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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002499-MR

PATRICIA SHEA — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN SCHROERING, JUDGE
ACTION NO. 97-CI-05354

BANK ONE, KENTUCKY NA AND
KELLY SERVICES, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Patricia Shea (Shea) appeals from an opinion order of the Jefferson Circuit Court entered September 8, 1998, granting summary judgment in favor of Bank One, Kentucky NA (Bank One) and Kelly Services, Inc. (Kelly). We affirm.

In reviewing a grant of summary judgment, we 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). Kelly, a temporary services agency, placed Shea for employment with Bank One in March of 1996, in its operations center at Fourth Avenue and Ormsby in Louisville. At the time, Kelly had filled over 400 temporary positions with Bank One. Shea worked in Bank One's Processing Center Research Department under the direct supervision of Roger Duncan (Duncan). Angela Hensley (Hensley), a Kelly manager, maintained an office at this location and supervised the "start-up" period between Shea and Bank One. Hensley also handled employee complaints from the Kelly temporary staff with Bank One.

In September of 1996, Bank One was closing the Research Department. Shea was aware that the department was closing and that her assignment was ending. On September 30, 1996, Shea's assignment in the Processing Center ended and Duncan released Shea from her duties. On that same day, Shea faxed a complaint to Hensley claiming that she had been sexually harassed by Duncan. The basis of her complaint stemmed from three separate incidents of physical contact and several instances of verbal name-calling. Shea claimed that Duncan had grabbed her buttocks on two separate occasions and that he had grabbed her right breast on another occasion to "see if they were real." In addition, Shea claimed that Duncan routinely referred to her as "slut" and "tramp" in the workplace.

On October 1, 1996, Bank One and Kelly undertook a joint investigation in response to Shea's allegations. Even though her

assignment with Bank One was scheduled to end, Bank One reassigned Shea to another Bank One facility where she began work the next week. Following the investigation, Bank One formally reprimanded Duncan and notified him that future inappropriate behavior would result in immediate discharge. Shea continued working for Bank One until December, 1996, when she left voluntarily for another job. She admits that after filing her complaint, she was not subjected to further harassment.

After receiving a "right to sue" letter from the EEOC, Shea filed a complaint against Bank One and Kelly alleging sexual harassment and intentional infliction of emotional distress on September 18, 1997. Following extensive discovery, Kelly and Bank One filed motions for summary judgment in August, 1998. Bank One and Kelly argued that Duncan's behavior did not constitute sexual harassment. In support of their argument, Bank One and Kelly pointed out that Shea admitted in her deposition that she and Duncan had a "joking" relationship and that she sometimes referred to him as "snaggletooth" and "slut puppy." They also claimed protection under the affirmative defense set out by the United States Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc., 524 U.S. 742 (1998), (Faragher/Burlington), because Bank One had a sexual harassment policy in place that Shea did not utilize. On September 8, 1998, the trial court granted summary judgment in favor of Bank One and Kelly. This appeal followed.

Shea argues that the trial court erred in dismissing the portion of her complaint alleging sexual harassment.[1] The questions presented to us are: (1) whether Duncan's conduct constituted sexual harassment; and (2) whether Bank One and Kelly satisfied the affirmative defense set out in Faragher/Burlington. Shea cites Kirkwood v. Courier Journal, Inc., Ky.App., 858 S.W.2d 194 (1993), for the proposition that claims of workplace sexual harassment are rarely summarily dismissed when colorable evidence of harassment is presented. Shea further contends that Bank One and Kelly did not meet their burden of proof under the Faragher/Burlington standard. We disagree.

We will address first the issue of whether Duncan's conduct constituted sexual harassment. The Kentucky Civil Rights Act (KRS Chapter 344, et. seq.) strives to minimize invidious discrimination in the Commonwealth. Specifically, 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

[1]Shea does not argue in her brief that the trial court erred with regard to its ruling on the issue of intentional infliction of emotional distress, Therefore, we will not consider that issue on appeal. Milby v. Mears, Ky. App., 580 S.W.2d 724, 727 (1979) (a reviewing court will confine itself to errors pointed out in the briefs and will not consider issues which are not raised on appeal).

> (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 . . . .

As quoted above, KRS 344.040, closely mirrors similar language in Title VII of the Federal Civil Rights Act. Our Supreme Court held in Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814 (1992), that federal court decisions construing federal anti-discrimination law should serve as guidelines for interpretation of our state anti-discrimination laws. Thus, we may draw on the federal body of sexual harassment law to help formulate the Commonwealth's sexual harassment standards.

To establish a claim for sexual harassment based upon hostile work environment, the plaintiff must show: (1) that the conduct in question was unwelcomed, (2) that the harassment was based on sex, (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment, and (4) that some basis existed for imputing the liability to the employer. Kauffman v. Allied Signal, Inc., 970 F.2d 178, 183 (6th Cir. 1992). The United States Supreme Court first set out the standard for hostile work environment sexual discrimination under Title VII in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). Sexual harassment, the Supreme Court noted, included:

> [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(citing Equal Employment Opportunity Commission Guidelines, 29 CFR § 104.11(a)(1985)).

In order to be actionable, the "hostile environment harassment" must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Vinson, 477 U.S. at 67. The United States Supreme Court elaborated on this "sufficiently severe or pervasive" standard in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), noting that the Vinson 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.

Harris, 510 U.S. at 21-22 (emphasis added). In addition to requiring that the harassment be both objectively and subjectively offensive, the Supreme Court held that all circumstances must be considered in

determining whether an environment is "hostile" including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance." Id. at 23.

Federal circuit courts have elaborated on the "sufficiently severe or pervasive" standard as well. The Second Circuit Court of Appeals held that in order to be deemed "pervasive" the harassment must be "repeated and continuous; isolated acts or occasional episodes will not merit relief ...." Torres v. Pisano, 116 F.3d 625, 631 (2nd Cir. 1997), (citations omitted). The rational behind requiring that the harassment be "sufficiently severe or pervasive" was stated succinctly by the Fifth Circuit Court of Appeals:

> A claim for a sexually hostile working environment is not a trivial matter. Its purpose is to level the playing field for women who work by preventing others from impairing their ability to compete on an equal basis with men. One must always bear this ultimate goal in mind. A hostile environment claim embodies a series of criteria that express extremely insensitive conduct against women, conduct so egregious as to alter the conditions of employment and destroy their equal opportunity in the workplace. Any lesser standard of liability, couched in terms of conduct that sporadically wounds or offends but does not hinder a female employee's performance, would not serve the goal of the equality. In fact, a less onerous standard of liability would attempt to isolate women from everyday insults as if they remained models of Victorian reticence.

DeAngelis v. El Paso Municipal Police Officer's Assoc., 51 F.3d 591, 593 (5th Cir. 1995).

Applying these standards to the case at hand, we find that Shea has shown that Duncan's conduct constituted hostile work environment sexual harassment. Shea alleges that Duncan grabbed her buttocks on two separate occasions and that he grabbed her right breast on another occasion. In addition she alleges that Duncan referred to her as "slut" or "tramp" weekly or every other week for three or four months. We believe that there is sufficient evidence of severe and pervasive conduct which constitutes sexual harassment as contemplated by both the United States Supreme Court as well as our Court system. The fact that Shea admitted to having a joking relationship with Duncan does not automatically mean that she was not offended by his conduct. At best, it only creates a question of fact which is properly left to the jury to resolve.

However, even if Shea could establish a case of sexual harassment, Bank One and Kelly still would not be vicariously liable for Duncan's conduct pursuant to the Faragher/Burlington affirmative defense. In 1998, the United States Supreme Court created an affirmative defense for employers who are sued for sexual harassment. In Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries, Inc., 524 U.S. 742 (1998), which were decided on the same day, the Supreme Court held that an employer could not be held vicariously liable for sexual harassment by a supervisor,

provided that no tangible employment action such as discharge or demotion had occurred, where the employer establishes that:

> 1. the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
>
> 2. that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 30; Burlington Industries, 524 U.S. at 20.

We believe that Bank One and Kelly established the Faragher/Burlington affirmative defense in the case sub judice. First, Bank One did not discharge Shea, even though her position had been terminated. Instead, she was moved to another Bank One facility where she held a position with similar job responsibilities. Thus, the affirmative defense is available to Bank One and Kelly. Second, the parties do not dispute the fact that once Shea filed the complaint on September 30, 1996, Bank One and Kelly launched an immediate investigation into the circumstances surrounding her allegations. The result of this investigation was that Bank One formally reprimanded Duncan.

Finally, Shea did not take advantage of Bank One and Kelly's respective policies against sexual harassment during the course of the alleged harassment even though she was aware of the policy. The policies were in place to prevent such a situation. When one fails to take advantage of the employer's anti-sexual harassment policies, that individual cannot then gain by his/her

failure to act. See Faragher, 524 U.S. at 30; Burlington Industries, 524 U.S. at 20.

Bank One and Kelly cannot be held vicariously liable for Duncan's conduct in that they established reasonable policies to prevent and correct any alleged sexually harassing behavior as set forth in Faragher/Burlington. The trial court appropriately granted summary judgment in favor of Bank One and Kelly.

For the forgoing reasons, the decision of the trial court is affirmed.

ALL CONCUR.

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