

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002550-MR

DORSEY FURR

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER, JUDGE
ACTION NO. 95-CI-000319

DEPARTMENT OF CORRECTIONS;
NORTHPOINT TRAINING CENTER;
DEWEY SOWDERS, individually and as
Warden of Northpoint Training Center;
DON SHEPHERD, individually and as
Unit Director of Northpoint Training
Center; TIM NAPIER, individually and
as Unit Director of Northpoint
Training Center; and E.L. SPARKMAN,
individually and as Warden of
Northpoint Training Center

APPELLEES

OPINION
AFFIRMING IN PART
AND

VACATING AND REMANDING IN PART

** ** * * * * *

BEFORE: COMBS, GARDNER, and KNOPF, Judges.

COMBS, JUDGE: The appellant, Dorsey Furr, appeals from a jury verdict in favor of the multiple Appellees. She also challenges the order of the Boyle Circuit Court granting summary judgment in favor of the Appellees on the issue of retaliation. Having

carefully considered the issues presented on appeal, we affirm in part and vacate and remand in part.

This appeal arises from an action filed by Furr on August 7, 1995, against the Appellees, alleging gender discrimination, sexual harassment, and retaliation in violation of KRS Chapter 344. From 1988 to 1996, Furr was employed as a correctional officer at Northpoint Training Center. She claimed that during her tenure at Northpoint, she was subjected to a sexually hostile work environment and that she was not promoted because of her gender. She also maintained that the Appellees took retaliatory action against her when she reported the discriminatory treatment to Warden Dewey Sowders.

The Appellees filed a motion for summary judgment on March 6, 1997. The court entered summary judgment in their favor as to Furr's claim of retaliation on May 20, 1997, finding no evidence of adverse or retaliatory action against Furr. The case proceeded to trial on the underlying issues of gender discrimination and sexual harassment, and the jury returned a verdict in favor of the Appellees. A judgment based upon the verdict dismissed Furr's complaint. This appeal followed.

The Appellees raise for the first time the issue of whether sovereign immunity barred Furr's claims against them since KRS Chapter 344 contains no express waiver of sovereign immunity. They rely upon the standard articulated by the Supreme Court of Kentucky in Withers v. University of Kentucky, KY., 939 S.W.2d 340 (1997), requiring a clear statement of intent by the General Assembly in order for waiver to be found. The Appellees

argue that there has been no express waiver of sovereign immunity with respect to claims brought under KRS Chapter 344.

The Department of Corrections (one of the Appellees) is a state agency, and any claim against it for monetary damages is precluded by Section 231 of the Kentucky Constitution unless waived by the General Assembly. "Where sovereign immunity exists by reason of the Constitution, the General Assembly may extend or limit waiver as it sees fit" Withers at 344. The Supreme Court has stated that sovereign immunity will be deemed waived by the General Assembly only when stated "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." Id. at 346 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 464-465, 53 L.Ed. 742 (1909)). While KRS Chapter 344 contains no express waiver of the shield of sovereign immunity, we conclude that an overwhelming implication of waiver can be found in the statutory text – thus complying with one of the two criteria of the Withers test.

KRS Chapter 344 prohibits employers from engaging in discriminatory practices and taking retaliatory action against employees for complaining of or reporting discrimination. KRS 344.030(2) defines "employer" in pertinent part as "a person who has eight (8) or more employees within the state" KRS 344.010(1) defines "person" as used KRS Chapter 344 to include "the state, any of its political or civil subdivisions or agencies." (Emphasis added). The very definition of "person" as adopted by our General Assembly specifically names the state as

an employer for purposes of KRS Chapter 344, thus effecting a waiver of sovereign immunity by "overwhelming implication." We hold, therefore, that Furr's claim was not barred by the doctrine of sovereign immunity.

The first issue which Furr raises on appeal is whether the court erred in granted summary judgment in favor of the Appellees on her claim of retaliation. She argues that there existed material issues of fact as to her claim of retaliation - issues which should have been resolved by the jury. Thus, she claims, it was improper for the court to grant summary judgment in favor of the Appellees.

In order to qualify for summary judgment, the movant must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. "The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used "when, as matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant." Id. at 483, citing Paintsville Hospital Co. V. Rose, Ky., 683 S.W.2d 255 (1985).

Pursuant to KRS 344.280(1), it is unlawful for an employer "to retaliate or discriminate in any manner" against a person who has exercised his rights under KRS Chapter 344. In order to establish a *prima facie* case of retaliation, the plaintiff must show: (1) that he was engaged in a protected activity, (2) that he was subjected to adverse treatment by his employer, and (3) that there was a causal connection between the activity engaged in and the employer's act. Upon a showing by the employer of a legitimate, non-retaliatory reason for his decision, the burden again shifts, and the plaintiff must then show that "but for" the protected activity, the adverse action would not have occurred. Kentucky Center for the Arts v. Handley, Ky. App., 827 S.W.2d 697 (1991).

In this case, the Appellees conceded that Furr had engaged in a protected activity by filing her internal complaint. Thus, Furr would have been required to establish the remaining two statutory criteria. After she filed her internal complaint, Furr alleged that the Appellees became hostile and physically abusive toward her; that she was stripped of her responsibilities; that she was scrutinized more closely than other employees; that the Appellees engaged in activity designed to make the inmates at Northpoint hostile towards her; and that, in general, the Appellees tried to make her work situation unbearable. The record contains an affidavit signed by Furr in which she details specific retaliatory actions by the Appellees.

Viewing the evidence in the light most favorable to Furr and resolving any doubts in her favor – as we must, we

cannot conclude that it would be impossible for her to prevail at trial on her claim of retaliation. Additionally, the record reveals that there are genuine issues of material fact that the jury should have resolved.

The next issue raised by Furr is whether the court erred in not granting her motion for a directed verdict. She argues that the Appellees failed to articulate a legitimate, non-discriminatory reason for not promoting her. Thus, she maintains that she was entitled to a directed verdict at the close of all the evidence. However, the record shows that the Appellees did, in fact, offer legitimate, non-discriminatory reasons for not promoting Furr. They introduced testimony and evidence as to how decisions concerning promotions were made and the factors which were considered – such as qualifications, performance, evaluations, and seniority. The Appellees introduced evidence that based only upon the above-mentioned factors, Furr had received a lower ranking than the employees who had been promoted over her. Since the Appellees offered legitimate, non-discriminatory reasons for not promoting Furr, the trial court did not err in denying Furr's motion for a directed verdict.

Furr also contends that the court erred in permitting the Appellees to call Mike Ethridge as a witness and to introduce documents that the Department of Corrections used for sexual harassment training. Ethridge, an employee of the Department of Corrections with the Training Division, testified as to the documents and lesson plans used in a training seminar on sexual harassment which had been conducted by the Department of

Corrections in 1991. The record shows that Furr cross-examined both Ethridge and other of the Appellees' witnesses extensively as to the whether they had received any training on the issue of sexual harassment as well as what subject matter comprised the training materials. Since Furr raised the issue of sexual harassment training, the court did not err in permitting the Appellees to introduce this evidence – even though Ethridge had not been listed originally as a witness. We find no error.

We have reviewed the remaining evidentiary issues raised by Furr on appeal, and we do not find that the court abused its discretion. Pursuant to KRE 403, the trial court may exclude relevant evidence if its probative value is outweighed by the danger of undue prejudice, if it tends to confuse the issues or to mislead the jury, or if it entails needless presentation of cumulative evidence. This decision is "a determination which rests largely in the discretion of the trial court" Transit Authority of River City v. Vinson, Ky. App., 703 S.W.2d 482 (1985); Faragher v. City of Boca Raton, 524 U.S. ____, 141 L. Ed. 662, 118 S. Ct. ____ (1998). We will not disturb a trial court's ruling to admit or exclude evidence "absent an abuse of discretion." Id. at 484. We have found no such abuse.

For the foregoing reasons, we vacate and remand the order of the court granting summary judgment in favor of the Appellees on Furr's claim of retaliation. We affirm the court's judgment based upon the jury's verdict in favor of the Appellees.

ALL CONCUR.

BRIEFS FOR APPELLANT:

BRIEF FOR APPELLEES:

Linda B. Sullivan
William C. Jacobs
Lexington, KY

Mark A. Sipek
Frankfort, KY