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# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-000675-MR  
NO. 1997-CA-000965-MR CROSS-APPEAL

PHILIP MORRIS, INC.

APPELLANT/  
CROSS-APPELLEE

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ELLEN B. EWING, JUDGE  
ACTION NO. 94-CI-000921

MARY WILSON

APPELLEE/  
CROSS-APPELLANT

AND

NO. 1997-CA-001043-MR

PHILIP MORRIS, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ELLEN B. EWING, JUDGE  
ACTION NO. 94-CI-921

MARY WILSON

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, DYCHE, AND GARDNER, JUDGES.

GARDNER, JUDGE: Philip Morris, Incorporated D/B/A Philip Morris, USA (Philip Morris) appeals from a judgment of the Jefferson Circuit Court in favor of Mary Wilson (Wilson) on her claim of constructive discharge from employment. Wilson cross-appeals on the issue of whether the trial court properly denied her motion to amend the complaint to include a claim for lost wages. We affirm.

Wilson began her employment with Philip Morris in 1978, and was promoted to a supervisory position the following year. Wilson would later allege that beginning in 1986, Bob Webber (Webber), who became Wilson's superior, began making uninvited sexual comments and overtures and would touch Wilson in an inappropriate manner. Wilson stated on the record that Webber would place his finger in her ear, make sexual comments, blow in her ear, and rub her leg and thigh. Wilson apparently issued no complaint to either Webber or Philip Morris regarding Webber's alleged behavior.

In 1992, Wilson was transferred to a different section of Philip Morris referred to in the record as "Guardite." She would later allege that three employees in that section over whom she had supervisory authority began making a number of sexually explicit comments and threatening behaviors designed to intimidate her. The alleged comments are contained in the record and will not be restated herein.

Wilson subsequently reported her allegations of harassment to two of her supervisors, one of whom reported the matter to Philip Morris's affirmative action specialist. It appears that the employees of Wilson's section were then instructed on the elements of sexual harassment and advised to stop any such behavior.

It was alleged by Wilson that shortly thereafter, the three employees in question sought revenge against Wilson by engaging in work slowdowns, by doing the work improperly, and by complaining over routine requests. The alleged retaliatory conduct was again reported to a superior, as well as to the affirmative action specialist and the head of Philip Morris's human resources. The record is not clear as to what action, if any, was taken as a result of Wilson's complaints.

Wilson allegedly began experiencing symptoms of depression, and was hospitalized at Our Lady of Peace Hospital for approximately one week. Wilson also allegedly became suicidal, and also purchased a weapon and went to the home of one of the employees with thoughts of shooting him. In November 1993, Wilson stopped working at Philip Morris.<sup>1</sup> She sought and received both social security disability income and Philip Morris disability benefits.

Wilson subsequently filed the instant action in Jefferson Circuit Court against Philip Morris and three of Wilson's subordinates. She alleged therein that the subordinates subjected

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<sup>1</sup>Wilson maintains that she is no longer employed at Philip Morris. Philip Morris maintains that Wilson is on a leave of absence.

her to sexually offensive conduct which created a hostile work environment in violation of Kentucky Revised Statute (KRS) Chapter 344, and that Philip Morris failed to take appropriate remedial action. Wilson also sought damages for the tort of outrage. The claim of outrage and the claims against the three subordinates were dismissed by way of partial summary judgment. Prior to trial, Wilson's complaint was amended to include the claim of constructive discharge.

The matter proceeded to trial, where the jury found in favor of Philip Morris on Wilson's claim that Philip Morris created a hostile work environment,<sup>2</sup> and also found in favor of Philip Morris on Wilson's claim of quid pro quo sexual harassment.<sup>3</sup> On the question of whether Wilson was constructively discharged,<sup>4</sup> the jury found in Wilson's favor and awarded Wilson \$2,000,000 in

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<sup>2</sup>The instruction on the claim of hostile work environment required a finding that the three subordinates subjected Wilson to verbal or physical conduct of a sexual nature, and/or that Wilson's complaint to Philip Morris brought about a retaliatory work slowdown, that the conduct had the purpose or effect of unreasonably interfering with Wilson's work performance, that the conduct was severe and pervasive, that Wilson suffered psychologically, and that Philip Morris failed to take the proper remedial action.

<sup>3</sup>The instruction on the claim of sexual harassment required a finding that Webber subjected Wilson to verbal or physical conduct of a sexual nature, that he was Wilson's superior, that submission to the conduct was a term of Wilson's employment, that Webber assigned Wilson to a different department because she rejected his advances, and that the transfer was an adverse job action.

<sup>4</sup>The instruction on the claim of constructive discharge required a finding that Wilson resigned her employment at Philip Morris, and that at the time she left the employment, her working conditions were so intolerable as a result of sexual harassment or retaliation that a reasonable person would have felt compelled to resign.

damages. A judgment was entered reflecting the verdict, and this appeal followed.

Philip Morris now argues that the trial judge committed reversible error in denying its motion for a directed verdict on the issue of constructive discharge. Specifically, it maintains that Wilson improperly failed to state a claim for lost wages, that the verdict was contrary to the evidence, and the claim must fail as a matter of law in light of the jury's findings on the questions of hostile work environment and quid pro quo sexual harassment. Alternatively, Philip Morris argues that it is entitled to a new trial. As a basis for this contention, it offers a litany of supporting arguments addressing issues ranging from prejudicial evidentiary rulings to the alleged misconduct of Wilson's counsel. Wilson cross-appeals on the sole issue of whether the trial court erred in failing to allow her complaint to be amended to include a claim for lost wages. Having closely studied the issues presented, the facts, and the law, as well as having heard the oral arguments of counsel, we find no error and must affirm the judgment from which the parties appeal.

We will first address Philip Morris's contention that it was entitled to a directed verdict on the issue of constructive discharge. When either a directed verdict motion or a judgment notwithstanding (JNOV) motion is made, the trial court must consider the evidence in its strongest possible light in favor of the party against whom the motion is made and must give him or her the advantage of every fair and reasonable intendment that the evidence can justify. Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991). In reviewing the decision of a trial court regarding a

motion for a directed verdict, the reviewing court must also ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. Id.; Meyers v. Chapman Printing Co., Ky., 840 S.W.2d 814, 821 (1992). A directed verdict is appropriate if the only reasonable inference from the evidence fails to sustain the claim. Meyers v. Chapman Printing Co., 840 S.W.2d at 822, citing Horton v. Union Light, Heat and Power Co., Ky., 690 S.W.2d 382 (1985). See also Lovins v. Napier, 814 S.W.2d at 922.

Philip Morris maintains that it was entitled to a directed verdict because Wilson failed to make a claim for lost wages; because the verdict was contrary to the evidence; and, because the claim must fail as a matter of law in light of the jury's decision on the questions of hostile work environment and sexual harassment. On the question of lost wages, we are aware of no requirement arising from either state or federal case law or statutory law that an action alleging constructive discharge must be grounded on a claim of lost wages. It is our conclusion that the failure to claim lost wages merely results in a bar to the recovery of lost wages. Philip Morris relies on a single footnote in Knabe v. The Boury Corporation, 114 F.3d 407, 408 (3rd Cir. 1997), to support its assertion that a claim for lost wages is a necessary prerequisite to recovery under the theory of constructive discharge.<sup>5</sup> We do not agree that such a conclusion can be drawn

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<sup>5</sup>Footnote one states in relevant part that, "[Knabe's constructive discharge claim, as presented here, is not a separate ground for relief, but rather would factor into the damages (e.g., back pay) available to Knabe had she prevailed in proving Boury's liability for sexual harassment."

from Knabe. The footnote cited by Philip Morris merely stands for the proposition that a party cannot sustain a claim for constructive discharge under discrimination law unless there is a causal relation between the discrimination and the discharge. See generally Lindale v. Tokheim Corporation, 145 F.3d 953 (7th Cir. 1998).

As to Philip Morris's claim that the jury's verdict for Wilson on her constructive discharge claim was contrary to the evidence, we again are not persuaded. The basis for this claim of error is the contention that Wilson went on leave from her employment and did not resign. As such, Philip Morris maintains that Wilson could not have been discharged, constructively or otherwise, and cannot prevail on her claim as a matter of law. We must note that evidence exists in the record sufficient to support either party's argument on this issue. Philip Morris offered testimony that Wilson was merely on leave, while Wilson offered evidence that she had resigned. As the parties are well aware, the trial judge is in the best position to judge the weight and credibility of the witnesses (for purposes of determining whether the evidence supported submitting the matter to the jury), and similarly the jury's duty as finder of fact is inviolate. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). We cannot examine the facts de novo, and must conclude from our review of the record that the trial judge did not err in submitting the issue of resignation to the jury (see footnote 1). Accordingly, we find no error.

We are also not persuaded by Philip Morris's argument that Wilson's claim of constructive discharge must fail as a matter

of law in light of the jury's verdicts on the claims of hostile work environment and sexual harassment. Philip Morris argues that since neither a hostile work environment nor sexual harassment were proven, they could not serve as a basis for the jury's conclusion that Wilson was constructively discharged. We agree that a party cannot sustain a claim for constructive discharge under discrimination law unless there is a causal relation between the discrimination and the discharge. See generally Lindale v. Tokheim Corporation, supra.<sup>6</sup> Since neither a hostile work environment nor sexual harassment was found in the matter at bar, it would apparently follow that a claim of constructive discharge could not be maintained. However, a hostile work environment and sexual harassment are not the only bases upon which a claim of constructive discharge may be grounded. KRS 344.280 provides that retaliatory conduct is violative of Chapter 344, stating in relevant part that,

It shall be an unlawful practice for a person . . . (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. . . .

KRS 344.450 provides that any person injured by an act in violation of Chapter 344 may institute a civil cause of action to recover actual damages sustained. Thus, retaliatory conduct may form a basis for maintaining an action for constructive discharge.

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<sup>6</sup>Federal law which interprets Title VII is applicable to Chapter 344. Hall v. Transit Authority of Lexington-Fayette Urban County Government, Ky. App., 883 S.W.2d 884 (1994).

Instruction No. 4, which addressed constructive discharge, expressly included retaliatory conduct as a basis upon which the jury could have concluded that Wilson was constructively discharged, and there is sufficient evidence in the record to support the jury's conclusion in this regard. Wilson testified as to retaliation that occurred after she reported the allegedly harassing conduct of the second-shift Guardite employees, and this claim was supported, in whole or in part, by the testimony of Barbara Crockett and Dr. Daniel Garst. Again, while we cannot examine the facts de novo nor reach our own conclusion as to whether retaliatory conduct occurred, it is clear that ample evidence exists upon which the jury could have reasonably concluded that said conduct occurred. Since retaliatory conduct is violative of Chapter 344 and therefore is a proper basis for maintaining a claim of constructive discharge, we cannot conclude that Philip Morris was entitled to a directed verdict on this issue.

Alternatively, Philip Morris argues that it is entitled to a new trial. As a basis for this contention, it offers the following supporting arguments: 1) the jury's verdict was contrary to the evidence; 2) the verdict was contrary to the instructions and the law; 3) the trial court erred in its evidentiary rulings; 4) the trial court erred in allowing the introduction of medical records; 5) the trial court erred by excluding evidence which established alternative causation for any disability and depression suffered by Wilson; 6) the damages were excessive and were awarded under the influence of passion and/or prejudice; 7) Philip Morris was prejudiced by erroneous instruction No. 5; and, 8) Philip Morris was prejudiced by the misconduct of Wilson's attorney.

We must conclude that the first and second of these arguments (i.e., that the verdict was contrary to the evidence, the instructions, and the law) simply restate the arguments which we resolved above in favor of Wilson. On the question of whether the trial court erred in its evidentiary rulings, we also find no error. Philip Morris maintains that the court erred in allowing Wilson to admit evidence of thirteen consensual romantic relationships between Philip Morris employees. It argues that Wilson introduced this evidence for the improper purpose of causing the jury to infer that unlawful harassment and/or sexual discrimination resulted from the relationships. It further argues that even if preferences were given to employees based on their participation in consensual romantic relationships, no discrimination under Title VII and KRS Chapter 344 could have resulted because the preferences would have adversely impacted both male and female employees. Having closely examined Philip Morris's contention, we believe this argument is moot in light of the fact that the jury returned verdicts in favor of Philip Morris on Wilson's claims of a hostile work environment and sexual harassment. If any error occurred in the admission of the evidence at issue, it was proven to be harmless since the jury found in favor of Philip Morris on these issues. CR 61.01; Callis v. Owensboro-Ashland Company, Ky. App., 551 S.W.2d 806 (1977).

Philip Morris next argues that it is entitled to a new trial because the trial court erred in allowing Wilson to admit into evidence medical records containing opinions. It notes that Wilson could not call her psychiatrists or psychologists to testify at trial based on her failure to comply with a pretrial order, but

that she nevertheless was allowed to offer their medical records into evidence. As such, Philip Morris maintains that Wilson was allowed to submit expert opinion without subjecting those experts to cross-examination.

Philip Morris relies on Young v. J. B. Hunt Transportation, Inc., Ky., 781 S.W.2d 503 (1989), which held in relevant part that voluminous hospital records could not be admitted if a physician was not available to explain them because counsel would have been free to draw whatever conclusion he wished without fear of evidentiary contradiction. We believe that Young is distinguishable from the matter at bar for at least two reasons. First, it cannot be said that Wilson's medical records are properly described as voluminous, and the harm which the court sought to avoid in Young, (i.e., records too complex for the jury to study) therefore is not present. Second, and more important, Philip Morris's own treating physician, Dr. Daniel Garst (Garst), examined the medical records at issue and addressed them by way of deposition. As such, we find the instant facts distinguishable from those of Young, and accordingly find no error on this issue.

Philip Morris's fifth claim upon which it seeks a new trial is that the trial court erred by excluding evidence which established alternative causation for any depression and disability suffered by Wilson. It briefly argues that it should have been allowed to introduce evidence of Wilson's alleged tumultuous relationship with her daughter's boyfriend and to argue that the stress resulting from this relationship was a contributing factor to her depression and disability. The sole case relied upon for this contention is Hall v. Arnett, Ky. App., 709 S.W.2d 860 (1991).

Hall stands for the proposition that a party may be entitled to a new trial where the exclusion of evidence appears to have produced a result inconsistent with substantial justice. We cannot conclude that the exclusion of evidence relating to the alleged tumultuous relationship between Wilson and her daughter's boyfriend can reasonably be said to have produced a verdict inconsistent with substantial justice, and accordingly we find no error on this issue.

Philip Morris also argues that the damages were excessive and were awarded under the influence of passion and/or prejudice. This argument is a restatement of earlier arguments wherein Philip Morris maintained that the verdict was contrary to the evidence, and we again find no error.

Philip Morris's seventh basis for arguing that it is entitled to a new trial is that it was materially prejudiced by Instruction No. 5. That instruction provided that if the jury found for Wilson on the claim of hostile work environment and/or sexual harassment and/or constructive discharge, it was required to award her damages for humiliation, embarrassment and mental anguish not to exceed \$3,000,000. Philip Morris maintains that this instruction erroneously misled the jury to consider Wilson's constructive discharge claim as an independent claim. We have previously found that no error occurred when the jury returned a verdict in favor of Wilson on the constructive discharge claim even though it failed to find in her favor on the hostile work environment or sexual harassment claims. As such, we find no basis for tampering with the judgment on this issue.

The final argument offered by Philip Morris to support its claim that it is entitled to a new trial is that it was materially prejudiced by the misconduct of Wilson's attorney. It points to three instances where Wilson's counsel allegedly ignored the court's instructions at trial, and maintains that this alleged misconduct should result in the matter being remanded for a new trial. The three instances to which it directs our attention generally relate to alleged attempts by Wilson's counsel to ask a question of a witness when counsel had been instructed not to ask the question. Philip Morris does not, however, disclose what questions were asked or how the answers improperly influenced the jury. In a separate instance, Philip Morris complains that Wilson's counsel improperly began to play a videotape in his closing argument, but it does not reveal what the tape was offered to prove or why it was improper. Furthermore, it does not indicate if these alleged errors are preserved for appellate review, nor does it cite any case law or statutory law in support of its claim. We cannot conclude that the conduct complained of prejudiced the proceeding against Philip Morris, and as such find no error.

Finally, Wilson briefly argues that the trial court erred in denying her motion to amend her complaint to state a claim for lost wages. She notes that amendments to the pleadings are to be liberally allowed where no prejudice to the opposing party results, and seeks the opportunity to present her claim if a new trial is ordered for any reason proposed by Philip Morris. Wilson has not overcome the strong presumption that the trial court is correct in its rulings, City of Louisville v. Allen, Ky., 385 S.W.2d 179

(1964), and in any event the matter is moot in light of our conclusion that Philip Morris is not entitled to a new trial.

For the foregoing reasons, this Court affirms the judgment of the Jefferson Circuit Court.

COMBS, JUDGE, CONCURS AND FILES A SEPARATE OPINION.

COMBS, JUDGE CONCURRING: The majority decision underlines and reinforces the viability of a cause of action based upon retaliation perpetrated against an employee for having exercised his statutory right to pursue a claim pursuant to KRS 344. The critical issue is not the success or failure of the underlying action based on discrimination but rather the reality that retaliation is a distinct and separate offense arising from the same occurrences or transactions. The fact that it is separate in no way renders it a nullity - - especially in this case. I concur separately for the sake of emphasis as to this important point.

DYCHE, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

DYCHE, JUDGE, DISSENTING. I must respectfully dissent. While I find the behavior of the individuals involved herein disgusting and unacceptable, appellee has not established her entitlement to a judgment for constructive discharge.

The evidence in the record does not support a finding by the jury of retaliatory behavior by appellant. The record indicates that the actions taken by Philip Morris in response to her complaints, limited as they were due to the collective bargaining agreement, satisfied appellee. She refused lateral transfers which would have alleviated her uncomfortable situation or removed her from her tormentors.

It further appears that appellee engaged, at times, in less than wholesome behavior toward these same employees, using sexual terms and racial epithets. She should not be allowed to participate in such shenanigans, and then call "foul!" when others do.

The jury found no basis for her complaints of sexual harassment and retaliation; I cannot see how the same jury could find that she was subjected to an intolerable workplace, based upon retaliation. I would reverse the judgment.

BRIEF AND ORAL ARGUMENT FOR  
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