RENDERED: December 10, 1999; 2:00 p.m.
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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002168-MR

SHARLENE MURPHY APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM MCANULTY, JUDGE
ACTION NO. 96-CI-04671

BANK ONE, KENTUCKY, N A;
JOHN ZEIGER; AND
JEFFREY A. LIPPS APPELLEES

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Sharlene Murphy (Murphy) appeals from an order of the Jefferson Circuit Court entered August 19, 1998, which granted summary judgment in favor of Bank One, Kentucky, NA (the Bank), on her claim of sexual harassment. Murphy also appeals from orders of the trial court entered January 2, 1997, and September 15, 1997, which denied her motions to amend her complaint to include additional causes of action against both the Bank and its attorneys, John Zeiger (Zeiger) and Jeffrey Lipps (Lipps). We vacate the order of the trial court which granted summary judgment in favor of the Bank in this case and remand for further proceedings in accordance with this opinion.

SUMMARY JUDGMENT

Murphy began working in the Facilities Management area of the Bank in October 1995. Although she was originally under the supervision of Vivian Korphage (Korphage), she came under the supervision of William Gaunt (Gaunt) in early January 1996.

Shortly after she began working under Gaunt's supervision, she went into his office to discuss problems she was having with a co-worker. According to Murphy, at some point in time during their conversation he reached out and held her hand. She did not perceive Gaunt's conduct to be unreasonable at the time, and felt that he did it to be supportive of her. Murphy also admitted that she voluntarily hugged Gaunt in early January after he paid her a compliment.

According to Murphy's deposition testimony, Gaunt's conduct slowly changed from grandfatherly in nature to lecherous. At one point around the end of February 1996, Gaunt allegedly made comments to her about Korphage's sex life and told her that Korphage had slept her way to the top. Gaunt's behavior escalated towards the end of March 1996 when he kissed her on the lips for the first time. According to Murphy, by this time Gaunt had instituted a daily hug routine. It was during one of these daily hugs when he kissed her and told her that she was the best thing that happened to him and that he got the cream of the crop between her and another female co-worker. When she expressed discomfort with this conduct, he said that it was better for them to be kissing cousins as opposed to enemies. Murphy testified

that she did not equate Gaunt's behavior with sexual harassment until the first kissing incident at the end of March.

According to Murphy, Gaunt's behavior remained the same after the kissing incident. Besides the daily hug, she described inappropriate touching by Gaunt during these hugs, related sexually implicit conversation Gaunt directed at her, and several other incidents of kissing. Murphy also described conduct directed at her by Gaunt during a business trip to Columbus, Ohio. Murphy admitted that while she tried to avoid Gaunt in an effort to avoid the daily hug, she never refused his requests for hugs.

Murphy freely admitted at her deposition that she was aware of and had received copies of the Bank's policy on sexual harassment and the notice provisions thereunder. She also admitted that while she told two of her co-workers (a secretary and a maintenance man) about Gaunt's behavior, she did not file a formal complaint with anyone at the Bank until June 19, 1996. On that day, she first went to Korphage and told her about Gaunt's behavior. According to Murphy, Korphage told her that she had formerly been harassed by Gaunt and that in light of what Murphy was telling her she wished she would have handled the matter differently. Korphage urged her to go directly to Human Resources and report Gaunt's behavior.

Murphy followed Korphage's advice and met with Joyce Tingle (Tingle) in Human Resources the same day. Murphy told her about Gaunt's conduct. According to Tingle's deposition

testimony, the Bank immediately launched an investigation into Murphy's allegations.

It was during the course of the Bank's investigation that the details concerning Korphage's earlier problems with Gaunt came to light. It appears that in 1995 Korphage went to Carl Page (Page), who at the time was an executive vice-president with the Bank who had supervisory responsibility over the Human Resources department. Page was also an attorney. Korphage testified in her deposition that she began having problems with Gaunt in 1993, and related problems with Gaunt making inappropriate comments and gestures, trying to hold her hand, hovering over her, and staring at her breasts. Korphage dealt with the situation by trying to avoid contact with Gaunt. It appears that Korphage only reported Gaunt's activities to Page due to her concerns over a new supervisory position that was opening up at the Bank and her desire not to have to supervise Gaunt or have Gaunt supervise her. Korphage told Page that she did not want to file a formal complaint, did not want Gaunt confronted with her complaint, and did not want her name raised in any subsequent investigation. Korphage also told Page that she would refuse to cooperate with any investigation and that she did not want any adverse action taken against Gaunt.

Due to Korphage's complaint to him and her refusal to file a formal complaint, Page called Michael Luvisi (Luvisi), an outside attorney who had previously advised the Bank on employment issues, and asked him what the Bank should do in light of Korphage's allegations. Luvisi advised Page that given the

nature of Korphage's allegations and her refusal to cooperate with the Bank and proceed further against Gaunt, the Bank should inform Gaunt about the fact that allegations had been made, give him a copy of the Bank's sexual harassment policy, and inform him that the policy would be enforced due to the fact that the alleged comments were inappropriate. Luvisi sent a draft memorandum to Page which detailed Korphage's complaint and reluctance to pursue the matter and described the remedial action to be taken. Luvisi advised Page that this would be the proper course of action for the Bank to take.

It appears that the Bank followed Luvisi's recommended course of action. According to an affidavit, Gaunt's supervisor, Gilbert Darnell, discussed Korphage's complaint with Gaunt. Tingle testified that during the course of the Bank's investigation, Gaunt admitted that someone in the Bank had talked with him about lewd comments he was allegedly making but stated that he did not know who made the allegations at that time. At his deposition, Gaunt denied that Page discussed the matter with him, but no one ever delved into whether anyone at the Bank ever talked to him about Korphage's complaint. Page copied Luvisi's draft memo with Gaunt's name penciled into the blanks and forwarded a copy of it to Korphage. Page never forwarded the memo to Human Resources, but instead placed it in a file marked "Confidential" which was not discovered until Murphy filed her formal complaint.

Tingle testified that following an investigation, the Bank concluded that Gaunt violated the Bank's code of ethics,

particulary finding that he engaged in conduct unbecoming a bank officer. According to Tingle the Bank did not make any finding as to who was the instigator in this case because regardless of who started the conduct, it was Gaunt's responsibility as a bank officer to put an end to it. Tingle stated that it could not be proven that Gaunt violated the Bank's sexual harassment policy. However, Tingle did agree that Gaunt's behavior created a hostile environment.

At the end of the five-day investigation, Gaunt was informed that his employment was being terminated due to his failure to comply with the Bank's code of ethics. Gaunt was ultimately permitted to resign in lieu of termination.

At his deposition, Gaunt denied behaving inappropriately toward Korphage or Murphy. According to Gaunt, Murphy initiated the majority of the physical contact between them, including the hugging and kissing. Gaunt admitted initiating hugs on two or three occasions when Murphy performed her job especially well. Gaunt agreed with the Bank's reasoning that no matter who started the conduct he should have taken steps to stop it. However, he further testified that he did not believe that the Bank felt that he had engaged in sexual harassment.

Murphy filed a claim against the Bank in August 1998 seeking damages from the Bank for a sexually hostile work environment in violation of the Kentucky Civil Rights Act, infliction of extreme emotional distress, and retaliation. On October 24, 1997, the trial court entered an order granting

summary judgment in favor of the Bank on all claims except for Murphy's claim of sexual harassment. In its order, the trial court found that Murphy had shown that the Bank had reason to know of Gaunt's behavior due to Korphage's earlier complaint and stated "[t]he question for the jury to decide is whether, in light of the prior knowledge of Gaunt's conduct toward a female employee, Bank One was negligent in allowing the conduct to continue in that Plaintiff was affected. See Hirase-Doi v. US West Communication, 61 F.3d 777, 786 (10th Cir. 1995)."

Subsequent to the trial court's order of October 1997, the United States Supreme Court rendered its opinions in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed. 2d 633 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998). In both cases, the Court issued the following holding:

> An employer is subject to vicarious liability to a victimized employee for an actual 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 [citation omitted]. 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.

Ellerth, 524 U.S. at ____, 118 S.Ct. at 2270, 141 L.Ed. 2d at 655; Faragher, 524 U.S. at ____, 118 S.Ct. at 2292-2293, 141 L.Ed. 2d at 689.

Based on the ruling of the Court in Ellerth and Faragher, the Bank renewed its motion for summary judgment, arguing that its adoption and enforcement of an anti-sexual harassment policy and Murphy's failure to timely report Gaunt's conduct satisfied both prongs of the affirmative defense. On August 19, 1998, the trial court entered summary judgment in favor of the Bank.

Murphy contends that the trial court erred in granting summary judgment in favor of the Bank on her sexual harassment claims due to the existence of genuine issues of material fact. At the outset, we note that our "standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). Murphy contends on appeal that while the Bank may prevail at

trial based on jury instructions drafted to incorporate the affirmative defense established in Ellerth and Faragher, the issue of the reasonableness of the Bank's conduct should be resolved by a jury. We agree.

Murphy argues that a genuine issue of material fact exists as to the reasonableness of the Bank's conduct, especially in light of Korphage's earlier complaint regarding Gaunt's behavior. Murphy contends that because Gaunt's inappropriate conduct continued after Korphage's complaint, a jury question existed as to whether the Bank exercised reasonable care to protect against and/or correct sexual harassment. The Bank argues that it is entitled to summary judgement under Ellerth and Faragher because it was able to show that (a) Murphy failed to timely report Gaunt's conduct despite the fact that she had received copies of the Bank's policies on sexual harassment and its reporting requirements; and (b) the Bank took prompt action which resulted in Gaunt's forced resignation once Murphy brought Gaunt's behavior to its attention. The Bank would further have us find that the fact that it knew of Korphage's earlier complaint should not enter into our decision as to whether summary judgment was appropriate.

We disagree with the Bank's argument that Gaunt's prior conduct with Korphage has no bearing under the affirmative defense provided under Ellerth and Faragher. Under those cases, the question is whether the Bank exercised reasonable care. If the Bank had knowledge of Gaunt's propensity to subject his co-workers and supervisees to sexual harassment prior to the time

that Murphy filed a formal complaint, then "there is a genuine issue of material fact as to whether [the Bank's] remedial actions or lack thereof during the period prior to [Murphy's complaint] were appropriate or whether [the Bank] was negligent, either in allowing such conduct to continue or in failing to learn of such continued behavior in a timely fashion so that it could respond appropriately." Hirase-Doi, 61 F.3d at 786. If we accept the Bank's argument, then an employer who had knowledge that a supervisor had previously harassed other female employees who did not file formal complaints would not be liable for damages if upon the filing of a formal complaint of yet another female employee the employer finally acts to correct the situation. It is for the jury and not the trial court to decide whether the Bank acted reasonably after Korphage complained. While we are aware that Murphy may not succeed in her claim before the jury, summary judgement cannot be used to deprive her of her day in court simply because the trial court believes she cannot prevail.

The Bank's argument that its reliance on Luvisi's advice justifies summary judgment in this case is equally unappealing. In fact, whether or not the Bank acted reasonably in following Luvisi's advice and taking no further action against Gaunt after Korphage informed Page of his behavior goes to the disputed issue of material fact which we have already identified- namely whether the Bank "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Ellerth, 524

U.S. at ____, 118 S.Ct. at 2270, 141 L. Ed. 2d at 655; Faragher, 524 U.S. at ___, 118 S. Ct. at 2292-2293, 141 L. Ed. 2d at 689.

Finally, the Bank's assertion that Murphy's failure to immediately report Gaunt's conduct automatically satisfied the second prong of the Ellerth/Faragher defense is incorrect. While the holding of those cases indicates that "a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense," the standard once again is whether Murphy "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Id. (emphasis added.) While Murphy freely admits that she waited until June 1996 to report conduct which she believes became offensive in March 1996, if she is able to submit an explanation for her delay it is for the jury and not the trial court to decide whether her conduct in delaying was unreasonable.

AMENDMENT OF COMPLAINT

Shortly after meeting with Tingle, Murphy retained legal counsel. On July 15, 1996, counsel for Murphy sent the Bank a letter demanding payment of $250,000 to settle her claim. Murphy claims that this letter was sent in response to the Bank's request for a demand letter. Following issuance of the letter, counsel for Murphy met with Zeiger and Lipps on August 6, 1996, to discuss settlement of Murphy's claim. It appears that during the course of the meeting counsel for Murphy provided Zeiger and Lipps with a copy of Murphy's verified complaint and informed them that the complaint would be filed if a settlement could not

be reached. Murphy's complaint contained no cause of action under Title VII of the United States Code, and instead only stated a cause of action for sexual harassment under the Kentucky Civil Rights Act. It appears that the settlement negotiations were unsuccessful.

On August 9, 1996, the Bank filed a declaratory judgement action in the United States District Court for the Western District of Kentucky (the Federal Court) against Murphy. In the complaint, The Bank alleged that:

> [i]n light of Bank One's adequate and effective response once it had notice of Murphy's claims, Bank One is entitled to a declaratory judgment that it complied with all applicable Federal and Kentucky laws and has no liability to Murphy . . . for the unauthorized conduct of its former employee.

The Bank alleged that Gaunt began harassing Murphy in May 1996, that Murphy reported Gaunt's conduct on June 19, 1996, and that the Bank promptly investigated and forced Gaunt's resignation on June 28, 1996. Aside from requesting declaratory judgment, the Bank expressly disavowed any claim for attorney fees in conjunction with its claim. Immediately upon receipt of the Bank's complaint, Murphy filed her action with the trial court on the same day.

On August 28, 1996, the Bank filed a motion with the trial court seeking a stay of Murphy's action pending resolution of its federal action. In response to the Bank's motion, the trial court entered an order giving it an extension of time to file an answer to Murphy's complaint pending its order on the motion to stay.

On September 27, 1996, the trial court entered an order granting the stay, apparently on the ground that a stay was proper because the Bank filed its action first. However, the trial court stated that "[c]learly, [the Bank] chose to avail itself of the federal standard on summary judgment, which concedely is less demanding than that enunciated in Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

While her state court action was stayed and prior to the filing of the Bank's answer, Murphy filed a motion seeking leave to amend her complaint on November 6, 1996. Under the amended complaint Murphy added Zeiger and Lipps as defendants and alleged under a new Count III that the filing of the federal declaratory judgment action constituted retaliatory employment discrimination in violation of KRS 344.280. On January 2, 1997, the trial court entered an order denying Murphy's motion to amend her complaint to the extent that she sought to add the cause of action contained in Count III. Apparently the trial court construed Count III to be a cause of action against Zeiger and Lipps only, as it held:

> [D]efense counsel . . . are clearly not Plaintiff's employers . . . . If Plaintiff has any viable claim of retaliation regarding the filing of the Declaratory Judgment Complaint, it is against [the Bank], not the attorneys who filed the claim.

On the same day as she filed her motion to amend, Murphy also moved the trial court for an order lifting the stay of her complaint on the ground that the federal court had dismissed the Bank's declaratory judgment action. Attached to

Murphy's motion was a memorandum opinion and order entered by the federal court on November 1, 1996, in which the court used its discretion under 28 U.S.C. Sec. 2201 to dismiss the Bank's claim. The federal court found that Murphy's complaint contained no federal cause of action and held that the fact that she may eventually seek relief under Title VII did not entitle the Bank to rush to the courthouse for the purpose of fixing the trial forum. Specifically, the court stated:

> It would be unjust for [the Bank] to be allowed to select the forum for this lawsuit's adjudication based on the mere possibility Murphy might have eventually sued in federal court. The declaratory judgment device was never intended to be used in such a fashion. [Allstate Insurance Company **v.**] Mercier [913 F.2d 273 (6th Cir. 1990)] specifically disapproved of the sort of procedural fencing and "racing to the courthouse" we find in this case.

The trial court lifted its stay by order entered November 12, 1996, and the Bank filed its answer on November 17, 1996.

On August 7, 1997, Murphy once again sought leave to amend her complaint to include, among other things, a claim for retaliatory employment discrimination in violation of KRS 344.280 regarding the Bank's filing of the federal declaratory judgment action. However, unlike the previous motion to amend, Murphy did not seek leave to add Zeiger and Lipps as additional defendants. The trial court once against denied Murphy's motion, stating:

> The Court first addresses Count III. In part, the opposition is based on the language in an Order of this Court dated December 31, 1996. Said order concerned another motion to amend the Complaint in which plaintiff sought to add an allegation of retaliation against two attorneys for Bank One. In denying the motion as to that Count of the Complaint, the

> Court stated that "[i]f the Plaintiff has any viable claim of retaliation regarding the filing of the Declaratory Judgement Complaint, it is against Plaintiff's employer, Bank One, not the attorneys who filed the claim."
>
> Upon further reflection, the Court is not certain that this statement is correct. This conclusion is based on two reasons. First, the Court is mindful of the fact that the Plaintiff will not be able to introduce evidence of the Declaratory Judgment Complaint without offering the explanation that it occurred in response to settlement negotiations. It is fundamental law that a party may not introduce evidence at trial of offers to settle or compromise. Whitney v. Pennick, Ky., 136 S.W.2d 570 (1940); Elam v. Woolery, Ky., 258 S.W.2d 452 (1953). The Court cannot allow the charge of retaliation to circumvent an otherwise established rule of evidence.
>
> The second reason for the change in the Court's opinion is that the Court questions whether the actions of Defendant Bank One in exercising its legal right to seek a declaratory judgment may constitute "retaliation" under KRS Chapter 344. To so hold would effectively deny an employer its rightful access to the courts which is guaranteed by Section 14 of the Kentucky Constitution. The Court may deny a motion to amend a complaint when the proposed amendment fails to state a claim upon which relief can be granted. First National Bank of Cincinnati v. Hartmann, Ky. App., 747 S.W.2d 614, 616 (1988).

Murphy contends that the trial court improperly denied her motion to amend to include a cause of action under KRS 344.280, which provides in part:

> It shall be unlawful practice for a person, or for two (2) or more persons to conspire:
>
> (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[.]

For purposes of the Kentucky Civil Rights Act, "person" is defined as:

> one (1) or more individuals, labor organizations, joint apprenticeship committees, partnerships, ass
> corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees in bankruptcy, fiduciaries, receivers, or other legal or commercial entity; the state, any of its political or civil subdivisions or agencies.

On appeal, the standard of review for a trial court's denial of a motion to amend is abuse of discretion. Hamilton v. Commonwealth Transportation Cabinet, Division of Highways, Ky., 799 S.W.2d 39, 40 (1990). We agree with Murphy that the trial court abused its discretion in not allowing her to amend her complaint.

Pursuant to CR 15.01, "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served[.]" It is only when a plaintiff waits until after the defendant has responded to the original complaint that CR 15.10 requires the plaintiff to seek leave of the court to file an amended complaint. Here, at the time Murphy filed her initial motion to amend the complaint, the Bank had not yet filed a responsive pleading. Therefore, pursuant to CR 15.01, Murphy should be been permitted to file her first amended complaint as a matter of right.

In so holding, we realize that the Hartmann case cited by the trial court recognizes an exception to CR 15.01 when the amended complaint is merely an exercise in futility which would

justify denial of the right to amend once as a matter of right prior to the filing of a responsive pleading. Hartmann, 747 S.W.2d at 616. In Hartmann, when the plaintiff's original complaint was dismissed due to lack of jurisdiction, he was not permitted to file an amended complaint as a matter of right because he was unable to remedy the court's lack of jurisdiction under the terms of the amended complaint. In so ruling, the court states "[a]lthough amendments should be freely allowed, the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself." Id. This is clearly not a case where there is a fatal deficiency in the original complaint which is incapable of correction by amendment.

Nor do we believe that the cause of action set forth by Murphy under Count III of the first amended complaint is merely an exercise in futility. First, we have reviewed Count III of Murphy's first amended complaint and disagree with the trial court's finding that Murphy was attempting to allege a cause of action for violation of KRS 344.280 against Zeiger and Lipps alone. Nowhere in the language of Count III is the cause of action so limited. We also disagree with the trial court's reasoning in not allowing Murphy's cause of action to proceed against Zeiger and Lipps. As stated earlier, "person" as used in KRS 344.280(1) is defined to include individuals, and more specifically, legal representatives. Even if the trial court believes that Murphy cannot prevail against Zeiger and Lipps, she

is still entitled to amend her complaint to present every potential cause of action.

We also find that the trial court abused its discretion in regard to Murphy's second amended complaint against the Bank. First, we disagree with the trial court's holding that Murphy would be unable to produce evidence of the Bank's federal action without revealing that it was filed in response to the breakdown of settlement negotiations. While the trial court correctly cites Whitney and Elam for the proposition that evidence of offers to settle or compromise is inadmissable at trial, this is clearly not a case which would require admission of such evidence. In this case, all the jury would have to be told is that once the Bank learned that Murphy intended to file suit, it chose to proceed in federal court. There is absolutely no need to introduce any evidence regarding the settlement negotiations.

Secondly, we also disagree with the trial court's finding that the Bank's filing of the federal declaratory judgment action did not constitute a violation of KRS 344.280. First, this cause of action was recognized by this Court in Mountain Clay, Inc. v. Commonwealth, Commission on Human Rights, Ky. App., 830 S.W.2d 395 (1992). In that case Elkins, a female employee, filed a complaint with the Kentucky Commission on Human Rights [the Commission] alleging that Mountain Clay had engaged in sexual discrimination. In response to her complaint, Mountain Clay filed a circuit court action asking the court to (1) enjoin the Commission from holding a hearing on the complaint; and (2) hold Elkins liable for its costs in defending against the action.

In response to Mountain Clay's action, Elkins filed a second complaint with the Commission alleging that Mountain Clay's lawsuit was retaliatory in nature and thus violative of KRS 344.280.

In holding that both the Commission and the circuit court properly ruled in Elkin's favor on her retaliation complaint, we held:

> The Kentucky Civil Rights Act was enacted "to safeguard all individuals within the state from discrimination because of race, color, religion, national origin, sex, and age" and to "further the interest, rights and privileges of individuals within the state." KRS 344.020(b). The prohibition against employer retaliation was enacted to protect these rights. As one court has said, "retaliation, whether in the form of a subsequent discharge or court proceeding, places an added cost on the exercise of those rights and as such has a 'chilling effect.' Only by enjoining suits filed in retaliation for the exercise of protected rights can those rights be ensured." EEOC v. Levi Strauss & Co., 515 F.Supp. 640, 642 (N.D.Ill. 1981).

Mountain Clay, 830 S.W.2d at 397 (emphasis added). Thus, Murphy has stated a valid cause of action and should be permitted to proceed.

Finally, we are unpersuaded that the fact that the Bank expressly disavowed any claim it may have had against Murphy for attorney fees in conjunction with its federal court action should make a difference in our decision. Although the Mountain Clay decision placed importance on the fact that Mountain Clay sought attorneys fees from Elkins in finding its actions to be retaliatory in nature, we do not believe that fact to be the lynchpin of the decision. It can hardly be denied that the

Bank's institution of the federal declaratory judgment action did not place "an added cost on the exercise of" Murphy's rights when Murphy had to bear the burden of her own additional attorneys' fees incurred in defending against the Bank's federal action. Mountain Clay, 830 S.W.2d at 397.

Having considered the parties' arguments on appeal, the trial court's order of August 19, 1998, granting summary judgment in favor of the Bank is vacated, and this matter is remanded for further proceedings. Secondly, the trial court's orders of January 2, 1997, and September 15, 1997, denying Murphy leave to amend her complaint, are also reversed.

COMBS, JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS BY SEPARATE OPINION.

EMBERTON, JUDGE DISSENTING. I respectfully disagree with the majority that the reasonableness of the Bank's conduct is an issue to be decided by the jury. The Bank had in place an anti-sexual harassment policy which was distributed to all employees and all employees were informed of its contents. Immediately after becoming aware of the alleged sexual harassment of Murphy by Gaunt, the Bank investigated the allegations which resulted in Gaunt's resignation. I believe that, as a matter of law, under Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), the trial court properly entered summary judgment.

My opinion is not altered by the allegations of prior sexual harassment alleged by Korphage. By her own admission, she

refused to pursue the allegations and stated that she would not participate in an investigation. Thus, the Bank was unable to pursue any formal investigatory procedures and took the only recourse available by handling the matter informally with Gaunt.

I would also affirm the trial court's denial of Murphy's request to amend her complaint to state a cause of action for retaliatory discharge against the Bank and Zeiger and Lipps. I agree with the trial court that the filing of a declaratory judgment action is not a retaliatory act as contemplated by Kentucky Revised Statutes (KRS) 344.280. The Bank sought nothing from Murphy in its declaratory judgment action but a determination of liability from the court.

I would affirm the trial court.

ORAL ARGUMENT FOR APPELLANT:

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BRIEF FOR APPELLANT:

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