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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001975-MR

MICHELLE KENT — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 05-CI-00743

COMMONWEALTH OF KENTUCKY,
FISH AND WILDLIFE — APPELLEE

OPINION AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: STUMBO, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: Michelle Kent ("Kent") appeals from a summary judgment of the Franklin Circuit Court finding that the Commonwealth of Kentucky ("Commonwealth") was not liable to her as a matter of law for violation of Kentucky Revised Statute(s) ("KRS") 344.280. Kent alleges that there were material issues of fact as to whether her employer, the Kentucky Department of

Fish and Wildlife Resources ("the Department"), retaliated against her in violation of the Kentucky Civil Rights Act. Upon review, we affirm in part and reverse in part.

Background

Kent began her employment with the Commonwealth of Kentucky in 1989. In 1998, she transferred to the Kentucky Department of Fish and Wildlife Resources. The allegations giving rise to this action arose in 2003, during Kent's fifth year with the Department, when she was acting as Personnel Administrator for the Department.

Kent was continually promoted during the years prior to 2003, and consistently received high employee performance reviews. In July of 2003, Kent's supervisor, Bob Bates ("Bates"), was the Division Director of Administrative Services. Bates indicated to Kent that he would be taking the position of Deputy Commissioner and discussed with Kent the possibility that she might replace him as Division Director. However, when later offered the position, Kent declined it – citing concerns about the level of responsibility the job entailed as well as its "non-merit" status.

Sherry Kefauver ("Kefauver") was thereafter named Division Director. Kent alleges that she spoke with Bates again on July 14, 2003, and indicated that she was interested in Kefauver's former position of Assistant Director. Kent alleges that Bates discussed "detailing" her into the position. "Detailing" is apparently a process whereby an employee who does not yet have

the qualifications for a position may be temporarily placed in a position until such time as he or she has the necessary qualifications. However, a person may only be detailed in a job for twelve months. Kent indicated to Bates that she did not want to be detailed immediately, but wanted to delay detailing into the position for several months until she was eligible to buy five years of retirement at a lower cost.[1] Kent alleges that Bates told her they could "hold off" a few months before detailing her into the position. Bates also allegedly suggested that Kent speak with Kefauver about her interest in the position. Kent contends that she discussed the timing issue with Kefauver, who did not think it would be a problem to wait before detailing her.

On September 2, 2003, Kent again discussed taking the position with Bates. Kent allegedly expressed misgivings at that time about taking the job. Bates then informed Kent that she was not the only one being considered for the position. He indicated that a candidate by the name of Jim Goodman ("Goodman") was also being considered for the job.

On September 8, 2003, Kent again spoke with Kefauver about the position. During this meeting, Kefauver told Kent that a Division Supervisor, Jeff Kays ("Kays"), had reported that Kent was having an extra-marital affair with another coworker in the Department. Kent was upset and met with Bates on the following day to discuss Kays' comment. Bates began investigating the complaint,

[1] According to Kent, fifteen years of service was necessary to "buy" retirement time at a lower cost. Kent was a few months away from being employed by the Commonwealth for fifteen years.

which was then turned over to the Department attorney, Ellen Benzing ("Benzing").

On September 19, 2003, Bates informed Kent that he had contacted the Personnel Cabinet about placing her in the Assistant Director position and found out that she lacked the managerial experience required to qualify for the position. Kent alleges that Bates told her that he was "sorry" and that he "had always taken care of her and still would." Kent avers, however, that there was never a problem with her waiting to be "detailed" into the position before she made the complaint about Kays.

On September 26, 2003, Benzing held a meeting with Kent to discuss the memorandum Benzing was preparing in response to Kent's complaint. The memorandum contained the details of Benzing's investigation as well as her initial findings. Kent was unhappy with Benzing's initial findings and demanded further inquiry into prior complaints that had been made against Kays by other women in the Department.

In October of 2003, the position of Assistant Director (the position Kent had sought) was filled by Regina Penn ("Penn"). Penn became Kent's new supervisor. On October 28, 2003, the Department formally responded to Kent's complaint by written letter. The Department found that Kays' conduct did not rise to the level of harassment or misconduct. However, the Commissioner of the Department, Tom Bennett, informed Kent that Kays had been verbally reprimanded and ordered to review the Department's harassment policy. Kays also

apologized to Kent, although it is disputed whether he was told to do so by superiors or did so of his own accord.

Kent disagreed with the Department's findings and thereafter retained private counsel. On November 20, 2003, Kent's counsel sent a letter to Commissioner Bennett questioning the conclusions reached by the Department in its investigation. The correspondence by Kent's counsel alleged that the Department failed to adequately investigate Kays' pattern of improper conduct, among other things. Penn, the new Assistant Director, responded to this letter on December 1, 2003, noting that the Department had already investigated the allegations against Kays and determined them to be without merit. Kent appealed Penn's decision.

Kent, accompanied by counsel, met with the Department's Deputy Commissioner and an Assistant Attorney General on December 18, 2003. In that meeting, Kent alleged that the Department failed to investigate her complaint or Kays' pattern of improper behavior towards women. She further contended that the Department engaged in "illegal hiring and promotion practices" including the "pre-selection of employees," as well as "illegal time-keeping procedures." The Deputy Commissioner made written findings on January 15, 2004, finding each of Kent's contentions to be without merit.

In early 2004, there was a change of administration at the Commerce Cabinet (hereinafter the "Cabinet")[2]. Although two investigations had already

[2] The Commerce Cabinet oversees the Department of Fish and Wildlife Resources.

been conducted, Kent reiterated her complaints to the new Executive Director of the Cabinet, Bob Wilson ("Wilson"). In March of 2004, Kent noticed that Bates and an individual from information technology were granted permission to allow remote access to her computer. Upon inquiring, she learned that the permissions had been programmed while she was out of the office on leave. Further, upon asking several fellow employees whether their computers had "permissions" on them, they reported that they did not.

In April of 2004, Kent's office was moved from the "Game Farm" (where she had always worked while employed by the Department) to the Cabinet's offices in the "Office Tower." Kent alleges that she was unable to perform the material duties of her position while working from the Tower because she did not have ready access to personnel files there. While Kent was working from the Tower, the Cabinet continued to investigate her allegations, which now included allegations concerning her latest performance reviews as well as allegations that her computer e-mail was capable of being remotely accessed by anyone without a password. She also alleged that during this time a file disappeared from her computer.

Upon completion of the new investigation, the Cabinet found Kent's allegations to be without merit. It found that other people in the Department had similar problems with their e-mail (which were immediately corrected once discovered), and that her other allegations did not rise to the level of harassment or retaliation. Kent continued to have conflicts with her immediate supervisor, Penn.

Wilson spoke with her about an opportunity to work in the Personnel Department for the Parks Department without a change in pay; however, Kent was not interested. Thereafter, for reasons that are unclear from the record, she was moved from the "Office Tower" back to the "Game Farm."

Unsatisfied with Wilson's attempts to resolve her ongoing concerns, Kent filed yet another formal grievance. This grievance was directed against the entire chain of command in the Department. Kent again alleged retaliation as a result of her September 2003 grievance over Kays' comment. In addition, she alleged that expectations concerning her job duties changed and that she was not provided with a description of what her duties were to include. Kent maintains that her performance evaluations during this time also suffered (although it is undisputed that she still had satisfactory performance reviews).

On February 16, 2005, Kent resigned from the Department and completed a voluntary transfer to the Department for Health and Family Services pursuant to a "Voluntary Transfer and Salary Retention Agreement."

On May 25, 2005, Kent filed the present action in Franklin Circuit Court alleging retaliation under KRS 344.030(5) and 61.101(1).[3] After substantial discovery had been completed in the case, including Kent's deposition, the Commonwealth filed its motion for summary judgment on August 5, 2008. After numerous extensions of time, Kent filed a response, which was accepted by the

[3] KRS 61.102(1) prohibits the reprisal of a public employee for disclosure of violations of the law. Kent does not appeal the decision with respect to KRS 61.102(1), but only with respect to KRS 344.030(5).

trial court despite being untimely. Thereafter, the trial court made a determination on the merits, finding in favor of the Commonwealth.

Analysis

On review of the grant or denial of a motion for summary judgment, we determine whether the trial court was correct in finding that the moving party was entitled to judgment as a matter of law and that there existed no genuine issues of material fact. *Steelvest, Inc v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). When asking this question, we review the record "in a light most favorable to the party opposing the motion for summary judgment." *Id*. As the grant or denial of summary judgment is a question of law, we review such judgments *de novo*, giving no deference to the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). Further, we look to federal law for guidance in interpreting Kentucky's Civil Rights Act. *See, e.g., Tiller v. University of Kentucky*, 55 S.W.3d 846, 849 (Ky. App. 2001).

The basis of Kent's claim is unlawful retaliation under KRS 344.280(1). Such claim requires that a plaintiff establish a *prima facie* case. A *prima facie* case of unlawful retaliation requires that Kent show each of the following:

> 1) [that] she engaged in a protected activity, 2) [that] she was disadvantaged by an act of her employer, and 3) [that] there was a causal connection between the activity engaged in and the employer's act.

Kentucky Center for the Arts v. Handley, 827 S.W.2d 697, 701 (Ky. App. 1991), citing *De Anda v. St. Joseph Hospital*, 671 F.2d 850, 856 (1982). In cases like the present one, where no overt evidence of retaliation is presented, we follow the guildelines set out under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See also Kentucky Department of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2004). Under the *McDonnell Douglas* framework, once the plaintiff establishes a *prima facie* case, the burden shifts to the defendant employer to come forth with a non-retaliatory reason for the adverse employment decision(s) that disadvantaged the plaintiff. *Kentucky Dept. of Corrections*, 123 S.W.3d at 134. Once the defendant employer presents such evidence, the plaintiff must then come forward with evidence of a causal connection, or retaliatory intent, *i.e.* that the proffered reason was merely pretext for a retaliatory reason. *Id*. A plaintiff who makes a *prima facie* case and offers proof of pretext can survive summary judgment. *Id*. Thereafter, however, the plaintiff must still "meet her initial burden of persuading the trier of fact by a preponderance of the evidence that the defendant unlawfully retaliated against her." *Id.,* citing *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 143, 120 S.Ct. 2097, 2106; 147 L.Ed.2d 105, 117 (2000).

Failure to be promoted in a position may be evidence of adverse treatment in retaliation cases. *Id*. In order to establish that failure to promote is evidence of adverse treatment, a plaintiff must demonstrate the following:

> [T]hat (1) she ***applied*** for promotion after engaging in a protected activity and was ***qualified*** for the promotion, (2) she was ***considered for and denied*** the promotion, and (3) other employees of similar or lesser qualifications received promotions at the time [her] request for promotion was denied.

Id. (emphasis added)*; see also Brown v. State of Tennessee*, 693 F.2d 600, 603 (6th Cir. 1982). In the present case, it is clear that Kent cannot establish a *prima facie* case of retaliation based upon failure to promote. Specifically, she never *applied* for the position of Assistant Director (because she lacked the requisite experience to be placed upon the state register of candidates for the position). Further, she was never *qualified* for the position because she lacked over eighteen months of experience required for the job. It is of little consequence that others in the Department had been detailed into jobs they were not qualified for, as detailing was only allowed for periods of twelve months or less according to personnel rules (and Kent would have needed to be detailed for over eighteen months). Kent admitted in her deposition testimony that it would have violated the State's merit system hiring guidelines if she would have been promoted to the position. However, she argued that they could "tweak the spec" for the job if they wanted to. We find it remarkable that Kent suggests on appeal that the Commonwealth engaged in retaliation because of its refusal to violate its own hiring procedures. As the trial court aptly noted, "appointment to [the position of Assistant Director] is determined solely on merit and fitness as prescribed by law. Neither the

Department's Commissioner nor the division directors are above the law nor have the authority to unilaterally amend such prescriptions."

However, we also recognize that "failure to promote" was not Kent's only evidence in support of a *prima facie* case of retaliation. Kent also argued that other actions by the Commonwealth constituted adverse treatment. Specifically, Kent averred that (1) her computer and e-mails were covertly monitored; (2) that she was "ostracized" in the workplace; (3) that her employer refused to provide her with detailed and accurate job details so that she could fully perform her duties and responsibilities; and (4) that her employer attempted to create the impression that she had been responsible for certain "hiring improprieties" in the past.

KRS 344.280 provides, in pertinent part, that:

> It shall be an unlawful practice for a person, or for two (2) or more persons to conspire:
>
> > (1) To 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 . . . .

(Emphasis added.) Our Supreme Court recently stated, in the case of *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 802 (Ky. 2004)(plurality), that a "plaintiff must identify a materially adverse change in the terms and conditions of [her] employment to state a claim for retaliation." *Id.,* quoting *Hollins v. Atlantic Co., Inc*., 188 F.3d 652, 662 (6th Cir. 1999). A materially adverse change is not a change that is a "mere inconvenience" or a mere

alteration of job responsibilities. *Id*. Rather, a materially adverse change must be something more than "those petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68; 126 S.Ct. 2405, 2415; 165 L.Ed.2d 345 (2006). The types of actions or behaviors in the workplace that constitute materially adverse changes are of such a nature as would dissuade "a reasonable worker from making or supporting a charge of discrimination." *Id*.

In the present case, Kent suffered no salary change and was not demoted from her position. However, her remaining allegations if true, could constitute a materially adverse change in the workplace as she alleges that her office was moved away from the rest of the department (to the "Tower"),[4] that she was unable to perform the material duties of her position while at the Tower because she did not have ready access to personnel files, that expectations changed concerning her job duties and that she was not given a proper description of her responsibilities, that her computer was remotely accessed and that file(s) mysteriously disappeared from her computer, and that she was generally ostracized by members of management within the Department. As the United States Supreme Court has said, "Context matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used

[4] Despite the Commonwealth's suggestion that Kent "agreed" to the move, Kent testified in her deposition that she did not know why she was moved and that she was essentially unable to perform her job while there because she lacked ready access to the personnel files.

or the physical acts performed.'" *Burlington Northern, supra*, quoting *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Additionally, we find it worthy of mention that we need not consider the underlying conduct giving rise to initial grievance, as the Court's primary concern should be the retaliatory acts in question. *See, e.g., Burlington Northern, supra.*

Here, as the actions *could be* considered materially adverse, the only remaining question is whether there was a causal connection between the Department's actions and Kent's filing of formal grievances. Certainly a jury could conclude that there was such a connection here, as most of the activities occurred close in time to filing of the original (or at least one of the later) grievances. *See, e.g., Follett v. Gateway Regional Health System, Inc*., 229 S.W.3d 925, 929 (Ky. App. 2007) (noting that there is rarely a "smoking gun" and that causal connection may be shown through "circumstantial evidence and the inferences that can be drawn therefrom.") Indeed, "at the *prima facie* stage the burden is minimal, requiring [only that] the plaintiff . . . put forth some evidence to deduce a causal connection between the retaliatory action and the protected activity." *E.E.O.C. v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997).

As an appellate court, we do not fact-find or pass judgment as to whether an appellant's allegations are true or untrue. Rather, that is a question for the finder of fact in the trial court. As aforestated, we must view the facts in a light most favorable to Kent. Here, we agree that Kent could not succeed, as a matter of law, in her retaliation claim based upon failure to promote. However, we cannot

avoid the conclusion that Kent's other claims, if true, could support a claim of retaliation. Such findings of fact are to be made by the jury and cannot be determined by the trial court as a matter of law. As such, summary judgment was not proper on these claims.

Thus, we affirm in part and reverse in part. Partial summary judgment was proper on the issue of failure to promote; however, summary judgment was not proper as to the other grounds supporting a claim of retaliation. Upon remand, the issue of whether such acts or omissions constituted retaliation should be presented to the jury at trial.

ALL CONCUR.

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