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# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-000936-MR

ALICIA FIELDS (now ALVARADO)

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 04-CI-02954

PAPA JOHN'S INTERNATIONAL, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: Alicia Fields (now Alvarado but hereinafter "Fields") filed suit against her former employer, Papa John's International, Inc. (hereinafter "Papa John's") under Kentucky Revised Statutes (KRS) Chapters 342 and 344, alleging various sexual discrimination and retaliation infractions which ultimately led to her dismissal from employment. She has appealed the Fayette Circuit Court's March 1, 2006, order granting summary judgment to Papa John's, and the April 17, 2006, order denying her motion to

vacate pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. For the reasons set forth below, we affirm the granting of summary judgment.

On July 21, 2004, Fields filed a complaint in the Fayette Circuit Court asserting Papa John's subjected her to sexually discriminatory practices, retaliated against her for complaining about such practices, and demoted and/or terminated her in retaliation for seeking benefits under the Workers' Compensation Act. In her prayer for relief, Fields requested reinstatement to her former position, or in the alternative, a reasonable sum to be determined as compensation for lost wages, reduction in the power to earn wages, past and future medical expenses, pain and embarrassment, humiliation and emotional distress, as well as punitive damages. Papa John's promptly filed its answer to the complaint and the discovery process began immediately, with multiple depositions being taken, interrogatories being propounded, and requests for production of documents being issued. A review of the record reveals the facts which precipitated the filing of the instant complaint, a synopsis of which follows.

Fields was hired by Papa John's in October 1998 and was promoted to assistant manager in January 1999. In October 1999 Fields volunteered to be demoted to a part-time delivery driver in order to further her educational goals. In January 2001 she was promoted to assistant manager. Approximately one year later, she was again promoted, this time to general manager. Later that year she received a promotion to training general manager. Deposition testimony revealed general managers are responsible for managing their stores, ensuring compliance with company policies, and

actively participating in the day-to-day operations of their assigned stores. Training general managers have the additional responsibility of training other general managers and attending mandatory meetings. There is a small pay increase associated with this position as compared to general managers. Both general managers and training general managers are responsible for making pizzas in their assigned stores.

Fields claimed she began having issues with two general managers from different stores in late 2002. These issues included gossiping and name-calling amongst the three employees. She alleged the other two employees called her a “bitch” and began a rumor that she was homosexual.<sup>1</sup> In early March 2003 Fields raised her concerns about these issues to her immediate supervisor, Chip Phelps (hereinafter “Phelps”), his supervisor, Operations Vice President Bill Mitchell (hereinafter “Mitchell”), and to People Services Director Lynn McQuillen (hereinafter “McQuillen”). She also raised issues of preferential treatment in favor of the other general managers.

On March 25, 2003, Fields took her complaints to Papa John's Chief Operating Officer (COO), Robert Waddell (hereinafter “Waddell”). At that time she complained she was receiving lower pay than male managers, two other managers were calling her names, those same two managers were receiving preferential treatment, and she was held to higher standards and expected to work longer hours than other managers. She admitted she had no personal knowledge to substantiate any of these allegations, yet the COO immediately took action to remedy the situation. A meeting was scheduled on

<sup>1</sup> By her own admission, Fields actively participated in the name-calling. In her deposition, she claimed that her actions were in “retaliation” to the conduct directed at her.

March 31, 2003, wherein all of Fields' concerns were discussed. The two other managers were to be contacted regarding their behavior. Pay records were examined and it was determined that Fields was earning within \$50.00 of the highest paid manager in the Lexington marketing area.<sup>2</sup> Further, company records were produced showing Fields was actually clocking in less than other managers. As a result of the discussions held at this meeting, Fields agreed to relinquish her position as training general manager and to return to a general manager's position while the issues were resolved. Additionally, a Development Plan was created and executed on April 3, 2003, to memorialize the meeting and further address any on-going concerns.<sup>3</sup> By all reports, conditions improved following this meeting, Fields was allowed to hire additional employees to ease her work load, and the rumors and name-calling subsided.

Sometime in March 2003 Fields reported a work-related injury to her lower back. She continued to work in the same position as before, albeit with physician-ordered physical restrictions. Her supervisors approved this accommodation for modified work duties, and nothing in the record indicates Fields was encouraged to exceed these limitations.

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<sup>2</sup> The record is silent as to how this difference was determined or the time span (i.e., weekly, monthly, annually, or otherwise) to which the pay differential referred.

<sup>3</sup> Fields testified that she reviewed and signed the Development Plan, but denies that such execution was voluntary. However, by her own admission, this assertion was not raised until the time of her deposition and was never brought to Papa John's attention. She admits she complained only about the portion of the Plan stating the number of assistant managers who were "turned over" while she was the training general manager as being erroneous. Her own copy of the Development Plan, upon which she had made notes, was attached to her deposition. Nothing thereon indicated she involuntarily executed the Plan as she now complains.

In September 2003 Fields sustained another work-related injury, this time to her right hand. As a result of the injury, she was completely restricted from using her right hand. Upon review of the physician reports and restrictions, Phelps advised Fields she could not work until she was released by her physician from the restrictions as Papa John's could not accommodate the restrictions in her current position as general manager. The two discussed the significant physical work requirements performed at a pizza delivery restaurant. Fields admitted in her deposition nearly every position in the store had significant physical components, many of which were repetitive in nature. Thus, Fields was placed on workers' compensation temporary total disability leave later in September 2003, underwent surgery on her right hand in February 2004, and continued to receive follow-up treatment for some time thereafter.

On May 6, 2004, her physicians declared Fields had reached maximum medical improvement (MMI) and released her to return to work with certain restrictions, including a limitation on repetitive gripping and the pinching/kneading of dough. The following day, Phelps advised Fields the only position available at Papa John's accommodating these restrictions was that of a delivery driver. Fields refused this position as it would require placing her in a store managed by one of the employees with whom she had previously had issues. Instead of accepting the delivery driver position, Fields requested and received an advance of four weeks' paid vacation time, under the

premise that she would be returning to unrestricted work activities for Papa John's in the not so distant future.<sup>4</sup>

Just prior to the expiration of the paid vacation time, McQuillen contacted Fields about returning to work. He agreed to inform her shortly thereafter as to which store she was to report in order to resume work. In spite of this conversation, Fields applied for and began receiving unemployment benefits. Fields testified she considered herself to have been fired because she was not offered a management position and was aware such positions were available at the time in question.<sup>5</sup> However, she explained to Phelps she applied for the benefits because she would only be working part-time.<sup>6</sup> Several times in late June, a general manager from Papa John's store in Winchester, Kentucky, attempted to contact Fields and left messages for her regarding reporting to work. These messages remained unanswered and Fields did not report to work. By late June 2004 Papa John's concluded Fields had abandoned her employment.

Fields denied she was disabled and claimed her surgery fully resolved her hand injury.<sup>7</sup> In her deposition, Fields was unable to say she had definitely informed

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<sup>4</sup> The vacation time Fields was granted had not yet been fully earned, yet Papa John's allowed her to take this time in order to complete plans for her impending wedding, take her honeymoon, and continue her healing process.

<sup>5</sup> Apart from her assertion, there is nothing in the record to indicate such positions were actually available.

<sup>6</sup> Nothing in the record indicates the number of work hours per week Fields was offered at this time by Papa John's.

<sup>7</sup> Fields did not deny she was still under doctor-ordered work restrictions. However, she denied feeling as though these restrictions rendered her "disabled" as that term is commonly used.

anyone at Papa John's of this fact. She stated she thought her restrictions would be permanent, but was unsure to whom, if anyone, within the Papa John's organization she had conveyed this information.

Following the completion of discovery, on November 18, 2005, Papa John's filed a motion for summary judgment and an affidavit in support thereof. Shortly thereafter, Fields filed a memorandum in opposition. After a series of continuances, a hearing was held on February 10, 2006. The Circuit Court entered a written order granting summary judgment in favor of Papa John's on March 1, 2006, finding (1) no genuine issue of material fact existed, (2) Fields had failed to inform Papa John's she was capable of making pizza after achieving MMI, (3) Fields had failed to return to work when so requested, and (4) Fields had failed to make a prima facie showing of discrimination or retaliation. On March 8, 2006, Fields filed a motion to vacate the March 1 order pursuant to CR 59. This motion was denied by the Circuit Court's order dated April 17, 2006. This appeal followed.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, 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. In *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show the adverse party cannot prevail under any circumstances. The Court has also stated “the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). “The 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 [citation omitted].” *Steevest*, 807 S.W.2d at 480. Furthermore, “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.” *Id.* at 482. *See also* Philipps, *Kentucky Practice*, CR 56.03, p. 418 (6th ed. 2005).

In the case sub judice, prior to Papa John's filing its motion for summary judgment, extensive discovery was completed by both sides with numerous documents having been produced and depositions having been taken of everyone possessing relevant information about the complaint filed by Fields. Discovery was closed by consent of the parties. All of the relevant facts of the case were therefore before the Circuit Court when its decision was made.



In her argument before us, Fields makes a series of conclusory assertions in an attempt to bolster her claim that summary judgment was improper. However, even when viewed in the light most favorable to her, these assertions do not raise issues of material fact. As her allegations fall into two distinct categories, we shall address them separately.

### DISCRIMINATION

First, Fields contends Papa John's subjected her to sexual discrimination and a hostile work environment in violation of the Kentucky Civil Rights Act (KCRA) which is codified at KRS 344.010 *et seq.* The KCRA closely tracks the language of Title VII of the United States Civil Rights Act of 1964.<sup>8</sup> For this reason, “United States Supreme Court decisions regarding the federal provision are most persuasive, if not controlling, in interpreting the Kentucky statute.” *Kentucky Commission on Human Rights v. Commonwealth, Department of Justice, Bureau of State Police*, 586 S.W.2d 270, 271 (Ky.App. 1979) (citing *Kentucky Commission v. Commonwealth, Department for Human Resources*, 564 S.W.2d 38 (Ky.App. 1978)). In enacting the KCRA, our Legislature affirmatively stated in KRS 344.020(1)(a) the purpose of the chapter was “[t]o provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 as amended. . . .” Further, the Supreme Court of Kentucky recognized in *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992), federal anti-discrimination caselaw should serve as a guideline in interpreting Kentucky's anti-

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<sup>8</sup> 42 U.S.C. §2000e-2(a).

discrimination legislation.<sup>9</sup> Thus, we shall analyze Fields' complaints in accordance with the guidance set forth in our statutes and decisions, coupled with the additional guidance provided by the federal body of law.

The crux of Fields' sexual discrimination claim rests upon her allegations that she heard rumors of male employees calling her a bitch and a lesbian. It is undisputed these comments were ascribed to two coworkers who had no supervisory powers over Fields. Therefore, as these coworkers did not possess any power or authority over Fields emanating directly from Papa John's, Fields must prove Papa John's was negligent in failing to protect her from a hostile environment. In *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 829 (6th Cir. 1999), after reviewing relevant United States Supreme Court rulings, the Sixth Circuit Court of Appeals set forth a reasonableness standard to be used in coworker discrimination cases, holding “when an employer responds to charges of coworker sexual harassment, the employer can be liable only if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known” [citation omitted]. The Court went on hold that in order to establish a prima facie claim of hostile environment sexual harassment by a coworker, a plaintiff must show:

- (1) she was a member of a protected class;
- (2) she was subjected to unwelcome harassment;
- (3) the harassment complained of was based upon sex;
- (4) the harassment unreasonably interfered with the plaintiff's work performance or created a hostile or offensive work environment that was

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<sup>9</sup> *Meyers* held the language of the KCRA closely “tracks the federal law and should be interpreted consonant with federal interpretation.” 840 S.W.2d at 821.

severe and pervasive; *and* (5) the employer knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action [emphasis original].

*Id.* at 829-30. Thus, Fields must allege and prove all five of the required elements enunciated under *Fenton* to establish her prima facie case. Upon a careful review of the record, it is clear Fields has not established the fifth element required to sustain her cause of action.<sup>10</sup>

Fields' own testimony reveals Papa John's quickly responded to her complaints regarding the name-calling and comments regarding her sexual practices. Further, she testified conditions improved after her March 31, 2003, meeting with Waddell. While nothing in the record indicates how Papa John's addressed this issue, Fields' testimony establishes Papa John's took some type of successful corrective action, and its upper management did not encourage, allow, or participate in the complained of behavior. Papa John's corrective actions occurred within a short time after Fields' complaints were brought to light, and these unspecified actions resulted in the desired effect of resolving the alleged harassment. Thus, Fields clearly failed in meeting her burden of establishing the required elements of a prima facie showing of sexual discrimination based on a hostile work environment.

Fields next contends she was subjected to pay discrimination based solely on gender, arguing she was held to higher standards than similarly situated males but

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<sup>10</sup> While our holding regarding the fifth element makes Papa John's arguments concerning the remaining *Fenton* elements moot, our review of the record makes us doubtful Fields has met her burden under the second, third, and fourth elements.

received less pay, thus revealing a sexually discriminatory motivation. This argument is also without merit. The evidence presented to the trial court revealed Papa John's immediately examined their records when Fields made her complaint regarding pay inequality. The results of this investigation showed Fields was actually working less than her male counterparts but was earning just \$50.00 less than the highest paid manager in the region. These results were presented at the March 31, 2003, meeting and were not disputed. Thus, on this issue, Fields likewise failed to make a prima facie showing she was discriminated against based on her gender.

Given Papa John's rapid and effective response to all of Fields' complaints, and the gender-neutral explanation given for the pay differential, we find the trial court correctly granted summary judgment on these issues as Fields had failed to make a prima facie showing of discrimination. There was no error.

#### RETALIATION

Fields next contends she presented sufficient evidence to sustain an action for retaliation. She claims she was unlawfully retaliated against for lodging a complaint about sexual harassment as well as for filing a worker's compensation claim. In order to prove a prima facie case of retaliation, a plaintiff must show:

(1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, *or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor*; and (4) there was a causal connection between the protected activity and the adverse employment action *or harassment* [emphases original][citation omitted].

*Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000). If a plaintiff makes such a showing, the burden then shifts to the employer to provide a nondiscriminatory reason for its actions. The plaintiff must then demonstrate the proffered reason was not, in fact, the genuine reason for the employment action taken. *Id.* In the case sub judice, Fields has failed in her burden to establish a prima facie case for retaliation.

First, Fields contends she presented evidence she was demoted as a result of lodging a complaint for harassment and sexual discrimination. This allegation is grounded in the actions stemming from the March 31, 2003, meeting wherein she agreed to a voluntary demotion while her issues with coworkers were being remedied. While taken alone and out of context this demotion could be argued to represent an adverse employment action, Fields' allegation fails to recognize the important factors preceding this action which place it in the proper context, including her reduced job performance as compared with other similarly situated employees, and the voluntary nature of the demotion. Indeed, we note Fields made no complaint regarding the voluntary demotion until after Papa John's filed its motion for summary judgment in the trial court. Fields has failed to present any evidence indicating a causal connection between her complaints and her demotion or that her demotion constituted a "severe or pervasive" action. Such failure is fatal to her allegation.

Finally, Fields contends she was retaliated against for filing a claim for worker's compensation. She cites to the lack of explanation by Papa John's as to who

ultimately made the decision she could not work as a manager in light of the physical restrictions imposed by her treating physician as being indicative of retaliatory conduct. Fields further presents the bare allegation that Phelps intended to “get rid of her” after she lodged her complaints and filed her worker's compensation claim. She also contends the “pizza restriction” was made up by Phelps and/or McQuillen with the sole intention of keeping her away from her employment. However, Fields' own testimony admits the requirement that all Papa John's managers be able to perform all aspects of the day-to-day operations of their stores. Logically, as Papa John's is in the business of selling pizza, managers must reasonably be expected to perform all required aspects of making pizza. Thus, we find no merit in Fields' argument.

Fields further alleges Papa John's failed to accommodate her physical restrictions upon her return to work in retaliation for her filing the worker's compensation claim. This argument is also without merit. Papa John's fully reviewed Fields' restrictions with her prior to her return from medical leave in an attempt to find a suitable modified duty position. Fields was offered a position she had previously held, albeit at a lower rate of pay, which would have accommodated her restrictions. Papa John's relied solely upon the medical reports provided by Fields in arriving at their decision. Fields testified she failed to inform her superiors she felt she could work without physical restrictions after reaching MMI. Nothing in the record indicates such knowledge could otherwise reasonably be imputed to Papa John's.

Additionally, Fields relies heavily upon her unsupported assertion that Phelps intended to “get rid of her” or “run her off” from his stores, and upon her unsupported contention that there were management positions available at the time she wished to return to work. However, even if such management positions were available, Fields has failed to show she could perform the duties required by such a position. She has again failed to make a prima facie showing of discrimination as she is unable to point to any evidence in the record from which a fact-finder could reasonably find a causal connection between her filing of a worker's compensation claim and the alleged discriminatory employment action.

We find it noteworthy that Fields requested, and received, an advance of approximately four weeks' paid vacation time from the same Papa John's supervisor she is now accusing of retaliating against her. This position seems untenable at best, as we find it difficult to fathom a situation in which a manager who was “out to get” a particular employee would grant such a request, especially in light of the fact Fields' request was granted to allow her further time to recuperate in order to facilitate her return to work without physical restrictions. Finally, Fields' failure to return to work after this gracious allocation of unearned vacation time reasonably presents the appearance of an abandonment of employment, not of retaliatory treatment.

Upon a careful review of the record, we find the trial court properly granted summary judgment against Fields as she failed to make the threshold showings necessary

to sustain her cause of action. Therefore, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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