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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001354-MR

KIM HARPER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCH PERRY, JUDGE
ACTION NO. 04-CI-010660

NATIONAL HEALTH SERVICES AND
LANDCORP ASHPS COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Kim Harper appeals from the judgment of the Jefferson Circuit Court, which denied her a grant of relief under Kentucky Rules of Civil Procedure (CR) 60.02, and upheld the trial court's grant of summary judgment in

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

favor of National Health Services, Inc. (National Health) on Ms. Harper's claims of negligent hiring and vicarious liability for sexual harassment. For the reasons stated, we affirm.

Factual Background

In July 1999, Ms. Harper was hired by National Health as a pre-certification nurse. National Health is a company that, in part, provides utilization review services to various companies and insurers. In her position, Ms. Harper periodically was required to consult with one of three staff physicians concerning medical issues. Ms. Harper and Dr. Olney Patrick worked together at National Health because her job required that she consult with him in order to determine the necessity for medical procedures in certain cases.

National Health, independently and through its parent corporations, had enacted sexual harassment policies. These policies were in effect in 1999 when Ms. Harper began her employment there. In fact, for the entire time that both Ms. Harper and Dr. Patrick were employed by National Health, they were both subject to the sexual harassment policy found in National Health's employment handbook. The parties received copies and signed acknowledgments about these policies and procedures.

Besides the sexual harassment policies in the National Health employee handbook, employees were subject to the sexual harassment policies of BCE Emergis (Emergis), the parent company of National Health. During her

employment at National Health, Ms. Harper signed several statements indicating that she had received, read, and understood the terms of these various policies.

During the summer of 2003, Dr. Patrick began asking Ms. Harper to have lunch with him. Ms. Harper, who was married, felt uncomfortable about accepting the invitation and at first refused. Eventually, after receiving reassurances from both her husband and a co-worker about the acceptability of having lunch with Dr. Patrick, Ms. Harper accepted the invitation and went out to lunch with him in August 2003.

Lunch proved to be a disquieting event for Ms. Harper. First, Dr. Patrick asked if she would like an alcoholic beverage. Ms. Harper answered no. Later, he asked if she used narcotics. Ms. Harper responded that she occasionally took migraine headache medicine. He then queried her about her use of marijuana. Ms. Harper answered in the negative. She then changed the subject of the conversation. But on the return trip to the office, he asked Ms. Harper if "she had ever slept with a black man," told her he liked "black women to rub on him," and said he once had a black girlfriend in Georgia. Ms. Harper's unease was further exacerbated upon arrival back at the office because an office-wide ice cream social was taking place in the parking lot, and she was embarrassed for her co-workers to see her with Dr. Patrick.

Later, she spoke with two co-workers and her husband about Dr. Patrick's behavior during lunch. One co-worker advised her to immediately inform her supervisor, and her husband suggested that she tell Dr. Patrick she was

not interested. Ms. Harper, however, did not immediately inform her supervisor about Dr. Patrick.

Still Ms. Harper contends Dr. Patrick's unwelcome attention continued. He left numerous voicemails asking her to lunch. At some point, she told him "no," and he stopped calling her.

About two months later, Ms. Harper applied for a new position at National Health. She not only wanted a change but also the volume of data entry in her current position was bothering her right arm. Likewise Ms. Harper wanted the new position because she would not have to speak with Dr. Patrick. But when she began the new position in December 2003, she found that although she would no longer have to confer with Dr. Patrick about medical cases, their respective offices were actually closer than before. Ms. Harper alleges that Dr. Patrick's unwelcome attention continued with inappropriate comments about her to co-workers and inappropriate touching on three different occasions. Dr. Patrick rubbed her back and shoulders on those occasions and either told her she looked nice or asked how she was doing.

Following the third incident, Ms. Harper decided to report the behavior to her supervisor, Pam Smith. Ms. Harper, Shandra Linton (another nurse who claimed to be a victim of harassment by Dr. Patrick) and Ms. Smith met with Dr. Andrew Krueger, National Health's Chief Medical Officer, and described Dr. Patrick's conduct. Dr. Krueger expressed dismay and responded that an immediate investigation would take place and Human Resources would have to be involved.

Nevertheless, Ms. Harper declined the request to make a written statement. She stated that her concern was about the possibility of an adverse impact on her.

According to Stacy Adams, National Health's Human Resources Manager, this was the first time National Health was aware of sexual harassment issues involving Dr. Patrick. Ms. Adams investigated the complaint and requested a written complaint from Ms. Harper. Ms. Harper again declined to make a written statement. Ms. Adams, however, kept her appraised. She told Ms. Harper that Dr. Krueger, with Ms. Adams, would meet with Dr. Patrick to discuss the women's concerns and outline the company's sexual harassment policy.

On April 7, 2004, Ms. Adams and Dr. Krueger met with Dr. Patrick. At this meeting, she advised him that some female employees had complained about his behavior. At the request of Ms. Harper, Ms. Adams did not identify the employees. After reviewing the sexual harassment policy with Dr. Patrick, she told him to be more careful in his actions. It is undisputed that following this meeting, Dr. Patrick stopped all harassing contact and communication with Ms. Harper. Yet in September 2004, Ms. Harper learned that she was going to be reassigned and would have to work again with Dr. Patrick. She refused, began crying, and left for the day. Upon her return to work the next day, she learned that she would be transferred to another position and would not have to work with Dr. Patrick.

In September 2004, another employee complained about Dr. Patrick's behavior and filed a written complaint. Thereupon, Ms. Adams and Dr. Krueger

created a performance improvement plan for Dr. Patrick. They discussed this plan with him on September 29, 2004. After they gave him specific examples of his unprofessional conduct, he refused to sign the written warning and performance plan. He instead chose to resign.

Procedural History

Ms. Harper initiated her law suit in December 2004, against National Health for sexual harassment and negligent hiring of Dr. Patrick. In addition, Ms. Harper filed suit against Dr. Patrick claiming that his conduct constituted assault and battery. Separately, National Health and Dr. Patrick tendered motions for summary judgment. After the parties engaged in extensive discovery, and following full briefing, Judge Lisabeth Hughes Abramson issued the March 30, 2006, opinion and order granting National Health's summary judgment motion, thereby dismissing, Ms. Harper's complaint against them. Moreover, Judge Abramson's order granted in part Dr. Patrick's motion for summary judgment by dismissing Ms. Harper's claim of assault but denying his summary judgment motion in all other respects.

On May 4, 2006, **approximately one and a half years after filing suit**, Ms. Harper deposed Dr. Patrick. According to Dr. Patrick's testimony, Dr. Amanda Lang (Lang), who was a staff physician with National Health, knew about the prior sexual harassment charges at the time of his hiring. Yet Dr. Lang recommended Dr. Patrick be hired to Dr. Steven Bowers (Bowers), then the Medical Director of National Health. Dr. Patrick further claimed that during his

interview by Dr. Bowers, he told him about the sexual harassment charges and also assured Dr. Bowers that the charges had been dismissed in Franklin Circuit Court and this Court. (Dr. Patrick's Deposition, pp. 42 - 44). Prior to Dr. Patrick's deposition, National Health's current principals and supervisors were unaware that Dr. Patrick had disclosed this information to the ex-officials of National Health, who originally hired him. Thereupon, Ms. Harper, based on Dr. Patrick's deposition testimony, filed a CR 60.02 motion for the trial court to reconsider its decision granting summary judgment to National Health based upon newly discovered evidence, citing Dr. Patrick's above revelations.

Judge Abramson was appointed to the Court of Appeals and vacated her position before ruling on the pending motion. Senior Judge Tom McDonald was appointed Special Judge in Jefferson Circuit Court Division Three. On October 2, 2006, Ms. Harper and Dr. Patrick appeared before Senior Judge McDonald on pending discovery motions. Ms. Harper's counsel advised the trial court that the CR 60.02 motion was still pending. At this time, Senior Judge McDonald signed the tendered order, which read "[i]t is hereby ordered that National Health Services be and hereby is reinstated as a Defendant in the above-styled action." The order was entered on October 11, 2006.

Senior Judge McDonald then left Division Three and Senior Judge Roger L. Crittenden was assigned as Special Judge to Division Three. Senior Judge Crittenden entered another order on December 4, 2006, which denied Ms.

Harper's CR 60.02 motion for relief. Therefore, National Health was once again dismissed as a respondent from the case.

Following the entry of Senior Judge Crittenden's order, Ms. Harper filed a motion to strike it. This order was denied by yet another judge, newly elected Circuit Judge Mitch Perry. Judge Perry's initial order merely stated that Senior Judge Crittenden acted within his authority, but it did not address whether or not a genuine issue of material fact existed for National Health. Responding to Ms. Harper's request, Judge Perry entered another order on April 13, 2007, explaining the trial court's reasoning in upholding the denial of Ms. Harper's CR 60.02 motion and the original granting of National Health's motion for summary judgment. In June 2007, Ms. Harper and Dr. Patrick reached a settlement. The claims against Dr. Patrick were dismissed with prejudice and the agreement memorialized by the trial court's June 7, 2007, entry of the agreed order. This appeal followed.

Standard of Review

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues of material fact and the moving party was entitled to judgment as matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). In reviewing a grant of summary judgment, our inquiry focuses on whether the trial court correctly found that there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. CR 56.03. Because summary judgment was granted to National

Health, we review the facts in the light most favorable to Ms. Harper, and all doubts are to be resolved in her favor. *Steelvest, Inc., v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Furthermore, we review a summary judgment *de novo* "because only legal questions and no factual findings are involved." *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

With regards to the issues concerning the granting and the propriety of the CR 60.02 motion, we can only reverse a denial of the motion under CR 60.02 if the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). In general, the reasons behind CR 60.02 have to do with some significant defect in the trial proceedings or evidence such that the effect of the final judgment, if allowed to stand, would result in a substantial miscarriage of justice. *Wine v. Commonwealth*, 699 S.W.2d 752, 754 (Ky. App. 1985).

Analysis

Three issues are presented for our consideration. We must determine whether sufficient judicial authority existed for Senior Judge Crittenden to enter the December 4, 2006, order denying Ms. Harper's request for relief under CR 60.02 after Senior Judge McDonald's order reinstating National Health as a party. Next we must address whether or not the "newly discovered" evidence provided by Ms. Harper in her CR 60.02 motion meets the criterion for such. And finally, we must decide the efficacy of the original order granting National Health's motion for summary judgment.

1. Judicial Authority

As a general rule, "[t]he doctrine of law of the case establishes a presumption that a ruling made at one stage of a lawsuit will be adhered to throughout the lawsuit." *Hallahan*, 138 S.W.3d 699 at 705 n. 4. A judge, however, does have the discretionary authority to reconsider a ruling. *Id.* "Generally, a judge may reexamine an earlier ruling and rescind it if he has a reasonable conviction that it was wrong and it would not cause undue prejudice to the party that benefited from it." *Id*. Moreover, and of particular relevance here, "[i]t is well established that a trial court may reconsider and grant summary judgment to a party subsequent to an earlier denial." *Id*. A decision to reconsider is reviewed under an abuse of discretion standard. *Id.* "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

Furthermore, courts have held that a judge may *sua sponte* reconsider a ruling without notice to the parties if the parties had the opportunity to fully brief the issues and to put on their evidence. *Fourroux v. City of Shepherdsville,* 148 S.W.3d 303, 305 (Ky. App. 2004). The record here indicates that Ms. Harper had the opportunity to fully brief the issues both in her response to National Health's

motion for summary judgment and also in the memorandum for the CR 60.02 motion.

After examining the record and the arguments of both parties, we do not believe that Senior Judge Crittenden abused the trial court's discretion in deciding to reconsider the previous ruling. The information on the record indicates that following Judge Abramson's appointment to the Court of Appeals, the division had a transition period until the appointment/election of a new judge. Transition periods often entail some disorder. We find nothing to demonstrate that Senior Judge Crittenden abused his discretion in subsequently denying the CR 60.02 motion but appropriately handled the judicial business of the division during a time of transition.

2. CR 60.02 Newly Discovered Evidence

CR 60.02 permits a collateral attack on a judgment based on the specific grounds set forth in the rule. *Faris v. Stone*, 103 S.W.3d 1, 4 (Ky. 2003). The rule names six separate grounds upon which a party may be relieved from the trial court's order. Here, Ms. Harper believes that four of the six grounds exist and would allow the introduction of Dr. Patrick's deposition testimony and a reconsideration of the summary judgment removing National Health as a respondent. CR 60.02 pertains in the following areas:

> . . . .
>
> (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02;

> (c) perjury or falsified evidence;
>
> (d) fraud affecting the proceedings, other than perjury or falsified evidence;
>
> . . . .
>
> (f) any other reason of an extraordinary nature justifying relief.

We will examine each pertinent ground. First, in order to have a new trial granted under CR 60.02(b), Ms. Harper must show "(1) the evidence was discovered after entry of judgment; (2) the moving party was diligent in discovering the new evidence; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) the evidence, if introduced, would probably result in a different outcome." *Meeks v. Ellis*, 7 S.W.3d 391, 392-3 (Ky. App. 1999), *quoting* *Hopkins v. Ratliff*, 957 S.W.2d 300, 301-02 (Ky. App. 1997). Therefore, we must determine whether or not Dr. Patrick's deposition testimony may be characterized as "newly discovered" evidence.

Ms. Harper depicts this evidence as "newly discovered" because it was obtained after the trial court entered its summary judgment. But CR 60.02 itself only allows evidence to be "newly discovered" if due diligence would not have allowed it to be discovered. Nothing indicates that this evidence was not discoverable at an earlier time as Ms. Harper could have deposed Dr. Patrick at

anytime following the filing of the action. It is simply not new evidence because the deposition took place one and half years after the initiation of the law suit.

Furthermore, the deposition testimony is merely cumulative. National Health's Chief Medical Officer, Dr. Krueger, answered Interrogatory No. 7, which questioned whether National Health had any information about prior complaints of sexual harassment against Dr. Patrick before his hire or to the present date, in the affirmative. He reported that the company had some information. A medical provider that worked with National Health had told Dr. Krueger in March 2003, that Dr. Patrick had only been charged with sexual harassment. Significantly, this same informant also told him that Dr. Patrick had been cleared of all allegations.

The trial court in its original opinion and order discussed this information, and particularly highlighted the fact that National Health had been told Dr. Patrick was cleared of all charges. Thus, the information from Dr. Patrick's deposition was merely additional i.e., cumulative and the trial court already considered the effect of such evidence when it granted summary judgment. In other words, the trial court ascertained that Dr. Patrick's previous charges and, more importantly, clearance from these charges was not material and did not create an issue of genuine fact. Hence, we conclude that under all CR 60.02(b) qualifications for "newly discovered" evidence, Dr. Patrick's deposition testimony cannot be characterized as "newly discovered."

No evidence has been supplied that implicates CR 60.02(c) or (d). The grounds under these two prongs involve perjury, falsified evidence, and/or

fraud affecting the proceedings. In the case at hand, the original National Health principals who hired Dr. Patrick were no longer with the company. Ms. Harper provided no facts showing the current principals knew about Dr. Patrick's history at the time of his hiring or that they acted in any way to prevent the court or Ms. Harper from discovering this information. Finally, with regards to Ms. Harper's reliance on the "catch all" language found in CR 60.02(f), which allows a court to relieve a party from its final judgment for "any other reason of an extraordinary nature justifying relief[,]" she provides no evidence of extraordinary circumstances warranting such relief. *Commonwealth v. Bustamonte,* 140 S.W.3d 581, 583 (Ky. App. 2004).

Therefore, Dr. Patrick's purported deposition testimony suggesting that National Health knew about his previous history at the time of his hiring does not meet any of the requirements for CR 60.02(b), (c), (d) or (f) and would not have resulted in a different trial court outcome. *See Brown*, 932 S.W.2d 359. As noted above, "CR 60.02 addresses itself to the sound discretion of the trial court." *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957). Accordingly, "[t]he trial court's exercise of discretion will not be disturbed on appeal except for abuse." *Id.* Considering the facts and procedural history of this case, we find no abuse of discretion in the trial court's denial of CR 60.02 relief. Moreover, because this testimony does not qualify as "newly discovered" evidence under CR 60.02, we will not consider it in our discussion of the soundness of the trial court's grant of summary judgment.

3. Original Summary Judgment Motion

The final question before us, then, is whether the trial court properly determined that there were no genuine issues of material fact and the moving party was entitled to judgment as matter of law. We must answer that question in the affirmative.

When a plaintiff brings a sexual harassment claim under Kentucky law, this Court interprets Kentucky's Civil Rights Act, KRS 344.040 *et seq*., in consonance with federal anti-discrimination law. *Meyers v. Chapman Printing Co., Inc.,* 840 S.W.2d 814, 821 (Ky. 1992); *Ammerman v. Board of Education of Nicholas County*, 30 S.W.3d 793, 797 (Ky. 2000). Therefore, a court should review it in the same manner as a claim brought under Title VII, the federal civil rights counterpart.

In order to establish a *prima facie* claim of hostile environment and sexual harassment by a co-worker, a plaintiff must show that: (1) she was a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based upon gender; (4) the harassment created a hostile work environment; and (5) the employer is vicariously liable. *See Clark v. United Parcel Service, Inc.,* 400 F.3d 341, 347-48 (6th Cir. 2005).

In the case at hand, Ms. Harper clearly meets the first three prongs, but the dispute centers around the final two elements necessary to establish an actionable claim. *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) is helpful in making this determination. Therein, the

Supreme Court stated that a hostile work "environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." (Citation omitted). In order to ascertain whether or not the environment is sufficiently hostile or abusive, we must look at all the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 787-88

It is obvious from the record, that Ms. Harper subjectively thought that Dr. Patrick's conduct toward her created a hostile work environment. For instance, when she broke into tears and had to leave work when learning that she was being transferred to a position that would once again require her to work with him, her behavior demonstrates the effect his conduct had on her. But the complicated issue is whether Dr. Patrick's conduct objectively created a hostile work environment. When "looking at all the circumstances" as required by *Faragher,* we must conclude that the alleged statements made by Dr. Patrick during lunch, his attempts to have a second lunch with her, his comments to other employees about her, and the three incidents of touching may be "sufficiently severe or pervasive" for a jury to decide whether the conditions of Ms. Harper's employment created an abusive work environment.

The trial court, however, in its determination of whether summary judgment should be granted to National Health noted that while the company was

not entitled to summary judgment based on the absence of a hostile work environment, its claim that it cannot be held vicariously liable for Dr. Patrick's conduct was more compelling. We agree with the trial court.

Both National Health and the trial court cite *Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868 (6th Cir. 1997) for the proposition that an employer in an harassment case is not held liable for the harassment itself, but rather for an inappropriate or insufficient response to it. And as this Court noted in *Kirkwood v. Courier-Journal*, 858 S.W.2d 194, 199 (Ky. App. 1993), "[s]exual or racial harassment by a co-worker is not a violation of Title VII unless the employer knew or should have known of the harassment and failed to take action."

For the sake of clarity, we note that although this Court's decision in *Blankenship* has been modified by the Supreme Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758-59, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), *Blankenship* remains good law for the proposition that a company may be held liable for co-worker harassment "if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known." *Blankenship*, 123 F.3d 868 at 873; *see also* Collette v. Stein-Mart, *Inc.*, 126 Fed. Appx. 678, 684 n. 3 (6th Cir. 2005) (noting that *Blankenship*'s suggestion that "mere negligence" is insufficient to establish employer liability was overruled by *Ellerth*/ *Faragher* and suggesting that, post-*Ellerth*/*Faragher*, "an employer may be held liable when its remedial response is merely negligent,

however well-intentioned."); *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 829 (6th Cir. 1999) (holding that, post-*Ellerth*/*Faragher*, the standard for co-worker harassment is negligence, but applying *Blankenship* to define negligence as an employer response that "manifests indifference or unreasonableness in light of the facts"). Hence, according to *Fenton*, in order for National Health, the employer, to be liable for the alleged sexual harassment between co-workers, it must be shown that the company was negligent or reckless. While Dr. Patrick was someone whom Ms. Harper was required to consult, he was not her immediate supervisor. Indeed, the incidents of touching, which Ms. Harper reported, occurred after she had been transferred to another division of National Health, which did not even require her to consult with him.

Therefore, given that Ms. Harper was Dr. Patrick's co-worker, she must present evidence that National Health knew about the harassment, failed to take steps to remedy the harassment, and, if it took steps, the steps were ineffective. Such a showing should be sufficient to establish a "policy" of tolerance by the company toward sexual harassment that would justify a finding of pattern or practice liability, so long as the other objective showings necessary to establish the existence of severe and pervasive harassment are in place. *E.E.O.C. v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F. Supp. 1059, 1076 (C.D. Ill. 1998).

National Health asserts that it took proper and reasonable measures to prevent and correct sexual harassment because it implemented an anti-harassment

policy, provided every employee a copy of the policy, and made reasonable efforts to train all employees regarding such policy. Emergis, National Health's parent company also had a sexual harassment policy applicable to the parties herein.

First, let us examine Ms. Harper's contention that National Health knew or should have known about Dr. Patrick's negligence. National Health became aware of prior allegations of misconduct concerning Dr. Patrick in March 2003, from a medical provider. Significantly, with regards to these allegations, the same provider also assured Dr. Krueger that Dr. Patrick had been cleared of all charges.

Thus, the question becomes, What did National Health's principals do when they became aware of Dr. Patrick's alleged harassing behavior toward Ms. Harper in March 2004? National Health maintains that it exercised reasonable care to promptly correct the alleged harassment. Once National Health learned of Ms. Harper's harassment complaint, it immediately investigated it. (Ms. Harper acknowledges that she did not report her concerns to supervisors until approximately seven months after she had lunch with Dr. Patrick.) As a matter of fact, Ms. Harper admits National Health took immediate steps, investigated the complaint, met with Dr. Patrick, informed him about the complaints, reviewed National Health's sexual harassment policy, and instructed him to be more careful in his actions.

Ms. Harper suggests that *Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540 (Ky. 2001) is instructive. While there are some similarities in the fact

pattern, there are substantial differences. In *Bank One*, the charges of sexual harassment were leveled at a supervisor rather than a co-worker. The legal remedies are quite different in such a case. Furthermore, the summary judgment grant in *Murphy* was overturned because the Supreme Court believed an issue of fact had been presented with respect to whether the bank confronted the perpetrator of the alleged harassment with the essential facts related to a previous charge by another employee and took proper corrective action to prevent later misconduct toward the plaintiff in that case. Ms. Harper herself has admitted that once National Health learned of Dr. Patrick's behavior, it acted, and the harassment ceased.

The final issue then is whether the action taken by National Health was effective. This meeting, by Ms. Harper's own admission, resulted in the cessation of Dr. Patrick's offensive conduct towards her. Eventually, because of actions by National Health, Dr. Patrick resigned from the company. In short, National Health was attentive and proficient in its handling of Ms. Harper's allegations of sexual harassment once she reported it. While we empathize with Ms. Harper's distress in dealing with Dr. Patrick, we find no basis to hold National Health vicariously liability for its failure to correct a sexually hostile work environment.

Let us now turn our attention to Ms. Harper's assertion that National Health should be held liable for negligently hiring and/or retaining Dr. Patrick. The tort of negligent hiring is recognized in *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d

438 (Ky. App. 1998). In Kentucky, "an employer can be held liable when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable risk of harm to a third person." *Id.* at 442. Courts evaluate whether the employer knew, or reasonably, should have known that (1) the employee in question was unfit for the position he or she was hired, and (2) the employee's "placement or retention in that job created an unreasonable risk of harm" to a third party. *Id*. Yet *Oakley* is distinguishable from the facts herein. In *Oakley*, the employer placed a female employee inside a store at night with another employee whom the employer knew had an extensive criminal history including an arrest for attempted rape. *Id.*

Continuing our analysis, it is noteworthy that many of the aforementioned facts are relevant in determining whether Ms. Harper has a claim of negligent hiring. She proffers that Dr. Patrick's behavior toward her, which created a hostile work environment, was foreseeable based on the prior charges of harassment against Dr. Patrick. National Health, however, only learned in March 2003, of the previous sexual harassment allegations and they were also informed by this provider that Dr. Patrick had been cleared of all charges.

Furthermore, National Health performed its pre-hiring investigation by using the company's standard practice of verifying his medical license with the Kentucky Medical Board of Licensure, ascertaining whether any pending complaints or history of disciplinary action existed with the Licensure Board, checking his references, confirming his specialty and board certification, and

performing a drug screen. The pre-hiring screening revealed his license was current, no pending complaints or history of disciplinary action existed, he was properly qualified and board-certified in his specialty, and the drug screen was normal.

Conversely, Ms. Harper provided no evidence supporting her claim of National Health's negligent hiring. She has offered nothing to demonstrate that National Health's pre-hiring investigation is deficient compared with industry standards. Similarly, no evidence has been provided showing that National Health covered up or ignored Dr. Patrick's conduct. In fact, Ms. Harper and Dr. Patrick were employed by National Health for four years before any alleged act of harassment occurred. This information supports National Health's contention that it would have little reason to suspect Dr. Patrick's behavior would be problematic. And, once the behavior was reported to National Health, they took immediate remedial action. Therefore, we must also concur with the trial court's decision that no genuine issues of material fact existed that National Health was negligent in its hiring and retention of Dr. Patrick. Thus, Ms. Harper cannot proceed with her claim of negligent hiring and retention and the trial court's grant of summary judgment in National Health's favor should be affirmed.

Conclusion

Having heard the oral arguments and closely examined the record in a light most favorable to Ms. Harper, and resolving all doubts in her favor, we must conclude that no genuine issues of material fact remain for adjudication and that National Health was entitled to a summary judgment as a matter of law. We find no error in the summary judgment on appeal.

ALL CONCUR.

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