RENDERED: FEBRUARY 2, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000894-MR

KATHLEEN SCHROEDER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 03-CI-006718

ATRIA MANAGEMENT CO., LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JUDGE; GUIDUGLI AND HENRY, SENIOR JUDGES.[1]

HENRY, JUDGE: Kathleen Schroeder appeals from an order of the Jefferson Circuit Court granting summary judgment to Atria Management Co., LLC ("Atria") as to Schroeder's claims of employment discrimination and retaliation. Upon review, we affirm.

[1] Seniors Judge Daniel T. Guidugli and Michael I. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

BACKGROUND

Atria is headquartered in Louisville, Kentucky and operates assisted-living facilities that provide care to the elderly and to individuals with Alzheimer's disease. At the time Schroeder worked there, the company employed approximately 3,000 individuals throughout the United States. Schroeder was hired by Atria on October 18, 2000 as the company's Director of Employee Benefits and Compensation. She reported to the company's Vice-President of Human Resources, Steve Kraus, who - in turn - reported to Werner Neuteufel, Atria's Chief Operating Officer.

After Kraus left the company in July 2001, Neuteufel asked Schroeder to temporarily assume at least some of the responsibilities of his position. Schroeder subsequently performed a number of Kraus's former duties, but she was never named as a vice-president, nor did she receive any additional pay for assuming those duties. She was also not asked to sit in on any senior management meetings. However, according to Schroeder, Neuteufel promised her that he would "take care" of her if she agreed to take on Kraus's duties.

Eventually, Atria decided to hire a permanent replacement for Kraus and made a listing of the required qualifications for the position. After the listing was posted, Schroeder applied for the position in August 2001. Neuteufel

acknowledged the receipt of Schroeder's application and told her that Atria also would be interviewing a number of external candidates for the job; however, he apparently also informed her that she would be considered one of the "finalists" for the position.

On November 13, 2001, Neuteufel and Carmin Grandinetti, Atria's chief legal advisor, each conducted separate interviews with Schroeder. According to Schroeder, Grandinetti told her that he did not need to discuss her work; instead, he questioned her about her time living in Houston, Texas. She further indicated that Neuteufel's interview consisted primarily of his asking her how she would feel about reporting directly to someone else. No other Atria executives interviewed Schroeder.

One of the other candidates interviewed for the position was Jack Tindal. Tindal had previously worked for the Sun Healthcare Group, Inc. in Albuquerque, New Mexico where, over his years of employment, he had served as the Vice-President of Human Resources and Ancillary Services, the Senior Vice-President of Human Resources and Inpatient Services, and finally as the Chief Administrative/Human Resources Officer of the company. Before his time with Sun Healthcare, Tindal was the National Director of Human Resources for The Mediplex Group, Inc. in Wellesley, Massachusetts. On or about November 30,

2001, Tindal was offered and accepted the Vice-President of Human Resources position at Atria.

As was the case with other new Atria hirees, Tindal was required to undergo drug testing, so he provided a specimen to Kroll Laboratories on December 14, 2001. On December 17th, Kroll reported an initial screening result indicating the presence of marijuana metabolites. Atria's drug testing policy required that any initial positive result be verified by a medical review officer. Tindal's original specimen was subsequently subjected to additional confirmatory testing, which revealed that the original result was a "false positive." The specimen was tested again at another laboratory and, again, it passed. Atria consequently concluded that the initial drug screen result was a "false positive" and Tindal joined the company in January 2002.

Schroeder notes that it was Tindal's hiring - after initially failing a drug test - that caused her to believe that Atria refused to give her the vice-president position because of sex discrimination. She complained to Neuteufel that she felt that it was improper for Atria to hire someone who failed a drug test, and that such action violated Atria's past policies. She further indicates that, although Neuteufel apparently told her that he agreed with her, his previously positive attitude towards her changed for the worse. Despite Schroeder's concerns

about not being hired for the vice-president position, however, she admits that she did not complain to anyone in Atria's upper management about her failure to be promoted; she submits that her failure to do so was due to her belief that it was not a viable avenue for relief.

On August 28, 2002, Tindal informed Schroeder that she was being terminated due to unsatisfactory performance and the fact that her job was being eliminated. The record reflects that Atria's Vice-President of Accounting had complained about the performance of Schroeder's department, and that Tindal blamed Schroeder for a problem regarding another vice-president's 401K account. According to Schroeder, however, the 401K problem was caused by Tindal himself; he blamed her for it because she had opposed his hiring and because "[h]e came to resent [her] for her superior abilities and the fact that she had applied for his job." Schroeder further notes that when she brought this situation to the attention of Grandinetti, Tindal began allocating fewer responsibilities to her. He also allegedly did such things as scheduling meetings when he knew that she would be out of the office, in an effort to make her look bad.

On August 1, 2003, Schroeder filed an employment discrimination lawsuit against Atria. In her complaint, Schroeder alleged that her failure to be promoted to the Vice-

President of Human Resources position was the result of sex discrimination in violation of the Kentucky Civil Rights Act ("KCRA") – specifically Kentucky Revised Statutes (KRS) 344.040 - and also that her termination violated the KCRA retaliation provisions contained within KRS 344.280. Schroeder also alleged common law claims for wrongful discharge and intentional infliction of emotional distress.

Over the following two years, the parties conducted extensive discovery, with Schroeder being deposed for two days. Eventually, Atria moved for summary judgment, which the trial court granted as to all of Schroeder's claims in a 16-page Memorandum and Order entered on March 31, 2005. Schroeder then moved for a CR 59 rehearing, which the court denied on April 26, 2005. This appeal followed.

STANDARD OF REVIEW

On appeal, Schroeder contends that summary judgment was inappropriate as to her sex discrimination and retaliatory discharge claims.[2] As a general rule, "[t]he 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, 916 S.W.2d 779, 781

[2] Schroeder does not appeal from the circuit court's dismissal of her common law wrongful discharge and intentional infliction of emotional distress claims.

(Ky.App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court." Blevins v. Moran, 12 S.W.3d 698, 700 (Ky.App. 2000). However, in conducting our review, "[t]he record must be viewed in a 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., 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment should not be granted unless "it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor." Id. at 482. Accordingly, "[t]he inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." Welch v. American Publishing Company of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). Ultimately, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, 807 S.W.2d at 482. "[W]hen a claim has no substance or controlling facts are not in dispute, summary judgment can be

proper." Brown Foundation v. St. Paul Ins. Co., 814 S.W.2d 273, 277 (Ky. 1991).

ARGUMENT

A. The Trial Court Did Not Err in Granting Atria's Motion for Summary Judgment as to Schroeder's Discrimination Claim.

Schroeder first argues that she presented sufficient evidence of "pretext" as to her KRS 344.040 discrimination claim to withstand summary judgment. Her claim stems solely from Atria's failure to promote her to the position of Vice-President of Human Resources. KRS 344.040(1) provides, in relevant part, that it is unlawful for an employer "[t]o fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's . . . sex." As a general rule, cases arising under KRS 344.040 are governed by the burden-shifting framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[3] See Brooks v. Lexington-Fayette Urban County Housing

[3] Kentucky courts have historically interpreted the civil rights provisions of KRS Chapter 344 consistent with the applicable federal anti-discrimination laws. See Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492, 495 (Ky. 2005); Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 802 (Ky. 2004). Accordingly, we look to federal, as well as state, law for authority in considering this appeal. See Jefferson County v. Zaring, 91 S.W.3d 583, 586 (Ky. 2002); Kentucky Commission on Human Rights v. Com., Dept. of Justice, 586 S.W.2d 270, 271 (Ky.App. 1979).

Authority, 132 S.W.3d 790, 797 (Ky. 2004); Kentucky Center for the Arts v. Handley, 827 S.W.2d 697, 699 (Ky.App. 1991).

In a claim arising under KRS 344.040(1), the plaintiff bears the initial burden of proving a *prima facie* case of discrimination. Jefferson County v. Zaring, 91 S.W.3d 583, 590 (Ky. 2002). One way in which a plaintiff can establish a *prima facie* case as to such a claim is to show that (1) she is a member of a protected class, (2) she was qualified for and applied for an available position, (3) she did not receive the job, and (4) that the position remained open and the employer sought other applicants. Brooks, 132 S.W.3d at 797. The trial court concluded that Schroeder met this required showing, and we see no error in this conclusion, Atria's protestations to the contrary notwithstanding.

"Upon establishing a *prima facie* case of discrimination, the burden shifts to the defendant-employer to articulate a 'legitimate nondiscriminatory' reason for its action." Id. "However, the burden of refuting the prima facie case need not be met by persuasion; the employer need only articulate with clarity and reasonable specificity, a reason unrelated to a discriminatory motive, and is not required to persuade the trier of fact that the action was lawful." Handley, 827 S.W.2d at 700. The trial court concluded that Atria met this burden with its contention and evidence that

Tindal was more qualified for the position in question than Schroeder, and – again - we see no error in this conclusion.

"After the defendant has met this burden, 'the McDonnell Douglas framework is no longer relevant.'" Brooks, 132 S.W.3d at 797, quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510, 113 S.Ct. 2742, 2748, 125 L.Ed.2d 407, 418 (1993). "This is because 'the McDonnell Douglas presumption is a procedural device, designed only to establish an order of proof and production.'" Id., quoting Hicks, 509 U.S. at 521, 113 S.Ct. at 2755, 125 L.Ed.2d at 425. At this point, "it is incumbent on the employee to demonstrate that the stated reason is merely a pretext to cover the actual discrimination." Handley, 827 S.W.2d at 699. Such a demonstration involves "a new level of factual specificity requiring the plaintiff to prove her ultimate burden of persuading the trier of fact that she is the victim of intentional discrimination and that the reasons given by the employer are merely pretextual." Id. at 700. "The intent requirement may be satisfied by direct allegations and proof of invidious discriminatory bias, or circumstantially demonstrated by alleging or proving discriminatory conduct, practices, or the existence of significant racially disproportionate conduct." Id. "While intentional discrimination may be inferred from circumstantial evidence, there must be cold hard facts presented from which the

inference can be drawn that race or sex was a determining factor." Id. at 700-01; see also Harker v. Federal Land Bank of Louisville, 679 S.W.2d 226, 229 (Ky. 1984).

Schroeder argues that she presented sufficient evidence of "pretext" as to her discriminatory failure to promote claim to withstand summary judgment. However, we are inclined to disagree, as the record is lacking in the type of "cold hard facts" required to establish a case of intentional discrimination.

For example, Schroder points to Tindal's initial "failed" drug test as an indication that the company wanted a male to have the vice-president of human resources position instead of a female, because "it casts serious doubts upon Tindal's basic qualifications for the position of Vice President of Human Resources." However, the record refutes Schroder's belief that Tindal failed his drug test. As noted above in the recitation of facts, after multiple tests, Atria determined that Tindal's first drug test result was a "false positive." Schroeder provides nothing in terms of objective evidence to challenge this determination beyond her own personal beliefs. Such beliefs alone are not enough to create a material issue of fact so as to avoid summary judgment. See Humana of Kentucky, Inc. v. Seitz, 796 S.W.2d 1, 3 (Ky. 1990); see also Handley, 827 S.W.2d at 701.

Schroeder also takes issue with the fact that Tindal's specimen was allowed to be re-tested after his initial "positive" test result, contending that this was against company policy. Even assuming that this contention is true, however, "an employer's failure to follow self-imposed regulations or procedures is generally insufficient to support a finding of pretext." White v. Columbus Metropolitan Housing Authority, 429 F.3d 232, 246 (6th Cir. 2005). Such a rule would appear to be particularly apt here given that there appears to have been a legitimate reason for Tindal's specimen to be re-tested. Schroeder provides nothing of an evidentiary nature to connect this re-testing to any sort of discriminatory animus against her because of her sex, again relying only upon her own subjective beliefs.

Schroeder lastly argues that a number of derogatory sexual comments allegedly made by Neuteufel, Grandinetti, and Chief Financial Officer Mark Jessee support her pretext arguments. Unfortunately, Schroeder's brief neglects to advise us of what, exactly, the substance of these comments actually was or when they were made. In conducting our own review of Schroeder's deposition, however, it appears that she admitted that she could not recall Jessee making any such derogatory comments. She also could not recall any specific sexist comments made by Grandinetti, but instead "inferred" sexist

connotations from some statements that he had made; however, she could not recall the substance of any of these purported statements. Accordingly, we do not believe that Schroder's deposition presents anything of evidentiary substance as to her contentions about Jessee and Grandinetti.

As for Neuteufel, Schroder testified that, sometime prior to July 2001, he made a comment that women "don't belong in the workforce" and "should be at home" in her presence while he was describing an incident involving his wife. However, the deposition contains no other similar statements made by Neuteufel. Essentially, then, we are left with one sexist comment from a member of Atria's management made at least five months before the promotion decision in question as evidence of pretext in the company's decision not to promote her. While this statement was unfortunate and undoubtedly inappropriate, we simply do not believe that it is enough – standing alone – to survive summary judgment. See White, 429 F.3d at 239 ("Isolated and ambiguous comments are insufficient to support a finding of direct discrimination.").

While Neuteufel's comment cannot be classified as ambiguous, it appears – at least from the record before us – to have been an isolated one. Moreover, we again feel compelled to note that it was made more than five months before the decision was made not to promote her. This fact is an important one

because "[t]he critical inquiry [in a sex discrimination case] is whether gender was a factor in the employment decision *at the moment it was made*." Price Waterhouse v. Hopkins, 490 U.S. 228, 241, 109 S.Ct. 1775, 1785, 104 L.Ed.2d 268 (1989) (Emphasis in original). We believe that the fact that Neuteufel's isolated comment here was made more than five months before the promotion decision in question does not provide enough support, standing alone, to Schroeder's claim of pretext to withstand summary judgment. Accordingly, we must conclude that the trial court did not err in granting Atria's motion for summary judgment as to Schroeder's KRS 344.040(1) discrimination claim.

B. The Trial Court Did Not Err in Granting Atria's Motion for Summary Judgment as to Schroeder's Retaliation Claim.

We finally address Schroeder's contention that Atria fired her in retaliation for her complaints that she should have been promoted to the position of Vice-President of Human Resources, in violation of KRS 344.280. That statute makes it unlawful for one or more persons "[t]o 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 344.280(1). Because Schroeder failed to

demonstrate a *prima facie* case of retaliation, we find that entry of a summary judgment as to the claim in favor of Atria was appropriate.

KCRA retaliation claims under KRS 344.280 are governed by a modified version of the McDonnell-Douglas framework discussed above. Handley, 827 S.W.2d at 701. In order to establish a *prima facie* case of retaliation, a plaintiff must prove that: (1) she engaged in a protected activity; (2) her employer knew that she engaged in the protected activity; (3) her employer thereafter took an adverse employment action against her; and (4) there was a causal connection between the protected activity and the adverse employment action. Brooks, 132 S.W.3d at 803.

The glaring problem that we see with Schroeder's argument is that she concedes that she "did not specifically complain to anybody in upper management about her denial of the promotion" to Vice-President. She also acknowledges that she "did not specifically identify her female gender as a basis for her complaint." In sum, she never voiced a concern or complaint to anyone within Atria's upper management that sex discrimination was a ground for her failure to be promoted. As noted by Atria, in order for a plaintiff to prevail on a retaliation claim, she must first establish that she actually contested an unlawful employment practice; it is not enough to

merely challenge the correctness of an employer's decision or dispute its position. See Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1313 (6th Cir. 1989). Schroeder has simply failed to provide any evidence whatsoever that she contested an unlawful employment practice.[4] Consequently, she fails to satisfy even the first prong of the KCRA retaliation test. We must therefore conclude that summary judgment was appropriately granted as to this claim.

CONCLUSION

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Philip C. Kimball
Samuel G. Hayward
Louisville, KY 40205

BRIEF FOR APPELLEE:

Thomas J. Birchfield
Louisville, Kentucky

[4] Schroeder attempts to justify her failure to make a complaint of discrimination to Atria's upper management by arguing that such an effort would have ultimately proven futile. However, there is nothing of evidentiary substance in the record to support this general contention.