

FILED: July 17, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

RONDA PARK,
an individual,
Plaintiff-Appellant,

v.

STATE OF OREGON,
acting by and through Department of Corrections,
Defendant-Respondent,

and

MARK NOOTH, JAMIE HERRERA
and OFELIA ALVARADO,
Defendants.

Malheur County Circuit Court
09037252L

A146485

J. Burdette Pratt, Judge.

Argued and submitted on March 22, 2012.

Elizabeth A. McKanna argued the cause for appellant. With her on the briefs was McKanna Bishop Joffe & Arms, LLP.

Cecil A. Reniche-Smith, Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Brewer, Judge pro tempore.

ORTEGA, P. J.

Reversed.

1 ORTEGA, P. J.

2 Plaintiff appeals from a supplemental judgment that granted attorney fees to
3 the state after a jury returned a defense verdict in plaintiff's suit against the state for sex
4 discrimination and unlawful retaliation. After the jury returned its verdict, the trial court
5 submitted a "special verdict form" to the jury that asked it to answer several questions
6 regarding plaintiff's veracity and whether her claims were "frivolous, unreasonable, and
7 brought in bad faith." The jury returned the special verdict, indicating that it found that
8 plaintiff's statements to her employer and to the court about the incidents underlying her
9 claims were untruthful. The state, after a general judgment was entered, sought an
10 enhanced prevailing party fee, costs, and attorney fees under Title VII of the Civil Rights
11 Act of 1964, 42 USC § 2000e-5(k). The trial court, after independently concluding that
12 plaintiffs' claims were "unreasonable, frivolous, and without foundation," awarded the
13 state a portion of the attorney fees sought and entered a supplemental judgment. Plaintiff
14 appeals that judgment, challenging the trial court's submission of the special verdict form
15 to the jury, as well as the court's award of attorney fees. We reverse the award of
16 attorney fees, concluding that the trial court erred in determining that plaintiff's claims
17 were "unreasonable, frivolous, and without foundation."¹

18 Plaintiff, an employee of the Oregon Department of Corrections (DOC) at
19 the Snake River Correctional Institution (SRCI), filed a complaint alleging unlawful

¹ Because we reverse the attorney fee award on the merits, we do not address plaintiff's first assignment of error regarding the court's submission of a special verdict form to the jury.

1 employment practices by the state, raising state and federal claims of unlawful sex
2 discrimination and unlawful retaliation for opposing unlawful employment practices, as
3 well as a claim for intentional infliction of emotional distress. Plaintiff's allegations of
4 discrimination were based on negative employment actions taken against her after three
5 separate incidents at work. Generally, those incidents involved (1) a physical altercation
6 with a male coworker, (2) accusations that plaintiff made an anonymous call to a local
7 newspaper to report misbehavior by a DOC employee, and (3) an incident in the SRCI
8 mailroom.

9 The following facts are uncontroverted. In April 2007, plaintiff happened
10 upon a set of keys that were unsecured, which was a violation of DOC policy. When she
11 picked up the keys to make a security violation report, a male coworker, who was
12 responsible for the keys, grabbed her wrist. Plaintiff and the male coworker differed on
13 how much force was applied to plaintiff's arm during the incident. She then filed a
14 worker's compensation claim and was assigned light duty by DOC for a period of time.
15 Plaintiff and the male coworker attended an informal mediation, at the end of which they
16 both agreed that they could continue to work together. The male coworker was not
17 disciplined for the incident.

18 Several days after that confrontation, a local newspaper reporter contacted a
19 local food processing plant that employed DOC work crews to inquire about an
20 anonymous report that a male DOC employee had urinated in a drain at the plant. When
21 initially asked about the incident, the offending coworker told his supervisor that he had

1 poured the contents of a soda bottle down the drain. The coworker admitted to the
2 incident when directly asked if he had urinated in the drain. The details of that incident
3 were well known within DOC and resulted in a letter of apology from DOC to the plant's
4 owner. Further, the offending employee had received a "non-disciplinary letter of
5 instruction" and no further discipline for his actions.

6 Almost immediately after the report, DOC officials "pointed the finger" at
7 plaintiff as the source of the anonymous tip and launched an investigation. Plaintiff was
8 reassigned to the mailroom a few days later, and she asserted that the reassignment was
9 stigmatizing and cost her the opportunity to work overtime and holidays. After being
10 reassigned, plaintiff lodged an internal complaint of sex discrimination, challenging her
11 reassignment and DOC's failure to discipline the two male coworkers involved in the
12 prior incidents. Her internal complaint eventually resulted in a determination by DOC
13 that there was not sufficient evidence to substantiate plaintiff's claim.

14 About two weeks after her reassignment and the filing of her internal
15 complaint, plaintiff was suffering some ill effects from estrogen treatment that she was
16 receiving, which led to a discussion between plaintiff and some female coworkers in the
17 mailroom about breast discomfort. That conversation occurred in the presence of a male
18 employee. At some point in the discussion, plaintiff asked one or more of the female
19 coworkers to touch her breast to confirm that it was unusually swollen, and at least one of
20 them did so. A supervisor overheard part of the conversation and, upon learning the full
21 extent of it, chastised the employees and initiated a "hostile work environment"

1 investigation against plaintiff. Sometime later, plaintiff received a letter of "Initiation of
2 Pre-dismissal Process" related to the mailroom incident. That disciplinary process
3 resulted in a one-step pay reduction for six months, but after plaintiff grieved the pay
4 reduction through her union, DOC withdrew the reduction and replaced it with a letter of
5 reprimand.

6 In the immediate aftermath of the mailroom incident, plaintiff was
7 separated from other staff to perform mail sorting duties. Plaintiff objected, requested
8 that she be sent home, and was placed on paid administrative leave, where she remained
9 for three-and-a-half months while DOC investigated the mailroom incident.

10 Some months later, plaintiff filed a complaint with the Civil Rights
11 Division of the Oregon Bureau of Labor and Industries (BOLI), alleging that she was
12 subject to different treatment and discipline based on her gender and in retaliation for
13 whistle-blowing, invoking the worker's compensation system, and reporting unlawful
14 employment practices and gender discrimination. BOLI returned a determination of
15 "substantial evidence of an unlawful employment practice" in violation of ORS
16 659A.030(1)(b) related to a claim of gender discrimination. As to plaintiff's other
17 allegations, BOLI returned a finding of "no substantial evidence."

18 Plaintiff proceeded to file a complaint in circuit court raising federal and
19 state claims of discrimination. The parties eventually stipulated to dismissal of plaintiff's
20 state law claims, so that only plaintiff's claim for gender discrimination and unlawful

1 retaliation under Title VII proceeded to trial.² Before trial, the trial court denied the
2 state's motion for summary judgment, concluding that genuine issues of material fact
3 existed given that the male employees in question engaged in misconduct of "comparable
4 seriousness" to the conduct that plaintiff had been accused and disciplined for, but
5 plaintiff had suffered much more severe discipline than did her male counterparts. As to
6 plaintiff's sex discrimination claim, the trial court concluded that there was "sufficient
7 evidence from which a finder of fact could conclude that the [state] engaged in sex
8 discrimination in its dealings with [p]laintiff." As for plaintiff's retaliation claim, the trial
9 court concluded that summary judgment was inappropriate because there was sufficient
10 evidence in the record "from which the jury could at least draw an appropriate inference
11 that the adverse employment action was causally connected to the protected activity."

12 The case proceeded to trial and, at the close of plaintiff's case, the state
13 moved for a directed verdict. The court, after noting that discrimination could be inferred
14 from the evidence of disparate treatment of "similarly situated employees," denied the
15 motion, concluding that "a lot of the issues, factual issues, are in dispute and the jury is
16 the one who has to resolve those issues of dispute. And I think there's enough evidence
17 on plaintiff's side to support her evidence--or to support her claim to avoid a motion for
18 directed verdict."

19 The jury ultimately returned a verdict for the state. Afterwards, the state

² The state had brought a counterclaim for breach of contract. The court granted plaintiff's motion for directed verdict on the state's counterclaim and it is not at issue on appeal.

1 asked the trial court to submit a special verdict form to the jury regarding plaintiff's
2 veracity. The court did so, and the jury returned the form indicating that it found plaintiff
3 to be untruthful. That action is the subject of plaintiff's first assignment of error, which
4 we need not reach.

5 After the court entered a general judgment, the state petitioned for attorney
6 fees, an enhanced prevailing party fee, and costs and disbursements. Plaintiff contended
7 that an award of attorney fees against her was not appropriate under Title VII. The trial
8 court awarded the state \$30,000 in attorney fees, as well as additional costs and
9 disbursements. In the order awarding attorney fees, the court determined:

10 "1. That independent of the special advisory jury verdict, and based on
11 this Court's personal observations of the witnesses and evidence at trial, that
12 plaintiff was not truthful in her statements to her employer concerning the
13 three incidents underlying her claims for discrimination and retaliation * *
14 *;

15 "2. That independent of the special advisory jury verdict, and based on
16 this Court's personal observations of the witnesses and evidence at trial, that
17 plaintiff was not truthful in her statements during the trial of this matter
18 concerning the three incidents underlying her claim for discrimination and
19 retaliation * * *;

20 "3. That the Court's ruling on the motion for summary judgment and the
21 Court's ruling on the defendant's motions for a directed verdict required the
22 court to assume the facts as alleged by the plaintiff and all reasonable
23 inferences from those facts were true;

24 "4. That with regard to the plaintiff's testimony this is not a case of
25 different witnesses remembering events differently. This is a disturbing
26 case of a plaintiff lying under oath in support of her claims;

27 "5. That the decision to award attorney fees is appropriate in this case
28 beyond the fact that the plaintiff did not prevail on her claims at trial;

1 "6. That prior to the filing of this lawsuit the plaintiff had been
2 reinstated with back pay after having demanded to be placed at home, and
3 was paid to sit at home;

4 "7. That based upon the above findings, the plaintiff's case alleging
5 discrimination and retaliation was unreasonable, frivolous, and without
6 foundation;

7 "8. That taking into account the plaintiff's current financial situation and
8 the financial situation projected by plaintiff's counsel, an award of \$30,000
9 in attorney fees is appropriate to deter future suits brought in bad faith, but
10 not deter good faith suits, and that such an award will not be unduly
11 burdensome to plaintiff, and;

12 "9. That the award of attorney fees in this case serves the same purpose
13 as an enhanced prevailing party fee."

14 The court entered a supplemental judgment awarding the state attorney fees and costs,
15 from which plaintiff now appeals.

16 Because it is dispositive, we begin with plaintiff's second assignment of
17 error, in which she challenges the trial court's award of fees under 42 USC section 2000e-
18 5(k), contending that the trial court erred as a matter of law by determining that plaintiff's
19 claims were not objectively reasonable. Section 2000e-5(k) simply provides:

20 "In any action or proceeding under [Title VII] the court, in its
21 discretion, may allow the prevailing party, other than the [Equal
22 Employment Opportunity Commission (EEOC)] or the United States, a
23 reasonable attorney's fee (including expert fees) as part of the costs, and the
24 [EEOC] and the United States shall be liable for costs the same as a private
25 person."

26 In *Christiansburg Garment Co. v. EEOC*, 434 US 412, 422, 98 S Ct 694, 54
27 L Ed 2d 648 (1978), the United States Supreme Court held that under section 2000e-5(k)
28 a prevailing plaintiff should generally be awarded attorney fees, but when the defendant
29 prevails,

1 "a plaintiff should not be assessed his opponent's attorney's fees unless a
2 court finds that his claim was frivolous, unreasonable, or groundless, or that
3 the plaintiff continued to litigate after it clearly became so. And, needless to
4 say, if a plaintiff is found to have brought or continued such a claim in *bad*
5 *faith*, there will be an even stronger basis for charging him with the
6 attorney's fees incurred by the defense."

7 (Emphasis in original.) The court further explained that:

8 "In applying these criteria, it is important that a district court resist
9 the understandable temptation to engage in *post hoc* reasoning by
10 concluding that, because a plaintiff did not ultimately prevail, his action
11 must have been unreasonable or without foundation. This kind of hindsight
12 logic could discourage all but the most airtight claims, for seldom can a
13 prospective plaintiff be sure of ultimate success. No matter how honest
14 one's belief that he has been the victim of discrimination, no matter how
15 meritorious one's claim may appear at the outset, the course of litigation is
16 rarely predictable. Decisive facts may not emerge until discovery or trial.
17 The law may change or clarify in the midst of litigation. Even when the law
18 or the facts appear questionable or unfavorable at the outset, a party may
19 have an entirely reasonable ground for bringing suit."

20 *Id.* at 421-22.

21 On appeal, plaintiff argues that the standard set in *Christiansburg* is high,
22 and that the trial court erred in concluding that it was met in this case. Plaintiff contends
23 that typically, where a state agency finds substantial evidence of discrimination and a
24 plaintiff survives motions for summary judgment and directed verdict, the defendant has
25 failed to show that the plaintiff's claim was unreasonable. Plaintiff further maintains that
26 the trial court could not award fees in this case simply because plaintiff lost or was not
27 credible. That is, the trial court erred by concluding that, because plaintiff was not
28 truthful on some things, there was no basis in law or fact for her claims. Plaintiff asserts
29 that, even assuming that she was untruthful about some details of the underlying
30 incidents, her claims could not have been objectively unreasonable because she put on a

1 *prima facie* case that she was treated more harshly than her male coworkers and the
2 court's conclusion that she was untruthful was related to minor details of the three
3 incidents that precipitated her discipline, not the disparate discipline that she received.

4 The state counters that, as the trial court found, plaintiff knowingly made
5 false statements to her employer and to the court about the incidents that led to the
6 discipline of which she complains. Further, the state points out that the trial court
7 explicitly acknowledged that it was awarding fees not merely because plaintiff lost at trial
8 but because she had lied about the facts that made up the basis for her claim. The state
9 contends that this was not a case in which the trial court merely found that plaintiff was
10 not credible; rather, it found that plaintiff was deliberately untruthful about the incidents
11 that led to her discipline. In sum, the state contends that, "to reverse the award in this
12 case would send a message that a Title VII claim based on fabricated events may be
13 brought with impunity."

14 There are no hard and fast rules for determining when a claim may be
15 deemed frivolous, unreasonable, or without foundation under *Christiansburg*.³ Each case
16 must be evaluated in light of the Court's warning not to engage in *post hoc* reasoning and
17 to avoid undercutting "the efforts of Congress to promote the vigorous enforcement of the
18 provisions of Title VII." *Christiansburg*, 434 US at 422. Nevertheless, there are several

³ We apply federal substantive law to federal claims brought in state court. *See Geris v. Burlington Northern, Inc.*, 277 Or 381, 561 P2d 174 (1977) ("[I]n cases arising under federal law * * * state courts are bound to follow federal substantive law but are free to follow their own practices as to matters which are strictly procedural.").

1 guideposts that federal courts use to evaluate an attorney fee claim by the prevailing
2 defendant in a Title VII case. Among other things, courts will examine whether the
3 plaintiff established a *prima facie* case, whether the defendant offered to settle, and
4 whether the trial court dismissed the case before trial or held a full-blown trial. *Sullivan*
5 *v. School Bd. of Pinellas County*, 773 F2d 1182, 1189 (11th Cir 1985). In fact, the denial
6 of a dispositive motion can be an appropriate consideration when determining whether a
7 plaintiff's case was frivolous, unreasonable, or groundless. *EEOC v. Great Steaks, Inc.*,
8 667 F3d 510, 517 (4th Cir 2012). The denial of a motion for judgment as a matter of law
9 "made at the close of all evidence is a particularly strong indicator that the plaintiff's case
10 is not frivolous, unreasonable, or groundless." *Id.* at 518 (noting that the court is "hard-
11 pressed to imagine circumstances where the district court could make this determination
12 and nevertheless deem the plaintiff's case frivolous, unreasonable, or groundless").
13 However, the mere establishment of a *prima facie* case does not render an attorney fees
14 award inappropriate if the discovery process makes it apparent that the plaintiff's claim is
15 patently frivolous, yet the plaintiff continues the litigation. *Blue v. U.S. Dept. of Army*,
16 914 F2d 525, 536 (4th Cir 1990).

17 Of particular importance to the present case, federal law is clear that it is
18 impermissible to award attorney fees to the defendant under section 2000e-5(k) simply
19 because a witness is disbelieved or because the court's credibility determinations went
20 against the plaintiff. *AFSCME v. County of Nassau*, 96 F3d 644, 652 (2d Cir 1996)
21 (stating that, although the assessment of evidence and testimony is within the province of

1 the trier of fact, a claim is not necessarily frivolous because a witness is "disbelieved or
2 an item of evidence is discounted, disproved or disregarded at trial"); *see also EEOC v.*
3 *Bruno's Restaurant*, 13 F3d 285, 290 (9th Cir 1993) (even accepting trial court's finding
4 that the plaintiff's witnesses were not credible, attorney fees were not appropriate unless
5 the plaintiff was aware that the evidence of discrimination was not credible). Further,
6 generally, where evidence is introduced that, if credited, would suffice to support a
7 judgment, fees are unjustified. *AFSCME*, 96 P3d at 652. In fact, a court's ruling in a
8 Title VII case that is based on credibility determinations can indicate that there was some
9 evidence to support the claims. *Sullivan*, 773 F2d at 1189.

10 On the other hand, where the plaintiff is aware that the evidence of
11 discrimination is not credible, the proceeding may be frivolous. *Bruno's Restaurant*, 13
12 F3d at 290. Similarly, if the plaintiff presses a claim which she knew or should have
13 known was groundless, frivolous, or unreasonable, an award of fees is appropriate. *Id.*
14 And, as a general matter, an award of attorney fees may be appropriate when the plaintiff
15 introduced no evidence to support the claims. *Sullivan*, 773 F2d at 1189. In short, "no
16 litigant can be allowed to abuse * * * courts or opposing litigants with impunity. Like all
17 other litigants, civil rights litigants face the prospect of sanctions if they pursue patently
18 frivolous lawsuits." *Blue*, 914 F2d at 534.

19 The trial court's determination that plaintiff here was "untruthful in her
20 statements to her employer [and the court] concerning the three incidents underlying her
21 claims for discrimination and retaliation" led to its conclusion that her claims were

1 unreasonable, frivolous, and without foundation. Plaintiff's position is that the court
2 simply disbelieved her or made credibility determinations against her, which, under the
3 federal case law, is not enough to justify an attorney fee award. The state's position is
4 that plaintiff's lying under oath about details of the incidents underlying her claims is not
5 merely a credibility determination; rather, her deliberate untruthfulness undermined the
6 validity of her claims to such an extent as to make them unreasonable and frivolous.

7 Considering the circumstances of plaintiff's case, the trial court's rationale,
8 and the high bar set in *Christiansburg*, we conclude that the court erred in awarding
9 attorney fees. At the outset, although not dispositive of the issue, the BOLI finding of
10 substantial evidence of discrimination and the trial court's denial of motions for summary
11 judgment and directed verdict militate against a conclusion that plaintiff's claims were
12 unreasonable, frivolous and without foundation. *Sullivan*, 773 F2d at 1189. In particular,
13 the trial court, in denying the state's motion for summary judgment, acknowledged that
14 there were genuine issues of material fact given that plaintiff and the male coworkers
15 were in similar jobs and engaged in similar conduct which involved "certain elements of
16 dishonesty," yet plaintiff was disciplined more severely than her male coworkers. The
17 trial court also denied summary judgment on plaintiff's unlawful retaliation claim because
18 there was evidence in the record from which the jury could infer that the adverse
19 employment action suffered by plaintiff was causally connected to plaintiff's complaint of
20 discrimination. Similarly, the trial court denied the state's motion for directed verdict
21 after acknowledging that "a lot of the issues, factual issues, are in dispute and the jury is

1 the one who has to resolve those issues of dispute. And I think there's enough evidence
2 on the plaintiff's side to support her evidence--or to support her claim to avoid a motion
3 for directed verdict." In both instances, the trial court recognized that plaintiff's claims
4 were supported by evidence sufficient to allow a reasonable factfinder to find in her
5 favor.

6 Moreover, that evidence did not depend entirely on plaintiff's own
7 testimony. Indeed, even disbelieving plaintiff's testimony, the essential elements of her
8 claim, as set forth above, are not in dispute. The parties differ as to specific details of
9 plaintiff's conduct and some of the surrounding circumstances, but there is no dispute that
10 plaintiff was disciplined and the male coworkers involved in the incidents or similar
11 types of incidents were not. Those facts are supported by evidence other than plaintiff's
12 testimony. As the trial court acknowledged, plaintiff introduced evidence, including
13 DOC's documentation of the various incidents and disciplinary proceedings (or lack
14 thereof), that tended to show that plaintiff suffered disparate discipline for similar
15 misconduct. That evidence may have supported an inference of discrimination regardless
16 of whether plaintiff's description of the underlying incidents was inaccurate or
17 deliberately untruthful. In short, as the trial court acknowledged in denying the state's
18 motion for directed verdict, there was evidence that created disputed factual issues that
19 the jury could have resolved in favor of plaintiff, and that evidence was not dependant on
20 whether plaintiff accurately recounted the details of the underlying incidents.

21 Ultimately, the trial court's explanation that plaintiff was untruthful

1 concerning the three incidents that led to her discipline are not a justification for attorney
2 fees in this case. In addition to the general principle that a claim is not frivolous because
3 a witness was disbelieved or evidence was discredited at trial, we also credit plaintiff's
4 argument that, even if plaintiff was untruthful as to some of the details surrounding the
5 incidents that led to her discipline, that untruthfulness did not make her claim of gender
6 discrimination or retaliation unreasonable or frivolous in this instance. Her claims were
7 based on the theory that the discipline that she received for the incidents was disparate to
8 the discipline her male counterparts received for similar incidents. There was evidence,
9 independent of the testimony found untruthful by the court, that DOC disciplined plaintiff
10 more severely for conduct that was similar in nature to the conduct engaged in by her
11 male coworkers. Thus, the foundation of her claims (disparate discipline and retaliation)
12 is not unreasonable if she lied about some of the details involved in the incidents that led
13 to her discipline. The crux of her claims is tied to the discipline that she received for
14 those incidents, which included punishment for being untruthful. Accordingly, because
15 there was evidence, independent of the testimony disbelieved by the court, that supported
16 plaintiff's claims and would have permitted the jury to draw inferences supporting her
17 claims, the trial court's determination that plaintiff's claims were unreasonable and
18 frivolous is error. Although there may be circumstances where a plaintiff's untruthfulness
19 about certain facts is so pertinent to the basis of the plaintiff's discrimination claims, that
20 those claims are rendered unreasonable by that untruthfulness, this is not such a case.

21 Reversed.