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Commonwealth Of Kentucky

Court Of Appeals

NO. 97-CA-1130-MR

GILDA HILL — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 95-CI-90073

GATEWAY REGIONAL HEALTH SYSTEM, INC., D/B/A MARY CHILES HOSPITAL, and JEFF BUCKLEY — APPELLEES

OPINION AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

* * * * * * *

BEFORE: ABRAMSON, BUCKINGHAM, and KNOX, Judges.

ABRAMSON, JUDGE: Gilda Hill ("Hill"), a former director of nursing at Mary Chiles Hospital in Mt. Sterling, Kentucky, appeals from an April 11, 1997, order of Montgomery Circuit Court dismissing her complaint against the defendants/appellees, Gateway Regional Health System, Inc. ("Gateway"), the corporation which operates Mary Chiles Hospital, and Jeff Buckley

("Buckley"), the hospital's chief executive officer. Hill maintains that Buckley, her former supervisor, and Gateway, through Buckley, subjected her to unlawful employment discrimination, in violation of the Kentucky Civil Rights Act, KRS 344.010 et seq., by creating a sexually hostile and offensive workplace. The trial court granted summary judgment for Gateway apparently on the ground that the acts about which Hill complains could not reasonably be construed as amounting to harassment or discrimination. It also dismissed Hill's complaint against Buckley individually, ruling that KRS Chapter 344 does not provide a cause of action against non-employer individuals. Given Hill's allegations and proffers of evidence and the state of the law with respect to hostile environment claims, we cannot conclude that Hill's allegations are insufficient to establish a hostile work environment and that Gateway was entitled to judgment as a matter of law. Moreover, the recent United States Supreme Court decisions in Faragher v. City of Boca Raton, 1998 WL 336322 (June 26, 1998) and Burlington Industries v. Ellerth, 1998 WL 336326 (June 26, 1998) refute Gateway's claim that it cannot possibly be liable for Buckley's harassing acts, if any, because he was acting beyond the scope of his employment. Thus we reverse the judgment as to Gateway and remand for further proceedings. As to Buckley, the trial court's dismissal comports with applicable law and we affirm.

In reviewing a grant of summary judgment, this Court must consider the facts in the light most favorable to the non-moving party. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Conscious of this requirement, we consider the salient facts giving rise to Hill's complaint to determine whether Gateway has established its right to judgment "with such clarity that there is no room left for controversy." 807 S.W.2d at 482.

Background Facts and Proceedings in the Case

Hill began working for Mary Chiles Hospital in 1980 as a nurse in the extended care facility. She enjoyed her work and performed well enough to receive a number of promotions. By July 1993, when Jeff Buckley became the hospital's chief executive officer, Hill had advanced to the position of director of nursing. She was responsible, among other things, for hiring and supervising the hospital's nursing staff.

The conduct about which Hill complains began shortly after Buckley arrived.

> (1)In July 1993, he told Hill that he always hired "pretty, young nurses to help recruit young physicians." When Buckley sensed from her expression that Hill disapproved of his comment, he remarked, "I know you don't want to hear it . . . but that's the way it is in the real world." On that same day, when Hill expressed some concern about a new supervisor who had modeled lingerie at work, Buckley stated, "If there is any lingerie modeled, it will be done in the administrative area" (his offices).

(2)On August 2, 1993, Rita Fugate reported to Hill that Buckley had told her that she would have more success on a recruiting trip for doctors if she "brought a young, attractive woman with her." Buckley suggested Ms. Fugate take a specific hospital employee with her for that purpose. On that same day, Buckley told Hill that she needed to hire an operating room supervisor who was a "tall, thin, blond with big breasts" because "these type of women would stroke physicians."

(3)In the winter of 1993, after a meeting with emergency room staff, Buckley personally related to Hill how attractive he thought one of the nurses, Christy Miller, looked in her jeans.

(4)On March 3, 1994, during a meeting between Hill and Buckley to discuss hospital matters, Buckley revealed to her that he was having an extramarital affair. He provided very explicit details about this affair, including the physical fulfillment which it provided him. He also mentioned marital problems caused by his affair including his difficulty in being sexually responsive to his wife.

(5)In April 1994, several employees, including Hill, were having dinner after attending a convention when Buckley initiated a conversation about The Bridges of Madison County, a book about an affair between a photographer and a housewife. He asked each woman at the table what she would do in similar circumstances and discussed the book for one and one-half to two hours.

(6)In April 1994, Buckley told Hill again how attractive he found Christy Miller and stated that she had "the most gorgeous blue eyes he had ever seen."

(7)On July 23, 1994, Hill was contacted at home by Robert Bashford, the House Supervisor at the hospital, and was advised that one of the floor nurses was having a private meeting with Buckley and had deserted her patients for approximately 45 minutes. This nurse was

the woman with whom Buckley was reputed to be having an affair.

(8)In the spring or summer of 1994, during a dance held at the Mount Sterling Country Club, Buckley danced the entire evening with the nurse while Hill spent most of the evening sitting with Buckley's wife, an experience which made Hill extremely uncomfortable.

(9)On August 1, 1994, Hill attended a masters degree program in Minnesota. Buckley told her before she left that there would be "pairing off" at the training, and the first thing he asked her about the program upon her return was whether there had been any "pairing off."

(10)On August 8 or 9, 1994, Mitzi Erway came to Hill and told her that Buckley had said, in the presence of Berna Ross (the head of the Human Resources Department) and Erway, that the hospital should hire "young, tall, thin attractive women." Later in the afternoon, Ross came to Hill and related the same information. Both women indicated that they were upset by Buckley's remarks.

(11)Buckley kept an open copy of the swimsuit edition of Sports Illustrated magazine in his office. It was lying on his desk where people from outside the hospital, as well as employees, could see it.

(12)Hill's secretary reported to her that an employee who worked in the business office had said that she (the employee) had attended a meeting at a restaurant which Buckley also attended. The entire evening Buckley had stroked the employee's leg under the table and everyone at the meeting allegedly knew what was happening. Later that evening, Buckley went to the employee's office and asked her if he could spend the night with her, because his wife's relatives were coming to visit.

These incidents occurred between Buckley's arrival in July 1993 and the beginning of August 1994. Hill claims that by the summer of 1994 she had grown despondent in her job, had withdrawn from her co-workers, had ceased to contribute at staff meetings, and had resorted to avoiding Buckley whenever possible. Although she had spoken about the situation with friends, including the head of the Human Resources Department at the hospital and a physician-member of Gateway's board of directors, she was unaware of any official hospital procedure for making discrimination complaints, and she feared retaliation if she took her concerns directly to the board. Her depression over this impasse became so severe that she sought medical attention from her family physician.

In early August 1994, two of Hill's colleagues at the hospital told her that they had heard Buckley reiterate his plan to hire young, attractive nurses. Not long before, Buckley had, in fact, after virtually no consultation with Hill, hired a new operating room supervisor who answered that description. Convinced that the sex-charged atmosphere at the hospital would not abate under Buckley and that she could not and should not have to adjust to it, at the end of August 1994 Hill resigned. Her severance agreement required that she wait at least six months before discussing her employment at Mary Chiles Hospital with anyone. She filed the instant complaint in August 1995.

As noted, the trial court dismissed Hill's complaint against Buckley individually on the ground that KRS Chapter 344 does not provide a cause of action against individual employees. Although no rationale was stated for dismissing Hill's complaint against Gateway, the trial court apparently concluded that Hill's allegations, if proved, would not entitle her to relief. This Court reviews these determinations de novo. With respect to the dismissal of Buckley, the issue before us is whether the statute was correctly interpreted. See, e.g., Pari-Mutual Clerks' Local 541 v. Kentucky Jockey Club, Ky., 551 S.W.2d 801 (1977). As for the dismissal of Hill's claim against Gateway, we consider whether "as a matter of law, it appears that it would be impossible for [Hill] to produce evidence at the trial warranting a judgment in [her] favor." Steelvest, 807 S.W.2d at 480.

Sex Discrimination Effected by Means of a Hostile Work Environment

KRS Chapter 344, the Kentucky Civil Rights Act, seeks to minimize invidious discrimination in the Commonwealth by making such discrimination unlawful in housing, education, employment, and other fundamental transactions. Of particular relevance to this case, KRS 344.040 provides in pertinent part:

> It is an unlawful practice for an employer:
> (1) . . . to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's . . . sex . . . ; or
> (2) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an

> individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's . . . sex . . . .

A principal purpose of the Civil Rights Act is "to provide for execution within the state of the policies embodied in the federal [anti-discrimination statutes]." KRS 344.020(1)(a). Indeed, KRS 344.040, quoted above, reiterates language from Title VII of the federal Civil Rights Act, and our Supreme Court has held that federal court decisions construing the federal law should serve as guides for the interpretation of our state anti-discrimination law. Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814 (1992). In Meyers our Supreme Court adopted the standard for sex discrimination by virtue of a hostile work environment first articulated by the United States Supreme Court in Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). Because our Supreme Court has not had occasion to revisit this issue, our analysis begins with a consideration of the substantive law developed by the federal courts.

Hill and Gateway both rely on Meritor Savings Bank v. Vinson, supra, and Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 292 (1993), in framing their arguments. In Meritor Savings, the Supreme Court first recognized a cause of action under Title VII for "hostile environment" sexual harassment. Harassment, the Court noted, includes

> "'[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.' . . . [S]uch sexual misconduct constitutes prohibited 'sexual harassment,' whether or not it is directly linked to the grant or denial of an economic quid pro quo, where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'"

477 U.S. at 65, 91 L. Ed. 2d at 58-59 (quoting from the Equal Employment Opportunity Commission Guidelines at 29 CFR § 104.11(a)(1985)). For such hostile environment harassment to be actionable, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" 477 U.S. at 67, 91 L. Ed. 2d at 60.

The Supreme Court attempted to elaborate on this "sufficiently severe or pervasive" standard of harm in Harris v. Forklift Systems, Inc.. The Court granted certiorari in that case to resolve a conflict in the federal circuits as to whether it was necessary to prove a serious effect on the plaintiff's psychological well-being or other actual injury before a hostile environment claim would be actionable. Justice Sandra Day O'Connor, writing for the Court, stated that the Meritor Savings standard

> . . . takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. . . . Conduct that is not severe or pervasive enough to create an objectively hostile or abusive

> work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.
>
> . . . A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. . . .

510 U.S. at 21-22, 126 L. Ed. 2d at 302.

Adopting a totality of the circumstances approach, the Harris Court offered a non-exhaustive list of factors to be considered:

> This is not, and by its nature cannot be, a mathematically precise test. . . . [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

510 U.S. at 22-23, 126 L. Ed. 2d at 302-03.

Given Justice Scalia's concurrence in Harris, where he characterized the statutory language at issue as so "inherently vague" as to defy a clear standard of harm, it is not surprising

that the federal courts have struggled to apply Meritor Savings and Harris. "Drawing the line is not always easy," the United States Court of Appeals for the Seventh Circuit has said:

> On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. . . . On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers. . . . It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other. . . .

Baskerville v. Culligan Intern. Co., 50 F.3d 428, 430-31 (7th Cir. 1995).

In Baskerville, the offending sales manager called Baskerville a pretty girl, made grunting noises when she entered the room, made suggestive comments about the effect she had on him, talked about losing control around pretty girls and suggested that such girls should run around naked when a certain announcement was broadcast over the public address system. Other conduct of a similar nature occurring over a seven-month period led Judge Posner of the Seventh Circuit to note that the man's repartee "has the sexual charge of an Abbott and Costello movie" and his offensive gestures "complete the impression of a man whose sense of humor took final shape in adolescence." 50 F.3d at 431. With this view of the offender's actions, the Seventh Circuit reversed a judgment in favor of Baskerville on two bases:

no reasonable jury could find a hostile working environment and the company took "all reasonable steps" to protect Baskerville once she complained. Id.

Adopting the Baskerville observation that Title VII "is not designed to purge the workplace of vulgarity," the Sixth Circuit also reversed a judgment entered in favor of the employee following a jury trial in Black v. Zaring Homes, Inc., 104 F.3d 822, 826 (6th Cir. 1997). Black, a land acquisition manager for a real estate development company, endured meetings regarding land acquisitions in which one man, taking a pastry from a plate, looked at her while noting his preference for "sticky buns" and another insisted on calling land adjacent to a Hooters restaurant "Titsville" or "Twin Peaks." Other cited incidents included the men's fixation on the name of a landowner which was pronounced "bosom," a suggestion that Black had been dancing on the tables at a biker bar and a comment about an uncooperative female county official to the effect "Just get the broad to sign it." Black was also told in a private meeting with her supervisor that she was "paid great money for a woman." 104 F.3d at 824. After considering the totality of the circumstances in the four-month period between Black's arrival and her dismissal, the Sixth Circuit concluded that the environment was "merely offensive." 104 F.3d at 826.

Finally, Gateway relies on Stacy v. Shoney's Incorporated, 955 F.Supp. 751 (E.D. Ky. 1997), a decision

granting summary judgment in favor of the employer. In that case, Stacy, a married hostess/server at a restaurant, complained about the conduct of her supervisor over a one-year period. The supervisor made constant comments about Stacy's appearance and his appreciation of her attractiveness, including his willingness to move in with her. On several occasions, when she was not at work, he would telephone to say he missed her, and when she was at work he made "ssshh" sounds when she walked by him. Finally the supervisor approached Stacy, touched his fist to her breast and slid her ink pen up and down in her breast pocket while commenting that he liked the pen. When Stacy immediately reported this last incident, the corporation took prompt remedial action but Stacy resigned. The district court noted that "[w]hether the conduct complained of rises to the level sufficient to create a hostile work environment is a legal question that a court may address on summary judgment motion." 955 F.Supp. at 754. After stating the operative definition for a hostile environment, the court considered the specific conduct at issue in light of the federal circuit and district court cases (including particularly Baskerville and Black) before concluding that the supervisor's conduct "while immature, inappropriate, and boorish, does not constitute offensive conduct actionable as harassment." Id.

The most recent pronouncement on hostile environment from the United States Supreme Court reiterates the Meritor Savings standard as further developed in Harris and notes:

> Most recently, we explained that Title VII does not prohibit "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." Oncale [v. Sundowner Offshore Services, Inc.], 523 U.S. . . . . A recurring point in these opinions is that "simple teasing," . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment."
>
> These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." . . . Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." . . . We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view.

Faragher v. City of Boca Raton, supra, ____ U.S. at ____. Thus after over a decade of evolution, the hostile environment standard can be more easily described but it still contains few, if any, precise elements.

Gateway defends the summary judgment by insisting that Buckley's conduct did not approach the offensiveness of the conduct found to be legally insufficient to produce a hostile environment in Baskerville, Black and Stacy. In particular, Gateway notes that none of Buckley's comments or behavior was

directed at, or was about, Hill personally. If that simple limitation were part of the accepted legal parameters of a hostile environment claim, we would have no qualms about Gateway's entitlement to judgment as a matter of law. However, in Black the Sixth Circuit acknowledged that this factor is not a necessary prerequisite:

> While we emphasize that sex-based comments need not be directed at a plaintiff in order to constitute conduct violating Title VII, we note that in this case most of the comments were not directed at plaintiff; this fact contributes to our conclusion that the conduct here was not severe enough to create an objectively hostile environment. See Cf. Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 541 (1st Cir. 1995) (finding that plaintiffs' allegations were not so severe as to create an objectively hostile educational environment under Title IX, in part because the sexual comments were not directed at the plaintiffs), cert. denied, ____ U.S. ____, 116 S. Ct. 1044, 134 L. Ed. 2d 191 (1996).

104 F.3d at 826. Thus while relevant to the severity of the alleged harassment, the objectionable conduct need not be directed to the plaintiff in order to be actionable. Similarly, vulgar or sexually offensive language or gestures is not a prerequisite. The Meritor Savings definition encompasses "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 477 U.S. at 65, 91 L. Ed. 2d at 58. Vulgarity and offensive are considerations but need not be present to constitute "conduct of a sexual nature."

Ultimately it is the Kentucky Supreme Court's decision in Meyers which requires a reversal of the summary judgment granted to Gateway. In Meyers the specific objectionable conduct was not addressed in great detail, but was summarized as follows:

> It would unduly burden this Opinion to outline all of the evidence in this record which supports the inference that the employer engaged in abusive and intimidating conduct of a sexual nature, and the finding of harassment of a severe or pervasive nature causing damages as awarded. It suffices to summarize that after Reynolds and his company (Chapman) acquired the company where Meyers was employed in February 1983, and continuing through her discharge in April 1985, Reynolds routinely conducted sales meetings where Meyers was the only woman during which he used language loaded with obscenity and sexual innuendo, and included embarrassing comments and terminology addressed directly to Meyers. Further, on several occasions Meyers was called to Reynolds' office in West Virginia where conversations took place suggesting that women in general, and Meyers in particular, were unfit for the work. Finally, there was testimony supporting the inference that Reynolds' sexually demeaning attitude towards women pervaded the whole sales operation, in the form of gender-based discrimination in assignments and conversation with other employees on the job reporting Reynolds' hostility towards women.

840 S.W.2d at 822-23.

This conduct is plainly more egregious than the conduct alleged by Hill. However, it is not a quantitative or qualitative comparison with Meyers that drives our conclusion, but rather the Supreme Court's directive in that case on the nature of the inquiry in a hostile environment case. After a jury found for Meyers on her sexual harassment claim and awarded

her damages for mental and emotional injuries "resulting from a sexually hostile and offensive working environment," the employer argued that our Supreme Court (which took the case on this Court's Motion to Transfer) should review the determination of hostile work environment de novo because it was a mixed question of law and fact. The Supreme Court rejected this argument:

> Deciding whether the evidence presented proves misconduct "severe or pervasive" is not a question of law but a question of fact, albeit a question of ultimate fact. It is similar in nature to whether damages are excessive. . . .whether negligence is gross . . . .and to other complex issues with an interpretive component such as whether the design of a product is defective or professional negligence has occurred.
>
> In reviewing this issue of evidential sufficiency the appellate court must respect the opinion of the trial judge who heard the evidence. It is significantly more difficult to overrule such a finding, sustained by the trial judge, than it would be to point out that some simple fact, an element of proof which need not be evaluated, is missing from the proof. . . . We agree that deciding whether evidence of sexual harassment rises to the level of "severe or pervasive" contains an interpretive component. But we do not agree that this means we should substitute our judgment on the issue for that of the jury and the trial judge. The interpretive component does not change basic character from a question of fact to a question of law.

840 S.W.2d at 821-22. (Emphasis supplied.)

Thus in Kentucky the determination of whether conduct is sufficiently "severe or pervasive" to alter the terms of employment and create an abusive environment is one of "ultimate

fact" to be made by the fact-finder. Cf. Stacy, supra. While in federal courts a questionable case can be disposed of as a matter of law, in Kentucky, under Meyers, the court must allow a colorable claim to be heard by the jury. This is not to say that hostile environment claims can never be decided on a motion for summary judgment, but Meyers, coupled with the stringent summary judgment standard stated in Steelvest, requires the conclusion that in Kentucky only those cases where the conduct is (1) clearly infrequent and isolated and (2) patently "merely offensive" can result in summary judgment for the employer for failure to prove a hostile environment.[1] This case does not fit that description.

Hill claims that Buckley's preoccupation with sexual matters was virtually constant and came to pervade the hospital's work environment. She has offered evidence of at least twelve incidents over a thirteen-month period that led her to view the situation as intolerable and to avoid encounters with Buckley because of his frequent sexual references. Other employees, Hill maintains, also noted this change in the hospital's atmosphere, including one co-worker who complained as she came from a meeting

[1]We do not purport to state that there are no other circumstances under which summary judgment can properly be granted. Even where conduct is sufficiently severe or pervasive to produce a hostile environment, summary judgment could still be appropriate where the employer establishes the affirmative defense discussed infra or the evidence establishes that the plaintiff did not subjectively perceive the environment as hostile. Harris, supra, 510 U.S. at ____, 126 L. Ed. 2d at 302.

with Buckley, "How come every time I go down there we have to talk about sex."

Buckley's alleged sex-related conduct was not infrequent or isolated, and it cannot be dismissed as "merely offensive." Aspects of it, such as Buckley's commentary on the appearance of certain women and his insistence on keeping an open Sports Illustrated swimsuit issue on his desk, might be characterized as immature and boorish. Even Buckley's alleged nosiness about his co-workers sexual attitudes, as shown by the Bridges of Madison County episode and his remarks to Hill about "pairing up" at her University of Minnesota class, could be regarded as indicating merely a woeful lack of sensitivity. But other conduct alleged by Hill is more troubling. Buckley's decision to subject Hill to a graphic description of his extramarital affair and certain intimate details of his married life arguably moves the case much closer to the hostile environment standard. A reasonable woman could find such conduct so offensive and repugnant that it would affect the conditions of her employment. Also, the allegations that Buckley on more than one occasion advocated hiring women who met certain physical criteria create a special concern in light of the fact that Hill was responsible for hiring nurses and so, presumably, would have been expected either to participate in, or at least acquiesce in, his personal hiring agenda. On this last point, it appears that Buckley did in fact hire, without consulting Hill, a young,

attractive operating room nurse who met his criteria. At this stage of the case, Buckley's alleged conduct on this score simply cannot be characterized as "merely offensive."

In summary, although obviously there is another side to this case, and although a jury may ultimately reject Hill's contention that she was subjected to a sexually hostile work environment, she has alleged and offered some proof of facts which, in their totality and interpreted favorably to her, raise genuine issues about the pervasiveness and severity of Buckley's misconduct. Under the Meyers directive regarding jury resolution of such issues, and under the Steelvest standard for summary judgment, we are persuaded that Hill is entitled to present her proof to a jury. The trial court erred by denying her that opportunity.

Gateway's Liability for Buckley's Conduct

Gateway further argues that summary judgment was proper because it cannot be liable for acts or conduct of an employee which was unauthorized and beyond the scope of his employment. Gateway cites Kentucky agency law in reliance on the United States Supreme Court's statement in Meritor Savings that employee liability for purposes of federal sexual harassment claims should be determined under common law principles of agency. The United

States Supreme Court re-examined this issue in Faragher and Burlington Industries, supra, and concluded that "a uniform and predictable standard must be established as a matter of federal law." Burlington Industries, supra, ____ U.S. at ____. After an exhaustive discussion of agency principles and consideration of the objectives of the federal anti-discrimination statute, the Supreme Court concluded that supervisors could subject their employers to liability under the following circumstances:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative

> defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Faragher, ____ U.S. at ____; Burlington Industries, ____ U.S. at ____. (This passage appears verbatim in both decisions.)

Buckley was Hill's supervisor and thus these recent decisions are applicable.[2] Because no tangible employment action is involved in this case, Gateway is entitled to pursue the affirmative defense which was raised in the pleadings and has now been more precisely defined by the Supreme Court. The factors relevant to this defense were not fully developed in the context of the summary judgment motion. At trial on remand, if a jury finds that Buckley created a hostile environment, Gateway must prove both factors by a preponderance of the evidence in order to qualify for the affirmative defense and avoid liability.

Buckley's Individual Liability for His Conduct

Finally, we affirm the dismissal of Hill's complaint against Buckley individually. The federal anti-discrimination statutes and KRS Chapter 344 are designed to protect workers from invidious employment discrimination, not to create a new field of tort law. As Hill acknowledges, the majority of federal courts which have addressed this issue have concluded that the federal

[2]We find no reason, given our Supreme Court's statement in Meyers, to conclude that Kentucky will not follow the vicarious liability standard stated in Faragher and Burlington Industries.

law in this area provides only for employer liability and does not create a cause of action against individual employees. Wathen v. General Electric Co., 115 F.3d 400 (6th Cir. 1997) (collecting cases). Hill's contrary arguments notwithstanding, we believe KRS Chapter 344 is similarly limited. KRS 344.040, on which Hill relies, makes it unlawful "for an employer" to engage in various discriminatory employment practices. Employment agencies and labor organizations are likewise charged with a duty to refrain from discrimination. KRS 344.050 and KRS 344.060. Nowhere in Chapter 344 has the General Assembly expressly provided for individual liability. Nevertheless, Hill argues that the statutory definition of "employer," which includes agents of the employer, and the broad purpose of the Act to protect workers' "interest in personal dignity and freedom from humiliation" (KRS 344.020), imply a legislative intent to provide a cause of action against individual harassers. We disagree.

In Wathen the Sixth Circuit addressed sexual harassment claims under Title VII and the Kentucky Civil Rights Act. Although that Court's construction of our state law is not binding, we find the opinion persuasive. First, the Wathen Court noted that the inclusion of the employer's "agents" within the statutory definition of employer is intended not to impose liability upon the individual agents, but to describe and limit the scope of the employer's vicarious liability. 115 F.3d at 406 citing Meritor Savings, 477 U.S. at 72. Second, the Sixth

Circuit noted that Title VII limits liability to employers with fifteen or more employees and that it was inconceivable that Congress intended to exclude small businesses but simultaneously allow individual liability. Third, the Wathen Court observed that the remedial provisions of Title VII, including reinstatement and back pay, are remedies available only to the employer and there are no statutory provisions providing for damages to be paid by individuals. Because the Kentucky statute closely parallels its federal counterpart and Kentucky courts have not addressed the issue of individual liability, the Wathen Court concluded that the substantive legal analysis under Title VII and the Kentucky Civil Rights Act should be identical. 115 F.3d at 403-04, n.5. We agree and conclude that, for the reasons stated in Wathen, Buckley is not subject to individual liability under KRS Chapter 344.

This conclusion does not preclude individual liability for workplace conduct but simply recognizes that traditional tort law must be the basis for those claims. See, e.g., Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61 (1996); Craft v. Rice, Ky., 671 S.W.2d 247 (1984). Where an individual harasser's conduct rises to the level of a recognized tort the victim of such workplace harassment is certainly entitled to a remedy. See, e.g., Hill v. J.J.B. Hilliard W.L. Lyons, Inc., Ky. App., 945 S.W.2d 948 (1996). We are simply not persuaded that KRS Chapter 344 was intended to provide a new set of standards for individual

liability in the workplace or to circumvent the ordinary evolution of tort law in this area.

For these reasons, we affirm in part and reverse in part the April 11, 1997, order of Montgomery Circuit Court and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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