IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MACK LITTON, Appellant, v. CLOVER PARK SCHOOL DISTRICT, Respondent,	No. 38932-1-II UNPUBLISHED OPINION

Penoyar, C.J. — Mack Litton appeals from a summary judgment order dismissing his chapter 49.60 RCW claims for wrongful termination. He claims that his employer created a hostile work environment, engaged in racial and gender discrimination, and inflicted emotional distress by engaging in outrageous conduct. Litton claims that unresolved factual disputes precluded summary judgment, the trial court failed to rule on his hostile work environment and gender discrimination claims, and Clover Park School District (the District) failed to provide proper notice of its motion for summary judgment. We affirm.

Facts

Litton worked for the District beginning in 1999 on a temporary basis but was eventually hired as a full-time custodian to work at Woodbrook Elementary School and later at Clover Park High School. In 2005, the District placed Litton on a disciplinary suspension and assigned him to work as a night custodian at Clarkmoor Elementary. The Board of Directors terminated Litton's employment effective June 28, 2006.

On February 12, 2008, Litton filed a complaint for damages. On December 11, 2008, the District filed a motion for summary judgment, noting the hearing for January 9, 2009. Litton filed

a written motion in opposition to summary judgment. Before the scheduled January 9 hearing, the superior court contacted the parties to inform them that it was setting the motion over because of an overcrowded docket. Litton then filed a motion to strike the District's motion for summary judgment, arguing that it was now beyond the period allowed for dispositive motions, relying on Pierce County Local Rule (PCLR) 56(1). On January 30, 2009, the court held a hearing on the District's motion and dismissed the complaint. Litton appeals.

analysis

I. Failure to Provide Adequate Record on Review

Preliminarily, the District asks us to dismiss Litton's appeal because he failed to provide an adequate record for review. When reviewing a summary judgment we consider the matter de novo and make the same inquiry as the trial court; summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue about any material fact and, assuming facts most favorable to the nonmoving party, establish that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

It is incumbent on the appellant to provide the same record to us that existed before the trial court. RAP 9.12. Litton failed in this regard by not providing most of the District's declarations in support of its summary dismissal motion. RAP 9.10 authorizes us to dismiss a review when a party fails to make a good faith effort to provide a record adequate for review. This rule also allows us to order supplemental record and to impose sanctions on the party failing in its duty to provide an adequate record.

As RAP 9.6 allows, the District provided the necessary clerk's papers for review. The

District should not have had to bear the cost of doing so and thus may recover its costs as a sanction against Litton. Now having a sufficient record, we decline to dismiss our review.

II. Timeliness of Summary Dismissal Hearing

Litton first claims that the trial court failed to follow PCLR 3 when it heard the District's dispositive motion after the time for doing so had lapsed. This rule provides: "All such motions shall be served, filed and heard pursuant to PCLR 7; provided that no pretrial dispositive motions shall be heard after the cutoff date provided in the Case Schedule except by order of the court and for good cause shown."

Litton acknowledges that that he had sufficient notice of the January 9, 2009 hearing. He argues though that he received no notice of the January 30, 2009 hearing and was present only because of "intuition." Appellant's Br. at 7.

The trial court explained at the January 30 hearing that it set the motion over because of an overcrowded docket and it wanted the parties to have an adequate opportunity to argue their motions. Further, Litton's counsel was present, had an opportunity to argue against the motion, and did not object to the timeliness of the hearing.[1] Litton waived any claim that he lacked notice of the hearing by appearing, acquiescing, and not making his objections known.

III. Standard of Review for Discrimination Claims

We review employment discrimination cases employing the evidentiary burden-shifting protocol established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this protocol, the plaintiff bears the initial burden of setting forth a

[1] Following the hearing, Litton made a record that the court did not consider his motion to strike the hearing based on timeliness. The court then explained that it, on its own, set over the motion as a courtesy to the parties. Litton did not claim a lack of notice as he does on appeal.

prima facie case of unlawful discrimination. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802), *overruled on other grounds McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006). If the plaintiff meets this burden, the evidentiary burden shifts to the employer to show admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action. *Hill*, 144 Wn.2d at 181. If the employer meets this evidentiary burden, the burden of proof shifts back to the plaintiff to show that the employer's stated reasons for the adverse employment action was a pretext. *Hill*, 144 Wn.2d at 182 (citing *McDonald Douglas Corp.*, 411 U.S. at 804). If the plaintiff fails to make such a showing, the employer is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 182 (citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 365, 753 P.2d 517 (1988)).

IV. Scope of Court's Ruling

Litton argues that the trial court erred in treating his claims as one for disparate treatment and intentional discrimination, instead of hostile work environment and gender discrimination. In fact, he baldly states that the trial court "allowed and participated in Clover Park School District's scheme to make a false record. . . . The [trial] court allowed Clover Park School District to plead the aforementioned claims because it did not have a sufficient defense to [his discrimination] claim." Appellant's Br. at 8.

The record does not support Litton's characterization of the trial court as part of a scheme to undermine his lawsuit. Litton's complaint initially lists three forms of discrimination under section IV: (1) hostile work environment; (2) RCW 49.60(3); and (3) outrage. Yet Litton's complaint then lists five causes of action under sections VII-IX: (1) intentionally discriminatory

conduct coupled with disparate treatment creating a hostile working environment; (2) hostile work environment; (3) retaliation; (4) defamation; and (5) outrageous conduct.

In his motion in opposition to the District's motion for summary dismissal, Litton claims to have four causes of action. The first claim is for racial discrimination under chapter 49.60 RCW. CP 44. In this response, he argues: "A cursory reading of Mr. Litton's Complaint, in a light most favorably to him, alleges a prima facie case of disparate treatment." Clerk's Papers at 55. He then lists six separate acts to show disparate treatment.

The record simply does not support Litton's claim that the trial court participated in an alleged falsehood. If anything, the record demonstrates that Litton did not present well-defined claims, appearing to reframe his claims at different points in the litigation. In any case, Litton's now characterized claims of gender discrimination and hostile work environment do not stand up to scrutiny.

As to the gender discrimination claim, the complaint contains no allegations or evidence to support a claim for gender discrimination. To establish a hostile work environment claim based on gender discrimination or harassment, an employee must prove the following: (1) the action was unwelcome, (2) the action was because of gender, (3) the action affected the terms or conditions of employment, and (4) the action is imputed to the employer. *Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 406-08, 693 P.2d 708 (1985). The employee's gender must be a motivating factor in the employer's treatment in order for a hostile work environment to exist. *Coville v. Cobarc Servs., Inc.,* 73 Wn. App. 433, 438, 869 P.2d 1103 (1994). Litton's pleadings do not support such a claim.

As to his claim of a hostile work environment, even assuming Litton made a prima facie

showing, the record shows that the District presented ample evidence to support its reasons for terminating Litton.[2] Litton has completely failed to show that such reasons were a pretext for discriminatory behavior.

> To establish a claim for a hostile work environment, a plaintiff must file the claim within the applicable statute of limitations and must prove that harassment was (1) unwelcome; (2) because she is a member of a protected class; (3) affected the terms and conditions of her employment; and (4) imputable to her employer. *Domingo v. Boeing Employees' Credit Union,* 124 Wn. App. 71, 84, 98 P.3d 1222 (2004). To satisfy the third element, the harassment must be sufficiently pervasive so as to alter her employment conditions. *Washington v. Boeing,* 105 Wn. App. 1, 10, 19 P.3d 1041 (2000). It is not sufficient that the conduct is merely offensive. *Adams v. Able Bldg. Supply, Inc.,* 114 Wn. App. 291, 296, 57 P.3d 280 (2002).

Clarke v. State Attorney Gen.'s Office, 133 Wn. App. 767, 785, 138 P.3d 144 (2006). Litton simply fails to show with competent evidence that he suffered harassment because of his race and that such harassment affected the terms and conditions of his employment. The District met its burden of showing that his own misconduct led to his termination not his race. Litton failed to overcome that evidence.

V. Outrage

Litton assigns error to the trial court's dismissal of his outrage claim but his brief contains no argument about it and, as such, we do not consider it. RAP 10.3(a)(6); *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991) ("In the absence of argument and citation to authority, an issue raised on appeal will not be considered."); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned arguments is insufficient to merit judicial consideration.").

[2] This evidence included an Employment Security Department decision finding that Litton's termination resulted from his own misconduct.

VI. Attorney Fees

The District requests an award of attorney fees and costs under RAP 18.9 as a sanction for filing a frivolous appeal. As it is the prevailing party, we award costs, including those incurred in providing supplemental clerk's papers, to the District. We deny its request for attorney fees.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Houghton, J.P.T.

Bridgewater, J.