

RENDERED: SEPTEMBER 4, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001226-MR

CONNIE MARSHALL

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 05-CI-004871

JIM HAYNES;
ANDY VINE; AND
BLUEGRASS AUTOMOTIVE, INC.

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; HENRY,¹ SENIOR JUDGE.

STUMBO, JUDGE: Connie Marshall appeals from an Order of the Jefferson

Circuit Court dismissing with prejudice her complaint alleging wrongful

termination and workplace discrimination. The action was dismissed after the trial

¹ Senior Judge Michael L. Henry 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.

court determined that Marshall repeatedly and intentionally refused to participate in discovery and to prosecute her action. In a cryptically written *pro se* argument, Marshall appears to argue that the Order on appeal resulted from judicial “malice and bias,” thus entitling her to reversal and remand. We affirm the Order of the Jefferson Circuit Court because Marshall has not demonstrated that her argument is preserved for appellate review, and has not addressed the trial court’s basis for the Order on appeal nor demonstrated the existence of reversible error.

Connie Marshall was an employee of Blue Grass Automotive, Inc., where she served as an administrative assistant. On June 6, 2005, she filed a *pro se* complaint in Jefferson Circuit Court against Blue Grass Automotive; Chief Executive Officer, Jim Hayes; and manager, Andy Vine, alleging that they created or tolerated a “racially and sexually hostile” work environment in which Marshall “was subjected to hate crimes.” Marshall maintained that she was subjected to death threats, was assaulted on three occasions resulting in two emergency room visits, and had bugs thrown in her hair by one or more Blue Grass employees. She further claimed that improper comments were made by Blue Grass employees about her body, that she received sexually explicit e-mails and was otherwise harassed and humiliated. Ultimately, Marshall maintained that she was improperly placed on leave, wrongfully terminated, and was entitled to \$5,000,000.00 in damages.

The matter proceeded in Jefferson Circuit Court, with Blue Grass serving interrogatories and requests for documents. After the matter was held in

abeyance for 60 days to give Marshall the opportunity to hire an attorney (which she did not do), Marshall answered the discovery request. Marshall subsequently served a “First Set of Interrogatories” on Blue Grass, et al., in April and May, 2006, which the defendants answered.

It appears from the record that Marshall was not satisfied with the answers to her tendered interrogatories, and she subsequently filed two motions to compel discovery responses and two motions for sanctions. The motions were denied on July 20, 2006.

Marshall then filed an Amended First Set of Interrogatories, to which the defendants again responded. Again apparently unhappy with the responses she received, Marshall filed additional motions to compel discovery answers and additional motions for sanctions. These motions again were denied.

After Marshall’s motion for a default judgment was denied, Blue Grass scheduled a deposition of Marshall to be conducted on September 26, 2007. Marshall then filed a written statement on September 7, 2007, stating that “[T]he plaintiff will not be in attendance at any depositions until the defendants have answered plaintiff’s interrogatories, pursuant to CR 37.01 and CR 36.02 and the laws of the Court (please note that I am referring to the laws on the books).” (Emphasis original).

Marshall did not appear at the September 26, 2007, deposition. Blue Grass responded with a motion to dismiss the Complaint based on Marshall’s willful failure to appear at the deposition. That motion was denied by way of an

Order rendered on April 16, 2008, which directed Marshall to pay the defendants' reasonable attorney fees.² In so doing, the court noted that Marshall appeared to be inviting a dismissal by her flagrant disregard of the court's order, but acknowledged that a dismissal with prejudice was a matter of last resort and that such an action was "not yet" warranted.

Another deposition of Marshall was scheduled on April 28, 2008. In response, Marshall left a voice mail with the defendants' counsel stating that she would not be available for the deposition. After counsel mailed to her a letter seeking clarification, Marshall left a second voice mail stating that she received the letter but adding nothing additional. Marshall did not attend the second deposition.

Blue Grass, et al., again moved for a dismissal of Marshall's complaint based on her willful refusal to participate in discovery. On May 28, 2008, the trial court rendered an Order sustaining the motion and dismissing the complaint with prejudice. In so doing, it determined that Marshall was proceeding in bad faith by refusing to participate in discovery, and that she appeared to be doing so in reaction to her misperception that she had been wrongfully denied the discovery and due process of law to which she was entitled. The court again noted its recognition that dismissal was a harsh remedy reserved for only the most extreme circumstances, but found that despite its best efforts to compel Marshall's participation in discovery, Marshall remained willfully noncompliant and unwilling to prosecute the action she filed. This appeal followed.

² The court later fixed that fee at slightly more than \$900.00.

In her *pro se* written argument, Marshall again claims entitlement to \$5,000,000.00 in damages arising from the harassment and wrongful termination she allegedly suffered at Blue Grass Automotive. In lieu of demonstrating – or even maintaining – that the Jefferson Circuit Court erred in dismissing her complaint, however, Marshall’s written argument consists of five paragraphs wherein she lists the exhibits which were tendered to the court at the time of the filing of the complaint.

We must first note that Marshall has not complied with the requirement set out in CR 76.12(4)(c)(v) that she demonstrate at the beginning of her argument that the issue raised is preserved for appellate review and, if so, in what manner. We would be well within our authority to strike Marshall’s brief and summarily affirm the order on appeal. CR 76.12(8)(a). It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court. *Combs v. Knott County Fiscal Court*, 141 S.W.2d 859 (Ky. App. 1940).

Even if the matter were preserved for appellate review, Marshall has done nothing to demonstrate that the Jefferson Circuit Court erred in dismissing her complaint. The trial court’s rulings are presumptively correct, and the burden rests with the appellant to demonstrate the existence of reversible error. *Clark County Bd. of Ed. v. Jones*, 625 S.W.2d 586 (Ky. App. 1981). Marshall has not alleged, much less demonstrated, the existence of reversible error. Her brief argument consists entirely of the proof which she apparently would have presented

had the matter proceeded to trial. Conversely, the record reveals that Marshall repeatedly and with volition refused to participate in discovery, and went so far as to memorialize her refusal to attend depositions and to enter it into the record.

Kentucky Rule of Civil Procedure (CR) 37.02 provides that a party who refuses to testify at deposition after having been so ordered may be found to be in contempt of court, with the range of sanctions including dismissal of the action. The factors a trial court are to consider in ruling on the involuntary dismissal of a case for failure to comply with discovery rules include: (1) the extent of the party's personal responsibility; (2) the history of dilatoriness; (3) whether the party's conduct was willful and in bad faith; (4) the meritoriousness of the claim; (5) prejudice to the other party; and (6) the availability of alternative sanctions. *Stapleton v. Shower*, 251 S.W.3d 341 (Ky. App. 2008).

It is clear from the April 16, 2008, Order denying Blue Grass Automotive's first motion to dismiss, as well as the May 28, 2008, Order on appeal, that the Jefferson Circuit Court closely considered Marshall's personal responsibility in refusing to participate in discovery, along with her apparent bad faith and willful conduct, as well as the availability of alternative sanctions and the other factors set out in *Stapleton*. In the April 16, 2008, Order denying Blue Grass Automotive's first motion to dismiss, the trial court expressly noted that "despite the Plaintiffs' [sic] apparent best efforts to invite the sanction requested," dismissal was a sanction of last resort which it sought to avoid. The trial court was left with no alternative but to dismiss the action given Marshall's willful and repeated

refusal to participate in discovery, coupled with what the court found was a “complete disregard . . . for the procedures, rulings and orders of this Court throughout the course of this litigation,” along with her written statement entered into the record which left no doubt as to the course of conduct she had chosen.

The record demonstrates that Marshall chose not to participate in discovery despite repeated opportunities and admonitions to do so. Dismissal of Marshall’s complaint was supported by the record and the law, and we find no error.

For the foregoing reasons, we affirm the Order of the Jefferson Circuit Court dismissing Marshall’s complaint.

ALL CONCUR.

BRIEF FOR APPELLANT:

Connie Marshall, *pro se*
Louisville, Kentucky

BRIEF FOR APPELLEES:

Felix J. Gora
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