service Company, Inc. (ATE), which managed LexTran's operations at the time. In 1989, Bach filed a sexual harassment lawsuit against Hamric, ATE, LexTran, and LFUCG. Hock was the executive vice president and the attorney for ATE at the time. As the attorney for ATE, Hock monitored litigation involving ATE, which included Bach's lawsuit. Bach's sexual harassment lawsuit settled in 1994, and Bach continued to work for LexTran as an executive secretary. Shortly after the settlement, the management relationship between LexTran and ATE ended.[1]

In 2003, LexTran signed a management contract with PTM. Hock was the President of PTM. Although Hock had been the executive vice president of ATE,

[1] Apparently, the LexTran Board of Directors hired an individual to manage LexTran after it ended its management relationship with ATE. The management of LexTran by that individual is not relevant to this appeal.

PTM and ATE are not affiliated. In January 2004, Crews, an employee of PTM, became the general manager of LexTran. As a result, Crews became Bach's immediate supervisor.

According to Crews, Bach lacked the computer skills that were necessary to perform her job and had problems with completing her work in a timely manner. On September 1, 2004, Crews gave Bach a memorandum instructing Bach to develop a written plan on how she intended to improve her computer skills. The memorandum stated that Bach needed to provide Crews with her written plan by September 10, 2004. Additionally, it stated that Bach needed to complete an approved computer skills training program by October 31, 2004, which would be paid for by LexTran. The memorandum further noted that Bach's work was often untimely, and listed five examples. Finally, it instructed Bach to inform Crews of the organizational plan or techniques she planned to develop to ensure that her tasks would be completed on time.

Crews provided Bach with a second memorandum on September 24, 2004. In this memorandum, Crews stated that on September 15, 2004, she received Bach's request to take a computer training class. Crews stated that, even though Bach was supposed to submit her request by September 10, she could take the class. Crews requested that Bach provide her with a list by October 1 of the other computer training classes she intended to take. Additionally, Crews stated that she was still waiting for Bach to submit her organizational plan, which Bach needed to submit by October 1. The memorandum also provided the following:

> Further, your current attitude and non-communicative approach toward me, and other staff members are not acceptable. I expect you to be a team player and act as one. The whispering behind my back with other staff members must stop. Although you and I may have our differences, there is not any reason for you to interfere with my relationship with other employees. Additionally, as an Executive Secretary you are expected to act in a fashion; whereby, I do not feel confidentiality will be broken. I should also remind you that you signed a confidentiality agreement.
>
> If your performance continues in the [sic] manner, disciplinary action will be taken up to including [sic] termination.

On September 28, 2004, Crews drafted a third memorandum to Bach. In this memorandum, Crews stated that Bach's behavior as discussed on September 24 had not improved. Specifically, Crews stated that Bach continued to spread malicious gossip; that she "caused great discord at LexTran by disseminating false information about a 'Hit List' for employees[;]" and that she submitted an incorrect advertisement to the Herald Leader costing LexTran $332. Crews stated that, as a result, Bach was being terminated immediately. Because Bach went on an extended medical leave which began on September 28, 2004, she did not receive the memorandum on that date. Instead, Bach received the memorandum notifying her of her termination on December 6, 2004, when she returned to work.

2. LFUCG Job "Offer"

In September 2005, Bach applied for a position as a staff assistant at the LFUCG Division of Police, and she was subsequently interviewed by two members of the Division of Police. According to Bach, when she was walking out

of the interview, she told one of the interviewers, Bea Barendregt, that she was sexually harassed at LexTran; that she filed a suit; and that she believed that was why she was terminated from LexTran. Bach apparently received a telephone call on October 20, 2005, offering her the position with the LFUCG Division of Police. However, Bach was told she still had to submit to physical and polygraph examinations.

On October 27, 2005, Bach submitted to a polygraph screening interview and examination. During her screening interview, Bach stated that she used prescription drugs that did not belong to her and that she had been fired from LexTran in December 2004. After her screening interview, Bach took the polygraph examination. On the day after the polygraph screening interview and examination, Bach received a letter from the LFUCG Division of Human Resources, which stated the following: "You have been recommended for the [Staff Assistant] position. Upon successful passage of the pre-employment physical and approval by the Mayor and ratification by the Urban County Council." The letter provided the time and place of Bach's pre-employment physical. Additionally, the letter stated that "[u]pon notification of you successfully passing your physical, final approval shall be completed and you shall be contacted by the appropriate division to establish a start date and employee orientation."

On November 4, 2005, and before her scheduled physical, Bach received another letter from the LFUCG Division of Human Resources notifying her that she did not receive the position. This letter stated the following:

> After a close review of your qualifications, as reflected on your application, we have found that while you have a good background you do not fully meet our requirements for the position at this time, due to **a violation of hiring standards**.

(Emphasis in original).

PROCEDURAL BACKGROUND

On July 30, 2007, Bach filed suit against the Appellees in the Fayette Circuit Court alleging unlawful retaliation in violation of Kentucky Revised Statute (KRS) 344.280, Kentucky's Civil Rights Act. Specifically, she alleged that her termination from LexTran and LFUCG's rescission of her job offer were in retaliation for the sexual harassment lawsuit she filed in 1989. On June 29, 2009, the LexTran Appellees collectively filed a motion for summary judgment, and on July 7, 2009, LFUCG also filed a motion for summary judgment. On November 30, 2009, the trial court entered two separate orders granting summary judgment- one in favor of LFUCG and one in favor of the LexTran Appellees.

Thereafter, Bach filed a motion to alter, amend or vacate the order granting summary judgment in favor of the LexTran Appellees. She also filed a motion to alter, amend or vacate the order granting summary judgment in favor of LFUCG. On January 11, 2010, the trial court entered an order denying Bach's motion to alter, amend or vacate the order granting summary judgment in favor of LFUCG.

After realizing that it did not address Bach's motion to alter, amend or vacate the summary judgment in favor of the LexTran Appellees, the trial court entered a subsequent order on January 20, 2010, denying Bach's motion. On February 18, 2010, Bach filed her notice of appeal.

On February 26, 2010, LFUCG filed a motion to dismiss Bach's appeal against LFUCG. By order of this Court entered on June 9, 2010, LFUCG's motion was passed to this panel for consideration of its merits.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In *Steelvest*, the word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). In ruling on a motion for summary judgment, the court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Steelvest, Inc.*, 807 S.W.2d at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative

evidence in order to defeat a properly supported motion for summary judgment. *Id.* at 481.

ANALYSIS

I. The LexTran Appellees

Bach makes three arguments as to why the trial court erred when it granted summary judgment in favor of the LexTran Appellees. First, she argues that the trial court erred when it applied the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), burden-shifting framework to her retaliation claim instead of a mixed-motive analysis. Second, she argues that the trial court erred when it concluded that she failed to plead a mixed-motive case. Finally, she argues that even if the *McDonnell Douglas* burden-shifting framework was the correct standard to apply, the trial court erred in concluding that she could not prove that the LexTran Appellees retaliated against her.

a. Standard Applied to Retaliation Claims

On appeal, Bach first argues that the trial court incorrectly applied the *McDonnell Douglas* burden-shifting framework to her retaliation claim against the LexTran Appellees. She contends that the trial court should have applied the mixed-motive analysis instead. We disagree.

As noted above, Bach alleged that the LexTran Appellees engaged in retaliatory conduct in violation of Kentucky's anti-retaliation provision, KRS 344.280. Specifically, she contends that LexTran terminated her in retaliation for filing the 1989 sexual harassment lawsuit. KRS 344.280 provides 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[.]

We note that our Supreme Court has held that Kentucky's anti-retaliation statute is to be construed consistently with Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3, and our courts routinely refer to federal case law for guidance. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 801-02 (Ky. 2004). Consequently, we look to both federal and state law for authority in determining whether the mixed-motive analysis applies to retaliation claims. *See Jefferson County v. Zaring*, 91 S.W.3d 583, 586 (Ky. 2002).

Congress enacted the "mixed-motive" analysis in Section 107(a) of the Civil Rights Act of 1991, codified at 42 U.S.C. § 2000e-2(m). This section of Title VII permits a plaintiff to show that the defendant has engaged in an unlawful employment practice by "demonstrat[ing] that race, color, religion, sex, or national origin was a motivating factor for [the] employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

A mixed-motive case, *i.e.*, when "both legitimate and illegitimate reasons motivated the decision," *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93, 123 S. Ct. 2148, 2150, 156 L. Ed. 2d 84 (2003), differs from a single-motive case, *i.e.*, when only an illegitimate reason motivated the employment decision. In a single-

motive case, the burden-shifting framework set forth in *McDonnell Douglas Corp.*, 411 U.S. at 802-04, 93 S. Ct. at 1824-25, and later modified by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093-94, 67 L. Ed. 2d 207 (1981) applies. In retaliation cases, this framework first requires a plaintiff to demonstrate a *prima facie* case of retaliation. Once the plaintiff establishes a *prima facie* case, the burden shifts to the employer to come forth with a non-retaliatory reason for the adverse employment decision(s) that disadvantaged the plaintiff. If the employer presents such evidence, the plaintiff must then come forward with evidence that the proffered reason was merely pretext for a retaliatory reason. *Kentucky Dep't of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2004).

The LexTran Appellees argue that the mixed-motive analysis does not apply to retaliation claims brought pursuant to KRS 344.280, because the Kentucky Civil Rights Act does not contain a provision similar to 42 U.S.C. § 2000e-2(m), which incorporates the mixed-motive theory of liability. Although we agree that the Kentucky Civil Rights Act does not include a similar provision, the Kentucky Supreme Court in *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814 (Ky. 1992), applied the mixed-motive analysis to a discrimination claim brought under KRS 344.040.[2] *See also First Property Management Corp. v. Zarebidaki,* 867 S.W.2d

[2] KRS 344.040(1) provides that:

> It is an unlawful practice for an employer:
>
> (a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms,

185, 187-88 (Ky. 1993). However, we note that the Court in *Meyers* did not address whether the mixed-motive analysis applies to retaliation claims brought pursuant to KRS 344.280.

The LexTran Appellees further argue that the mixed-motive standard only applies to discrimination claims and not retaliation claims. They note that the mixed-motive standard set forth in 42 U.S.C. § 2000e-2(m) states that an unlawful employment practice is established by showing that "race, color, religion, sex, or national origin was a motivating factor . . . ." It does not state that retaliation may be shown to be a motivating factor. As correctly noted by the LexTran Appellees, the majority of the federal courts of appeals that have considered the issue have concluded that Section 2000e-2(m) does not apply to Title VII retaliation cases. *See, e.g.*, *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 n.7 (4th Cir. 1999); *McNutt v. Bd. of Trs. of Univ. of Ill.*, 141 F.3d 706, 709 (7th Cir. 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (3d Cir. 1997); *Tanca v. Nordberg*, 98 F.3d 680, 684 (1st Cir. 1996); *but see Smith v. Xerox Corp*., 602 F.3d 320, 329-30 (5th Cir. 2010) (concluding that a mixed-motive jury instruction was proper in a Title VII retaliation case).

In support of her argument that the mixed-motive analysis does apply to retaliation claims, Bach points to the United States Sixth Circuit Court of Appeals

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> conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking[.]

decision in *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008). We believe that *White* is inapplicable because it involved a claim brought under Title VII's anti-discrimination provision. It did not address whether the mixed-motive analysis applies to cases brought under Title VII's anti-retaliation provision. Therefore, we do not find it to be persuasive.

Although this issue has not been directly addressed before, our Supreme Court has applied the *McDonnell Douglas* burden-shifting framework to retaliation claims brought pursuant to KRS 344.280. *See Brooks*, 132 S.W.3d at 803; *Kentucky Department of Corrections*, 123 S.W.3d at 134. Thus, our Supreme Court has implicitly acknowledged that the *McDonnell Douglas* burden-shifting framework is the correct standard to apply to retaliation claims. As an intermediate appellate court, this Court is bound by established precedents of the Kentucky Supreme Court. Rule of the Supreme Court (SCR) 1.030(8)(a). Therefore, we conclude that the trial court did not err when it applied the *McDonnell Douglas* burden-shifting framework instead of the mixed-motive analysis to Bach's retaliation claim.

b. Pleading a Mixed-Motive Case

We note Bach's argument that the trial court erred in concluding that Bach did not plead a mixed-motive case. Having concluded that the trial court correctly applied the *McDonnell Douglas* burden-shifting framework and that a mixed-motive analysis is not applicable to the instant case, this argument is moot.

c. Application of *McDonnell Douglas*

Having concluded that the *McDonnell Douglas* burden-shifting framework is the correct standard to apply, we now address whether the trial court correctly concluded that Bach did not meet her burden of proof under that standard.

As noted above, under the *McDonnell Douglas* framework, a plaintiff must first demonstrate a *prima facie* case of retaliation. Once the plaintiff establishes a *prima facie* case, the burden shifts to the employer to come forth with a non-retaliatory reason for the adverse employment decision(s) that disadvantaged the plaintiff. If the employer presents such evidence, the plaintiff must then come forward with evidence that the proffered reason was merely pretext for a retaliatory reason. *Kentucky Dept. of Corrections*, 123 S.W.3d at 134.

1. *Prima Facie* Case

In order to establish a *prima facie* case, a plaintiff must prove that: (1) she engaged in a protected activity; (2) her employer knew that she engaged in the protected activity; (3) her employer thereafter took an adverse employment action against her; and (4) there was a causal connection between the protected activity and the adverse employment action. *Brooks*, 132 S.W.3d at 803.

There is no dispute that Bach established the first and third elements of her *prima facie* case. Specifically, the parties agree that Bach's act of filing her sexual harassment lawsuit in 1989 was a protected activity and that her termination from LexTran in 2004 was an adverse employment action. However, the parties disagree as to whether Bach sufficiently established elements two and four of her *prima facie* case.

As to element two, Bach contends that there is a genuine issue of material fact as to whether the LexTran Appellees knew that she filed a sexual harassment lawsuit against LexTran in 1989. We agree.

There is no dispute that Hock, who was the attorney and executive vice president for ATE when Bach filed her sexual harassment claim against ATE and LexTran, knew about the lawsuit. As to Crews, we believe there is a genuine issue of material fact as to whether she knew about Bach's sexual harassment lawsuit. In her deposition, Crews testified that in January 2004, as an employee of PTM, she became the general manager of LexTran on behalf of PTM. Crews also testified that she had no knowledge of Bach's 1989 lawsuit, and that she was the sole decision-maker responsible for Bach's termination.

Bach testified in her deposition that she never told Crews about the lawsuit and that she and Crews never discussed it. However, she submitted two affidavits to support her contention that Crews was aware of the 1989 lawsuit. In the first affidavit, Timothy E. Burnett (Burnett) stated that he was the union president for the unionized workers at LexTran in 2004 when LexTran hired PTM as its management company. Burnett further stated that at a LexTran meeting regarding the hiring of PTM, he stated in the presence of Crews that Bach was one of the employees who filed a lawsuit against the previous management company.

In the other affidavit submitted by Bach, Michael L. Pence (Pence) stated that he had been LexTran's affirmative action officer, and that in late May or early June 2004, he had a conversation with Crews wherein she expressed that she

had issues with Bach's performance. Pence stated that he then "commented to the effect that since Ms. Bach had filed a successful outcome in a sexual harassment lawsuit against LexTran and its management company that caution should be exercised."

We note that Burnett's affidavit is vague and only states that he mentioned that Bach filed "a lawsuit" against the "previous management company." Thus, we do not believe that it creates an issue of fact as to whether Crews was aware that Bach filed a sexual harassment lawsuit against LexTran. However, because Pence's affidavit states that he told Crews about Bach's sexual harassment lawsuit against LexTran in May or June 2004, which was prior to Bach's termination, we believe there is a genuine issue of material fact as to whether Crews knew about the lawsuit.

There is also a genuine issue of material fact as to whether LexTran and PTM had knowledge of Bach's sexual harassment lawsuit. As provided in *Muhall v. Ashcroft*, 287 F.3d 543, 552 (6th Cir. 2002), a plaintiff can satisfy the second element in a retaliation case against an employer by showing that "the individuals charged with taking the adverse employment action knew of the protected activity." Crews testified that she was an employee of PTM and the general manager of LexTran. She also testified that she was the sole decision-maker responsible for Bach's termination from LexTran. Because there is a genuine issue of fact as to whether the decision-maker, Crews, knew about Bach's sexual harassment lawsuit, there is also a genuine issue of fact as to whether PTM

and LexTran knew about the lawsuit. Accordingly, Bach sufficiently established element two of her *prima facie case*.

Although we believe that Bach established element two of her *prima facie case*, she failed to show that there was a causal connection between her sexual harassment lawsuit and her termination as required by element four. As stated in *Brooks*, 132 S.W.3d at 804:

> In cases where there is no direct evidence of a causal connection, the causal connection of a *prima facie* case of retaliation must be established through circumstantial evidence. *Nguyen v. City of Cleveland,* 229 F.3d 559, 566 (6th Cir. 2000). Circumstantial evidence of a causal connection is "evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action." *Id.* at 566. In most cases, this requires proof that (1) the decision maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action. *See, e.g., Clark County School District v. Breeden,* 532 U.S. 268, 273, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509, 515 (2001).

The LexTran Appellees argue that because Bach was terminated fifteen years after she filed her lawsuit and nearly ten years after it settled, there was not a close temporal proximity between her lawsuit and her termination.

Bach argues that a close temporal proximity exists because Hock, as the former executive vice president of ATE, was not able to retaliate against her until PTM became LexTran's management company in 2003. Therefore, she argues that the ten-year lag resulted from Hock not having the "authority to affect [her] employment for a 'period of ten years.'"

Even if we assume that Bach's assertion is true, a close temporal proximity still did not exist. As to LexTran, approximately ten years passed between the time Bach settled her lawsuit and the time she was terminated. As to PTM, Hock, and Crews, more than fourteen months passed between the time that PTM began managing LexTran and Bach's termination. Therefore, Bach did not prove that a causal connection existed between her sexual harassment lawsuit and her termination. Accordingly, she did not establish a *prima facie* case of retaliation.

2. Non-Retaliatory Reason & Pretext

Even if Bach could establish a *prima facie* case of retaliation, Bach cannot show that the LexTran Appellees' non-retaliatory reasons for terminating her were pretext. The LexTran Appellees provided the following non-retaliatory reasons for terminating Bach: she lacked the necessary computer and organizational skills to perform her job; she missed deadlines; she made mistakes; and she spread malicious gossip about a "hit list" that caused employees of LexTran to fear that they would be terminated. In support of their non-retaliatory reasons, the LexTran Appellees point to Crews's deposition testimony and the three memoranda Crews provided to Bach notifying her of the problems with her job performance. Because "[a]ttitude, commitment to the work, flexibility, and other nondiscriminatory criteria are legitimate reasons to [terminate] an individual[,]" *Kentucky Ctr. for the Arts v. Handley*, 827 S.W.2d 697, 700 (Ky. App. 1991), we conclude that the LexTran Appellees provided legitimate, non-retaliatory reasons for Bach's termination.

Once the LexTran Appellees proved that legitimate, nondiscriminatory reasons motivated Bach's termination, Bach was required to prove that such purposes were pretext and were not the true reasons for her termination. A claimant may demonstrate pretext by showing: "(1) the proffered reasons [were] false; (2) the proffered reasons did not actually motivate the decision; or (3) the . . . reasons given were insufficient to motivate the decision." *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 497 (Ky. 2005).

In this case, Bach has not pointed to any evidence, other than her own conjecture, that her discharge was in retaliation for her sexual harassment lawsuit. Consequently, without more than conclusory allegations and subjective beliefs, Bach's retaliation claim against the LexTran Appellees cannot survive summary judgment. *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007).

II. LFUCG

As to LFUCG, we first address LFUCG's motion to dismiss Bach's appeal. As noted above, on November 30, 2009, the trial court entered two orders – one granting summary judgment in favor of LFUCG and one granting summary judgment in favor of the LexTran Appellees. On December 11, 2009, Bach filed a motion to alter, amend or vacate the order granting summary judgment in favor of the LexTran Appellees. On that same date, she also filed a motion to alter, amend or vacate the order granting summary judgment in favor of LFUCG. On January 11, 2010, the trial court entered an order denying Bach's motion to alter, amend or vacate the order granting summary judgment in favor of LFUCG. This order did not address Bach's motion to alter, amend or vacate the order granting summary judgment in favor of the LexTran Appellees. This order stated that, "There being no just cause for delay, this is a final and appealable order."

After realizing that it did not address Bach's motion to alter, amend or vacate the summary judgment in favor of the LexTran Appellees, the trial court

entered a subsequent order on January 20, 2010, denying Bach's motion. On February 18, 2010, Bach filed her notice of appeal.

LFUCG contends that because the January 11, 2010, order denying Bach's motion to alter, amend or vacate the summary judgment was final and appealable, Bach had thirty days from January 11, 2010, to file her notice of appeal against LFUCG. Because Bach did not file her notice of appeal until February 18, 2010, LFUCG argues that Bach's appeal against it should be dismissed. To the contrary, Bach argues that the January 11, 2010, order was not final and that the thirty-day time period did not begin to run until the court entered the January 20, 2010, order. We agree with LFUCG that the January 11, 2010, order was final and appealable.

Generally, a final and appealable judgment is one that adjudicates "all the rights of all the parties in an action or proceeding, . . ." Kentucky Rule of Civil Procedure (CR) 54.01. In an action involving multiple claims or multiple parties, CR 54.01 permits a court to make an otherwise interlocutory order final and appealable in limited circumstances as provided in CR 54.02. Specifically, an interlocutory order may be made final and appealable if the order includes both recitations: (1) there is no just cause for delay, and (2) the decision is final. CR 54.02. A circuit court's failure to include both recitations in the order is fatal and renders the order nonappealable. *Watson v. Best Fin. Servs. Inc.*, 245 S.W.3d 722 (Ky. 2008).

In this case, the January 11, 2010, order disposed of all the claims raised against LFUCG. Additionally, the order stated that the decision was final and that

there was no just cause for delay. Therefore, pursuant to CR 54.01 and CR 54.02, the January 11, 2010, order was final and appealable as to LFUCG. Thus, Bach had thirty days from its notation of service to file her notice of appeal. CR 73.02(1). The notation of its service was made on January 11, 2010. Because Bach did not file her notice of appeal until February 18, 2010, her notice of appeal as to LFUCG is untimely.

Under CR 73.02(2), the time for filing a notice of appeal is considered mandatory and subject to strict compliance. *Fox v. House*, 912 S.W.2d 450, 451 (Ky. App. 1995). Thus, "a tardy notice of appeal is subject to automatic dismissal . . . ." *Excel Energy, Inc. v. Commonwealth Institutional Sec., Inc.*, 37 S.W.3d 713, 716-17 (Ky. 2000). Accordingly, we grant LFUCG's motion to dismiss Bach's appeal.

Even if Bach had timely filed her notice of appeal against LFUCG, she would not prevail on appeal. First, she contends that the trial court erred when it did not apply the mixed-motive analysis to her retaliation claim. Bach also argues that the trial court erred in concluding that she did not plead a mixed-motive case. Because we already addressed these issues above, we do not do so again here.

Bach further argues that even if the *McDonnell Douglas* standard was the correct standard to apply, the trial court still erred by granting summary judgment in favor of LFUCG. We disagree.

Even if we assume that Bach could establish a *prima facie* case of retaliation, she cannot show that LFUCG's non-retaliatory reason for rescinding

the job offer was a mere pretext to cover up its retaliatory conduct. LFUCG argues that it disqualified Bach because, in her pre-polygraph interview, Bach stated that within the past year she took prescription drugs that did not belong to her. LFUCG argues that Bach's use of those drugs was a violation of its hiring standards, and that such standards were even set forth in the job posting for the position as follows:

> Individuals who have used illegal drugs within twelve (12) months immediately preceding the application filing process will automatically be eliminated from further consideration. *This also includes use of medications not prescribed to applicant.*

(Emphasis added). We believe that, based on the preceding, LFUCG's reasoning does not appear to be pretextual.

Bach argues that LFUCG's reasoning is pretextual because basing an adverse employment action on the results of a polygraph examination is unreasonable as a matter of law. However, as noted by LFUCG, the non-retaliatory reason for rescinding Bach's job offer was not based on the polygraph examination. It was based on Bach's response during her pre-polygraph interview. Therefore, the reasonableness of taking employment actions based on polygraph examination results is not relevant to our analysis of pretext.

Bach has not pointed to any evidence, other than her own conjecture, that LFUCG's stated reason for rescinding her offer was pretext for a retaliatory reason. Therefore, as noted above, without more than conclusory allegations and

subjective beliefs, Bach's retaliation claim against LFUCG cannot survive summary judgment. *Seitz*, 796 S.W.2d at 3.

Finally, because Bach cannot prove that the LexTran Appellees or LFUCG retaliated against her, her claim that LFUCG conspired with LexTran to retaliate against her was also properly dismissed. Accordingly, the trial court correctly granted summary judgment in favor of LFUCG.

CONCLUSION

For the foregoing reasons, we affirm the order of the Fayette Circuit Court granting summary judgment in favor of the LexTran Appellees. Additionally, LFUCG's motion to dismiss is GRANTED, and it is hereby ORDERED that Bach's appeal against LFUCG be DISMISSED.

ALL CONCUR.

ENTERED: JULY 8, 2011 /s/ Michelle M. Keller
JUDGE, COURT OF APPEALS

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:
CREWS; HOCK;
William C. Jacobs
TRANSIT AUTHORITY OF
Lexington, Kentucky
AND

ARGUMENT FOR APPELLEES,
TERRY GARCIA THOMAS P. PROFESSIONAL MANAGEMENT, LLC; TRANSIT AUTHORITY OF LEXINGTON:
Todd C. Myers
Barbara A. Kriz
Lexington, Kentucky

BRIEF FOR APPELLEES:
Todd C. Myers

Lexington, Kentucky

BRIEF AND
ORAL ARGUMENT
FOR APPELLEE,
LEXINGTON-

FAYETTE

URBAN COUNTY

GOVERNMENT:

Tracy W. Jones
Lexington,

Kentucky