RENDERED: NOVEMBER 25, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000089-MR

TERRA BECKER — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 08-CI-00045

SABER MANAGEMENT- KENTUCKY, LLC; AND MARK GOODSIR — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

VANMETER, JUDGE: Appellant, Terra Becker, appeals from a Taylor Circuit Court's order granting summary judgment to appellees, Saber Management-Kentucky, LLC and Mark Goodsir. Becker filed a multi-count complaint against

[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.

Saber and Goodsir asserting two primary claims under the Kentucky Civil Rights Act (KCRA), as set out in KRS 344.040: (1) hostile work environment/sexual harassment; and (2) retaliation. Becker argues on appeal that the trial court erred in summarily dismissing these claims. Finding no genuine issues of material fact in this record to preclude summary judgment on these issues, we affirm.

I. Factual Background

Many of the facts in this case are disputed. Since this appeal addresses the propriety of a summary judgment decree, we will recite the facts in a light most favorable to Becker. *See Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) ("[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 [her] favor").

Becker was a full-time high school student during her period of employment with Saber. She was hired for a part-time position in April 2007 at Campbellsville Memorial Gardens, a cemetery. Her job duties included providing general office assistance to the Administrator, Shellie Mattingly, as well as making telemarketing phone calls to potential customers for the purpose of trying to set up sales appointments with the cemetery's sales counselor. Becker was paid an hourly rate, plus two dollars for every appointment she made and five dollars for each appointment resulting in a sale. According to Becker, her supervisors were Mattingly and the Sales Manager.

At the time of Becker's hiring, the Sales Manager was Jennifer Ward. In October 2007, Ward transferred to another location. On Monday, October 22, 2007, Charles Gernheuser was brought in to replace Ward. Thereafter, Gernheuser hired three new female sales counselors, increasing the total number of sales counselors in the Campbellsville office from one to four.

The record is clear that during the two-week period between October 22 and November 5, Gernheuser made numerous unwanted comments of a sexual nature to Becker, as well as to the other female employees. A summary of the incidents, described by Becker in her deposition, includes the following:

> 1. Stated to Becker, in the presence of another male employee, that it would be nice if Becker were wearing a bikini so that everyone could watch her.
>
> 2. Repeatedly commented to Becker that she was beautiful and that he wished he was younger and she was older, so he could pursue her. With respect to this last class of comment, Becker testified in her deposition that she understood from his comments that he was not going to pursue her.
>
> 3. Stated to Becker that she had a "nice ass."
>
> 4. Attempted to get Becker to come to his apartment to help him move in and pick out paint to match some pictures that had been made by his daughter. Becker testified that she did not view Gernheuser's invitation as either an explicit or implicit request for sex.
>
> 5. Called Becker and asked her to come to the office at 11:30 one night to help with an unidentified activity.
>
> 6. Required Becker to drive with him to the lobby of a local Holiday Inn, where Gernheuser was then

staying, to look at his daughter's pictures which Gernheuser had set up in the lobby to sell. While at the Holiday Inn, Gernheuser looked at his email on a computer in the lobby and Becker went to the cafeteria for hot chocolate. Then Gernheuser and Becker went back to the office.

7. Required Becker to drive with him to his apartment. The length of the stay was five to ten minutes.[2]

8. Asked Becker to stay at his apartment over the weekend,[3] while he traveled to the company's office in Indiana. Becker testified Gernheuser wanted her to babysit his dog, and he suggested Becker could have friends over, sleep in his bed, eat his food and use the shower. When Gernheuser initially tried to give Becker a key, she refused, but he had multiple apartment keys made and gave one to each employee in the office.

9. The last time Becker and Gernheuser were in the office, he touched her back in the area of her shoulder.

At the time of these incidents, Becker was 17 years old and Gernheuser was 57 years old. The record is clear and undisputed, however, that Gernheuser never explicitly propositioned Becker, requested sexual favors, asked her out, or threatened her.

On or about Friday, November 2, which was eleven days after Gernheuser started in the Campbellsville office, Becker reported Gernheuser's

[2] Becker's deposition testimony was inconsistent on whether she actually ever went with Gernheuser to his apartment. For the purpose of this opinion, and again considering the facts most favorably to Becker, we will assume that she did go to the apartment.

[3] The exact dates that Gernheuser would have been gone are not clear from the record, but the weekend was that of Friday, November 2 to Sunday, November 4, which presumably was his final weekend assigned to Saber's Campbellsville office.

conduct to the Administrator, Mattingly, who assured Becker that she would address the situation immediately. Around this time, Becker also reported to Mattingly an incident involving Gernheuser's use of profanity and yelling, which was directed towards the female sales counselors. This latter incident, and Gernheuser's statements and conduct towards Becker, were reported by Mattingly during a conference call to management personnel at Saber's headquarters in Kokomo, Indiana.

Three days later, on Monday, November 5, Gernheuser was demoted and transferred to another location.[4] After another three days, on Thursday, November 8, Goodsir replaced Gernheuser as the new Sales Manager for the office. Goodsir met with the employees, including Becker, and expressed empathy regarding their dealings with Gernheuser. However, to eliminate the ongoing discussions regarding Gernheuser, Goodsir instructed the staff to put the incident behind them and not talk about it any more.

Despite his departure, Gernheuser continued to call the staff, including Becker on two occasions. Becker reported these telephone calls to Goodsir on or about Saturday, November 10. Goodsir did not document Becker's renewed complaint or report it to headquarters. However, at some point Gernheuser called the office while Becker and the other female sales counselors were present. Goodsir took the telephone and instructed Gernheuser that he was not to speak with any of the staff. Rather, if Gernheuser should have any reason to

[4] Gernheuser did not return to the Campbellsville office after his departure in the week ending Friday, November 2.

call again, he should speak only with Goodsir. Gernheuser thereafter stopped calling.

On Monday, November 12, Goodsir stayed late to observe Becker's work, as the sales counselors had complained to him about her performance in generating sales appointments. After observing Becker, Goodsir concluded that she was making too many personal phone calls and not enough sales calls, although he stated during his deposition that he had discarded his handwritten notes documenting her work performance from that night. With four sales counselors clamoring for leads, Goodsir decided that the office needed a full-time telemarketer. Goodsir, who understood that Becker was a full-time student who could not work full-time, discharged her on November 13. Immediately thereafter, one of the sales counselors was transferred to the newly-created full-time telemarketing position.

In January 2008, Becker filed a complaint in the Taylor Circuit Court alleging claims for hostile work environment/sexual harassment and retaliation. Becker's claims were dismissed by summary judgment. This appeal follows.

II. Standard of Review

Our standard of review on appeal of a summary judgment order 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 (Ky.App. 1996). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should

not render a summary judgment if there is any issue of material fact." *Steelvest, Inc.*, 807 S.W.2d at 480. The determination of whether there is any issue of material fact is a question of law and thus, the trial court's determination regarding this question is owed no deference by this Court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky.App. 2000).

III. Hostile Work Environment

In her first argument, Becker claims the trial court erred in its determination that no genuine issues of material fact existed regarding her hostile work environment/sexual harassment claim, which was brought under the KCRA. Under KRS 344.040, "it is unlawful for an employer, on the basis of sex, to 'discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment . . . [or] to limit, segregate, or classify employees in any way which would . . . tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee.'" *Ammerman v. Bd. of Educ.*, 30 S.W.3d 793, 797 (Ky. 2000). In other words, consistent with Title VII of the 1964 Federal Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), the KCRA prohibits sexual harassment in the workplace that creates "a hostile or abusive work environment." *Id*. at 798. The Kentucky Supreme Court has made clear that since "the provisions of KCRA are virtually identical to those of the Federal act[,] . . . 'in this particular area we must consider the way the Federal act has been interpreted.'" *Jefferson County v. Zaring*, 91 S.W.3d 583, 586 (Ky. 2002) (citations omitted); *see Ammerman*, 30 S.W.3d at 797-98. In

addition, "an interpretation given to a federal statute by the United States Supreme Court is binding on state courts, 'any state law, decision, or rule to the contrary notwithstanding.'" *Zaring*, 91 S.W.3d at 586 (quoting *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209, 220-21, 51 S.Ct. 453, 453, 75 L.Ed. 983 (1931)).

To establish successfully a *prima facie* showing of a cause of action predicated upon hostile work environment based on sex, a plaintiff must demonstrate that "(1) she is a member of a protected class, (2) she was subjected to unwelcome sexual harassment, (3) the harassment was based on her sex, (4) the harassment created a hostile work environment, and that (5) the employer is vicariously liable." *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 347 (6th Cir. 2005).

In the instant case, no dispute exists concerning the first three elements. However, with respect to the fourth element of whether a hostile work environment existed, case law emphasizes that not only must the conduct be extreme and based upon the plaintiff's gender, but it must also pass the test of objectivity. A determination as to the existence of an objectively hostile or abusive work environment can be made only by looking at all the circumstances, which may include "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." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993).

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S.Ct. 2275, 2283, 141 L.Ed.2d 662 (1998), the United States Supreme Court reiterated its conclusion that to be actionable, "a sexually objectionable 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." This requires that a trial court examine the totality of the circumstances, the frequency of the conduct, whether the conduct was physically threatening or humiliating, and whether the conduct in fact interfered with an employee's work performance. *Id.* at 788, 118 S.Ct. at 2283. As stated by the Supreme Court,

> [t]hese standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." We have made it clear that the conduct must be extreme to amount to a change in the terms and conditions of employment . . . . [Citations omitted.]

Id. at 788, 118 S.Ct. at 2283-84.

Thus, in order to establish a hostile or abusive work environment, incidents of sexual harassment must be sufficiently severe or pervasive so as to "'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 787, 118 S.Ct. at 2283 (quoting Mentor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405-06, 91 L.Ed.2d 49 (1986)). Moreover, the incidents "must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive[.]" *Id.* at 787, 118 S.Ct.

at 2283 (internal quotation and citation omitted). "[I]solated incidents must be extremely serious and be more than episodic" in order to meet the "severe or pervasive" element of a KCRA claim. *Lumpkins ex rel. Lumpkins v. City of Louisville*, 157 S.W.3d 601, 605 (Ky. 2005).

Becker argues that, with regard to her sexual harassment claim, the trial court erroneously concluded that Gernheuser's conduct was not, as a matter of law, "sufficiently severe or pervasive so as alter the conditions" of Becker's employment. Becker contends the trial court erred by failing to consider the totality of the circumstances in arriving at this conclusion. We disagree.

Becker's exposure to Gernheuser's inappropriate statements and conduct was limited. From the beginning of her employment to the end of her employment, Becker interacted with Gernheuser in person on no more than six occasions. She also received telephone calls from Gernheuser during a three-week portion of her employment. However, no inappropriate touching is alleged by Becker, and no overt threats of violence or demands for sexual favors were made. The annoying circumstances and inappropriate behaviors identified by Becker, when viewed in their totality, simply do not rise to the required level, and Gernheuser's actions do not constitute severe and pervasive harassment under the prevailing standard. Without a doubt, his comments were inappropriate, unwelcome, and as Becker testified, "creepy" and "weird." Nevertheless, under the objective standard mandated by *Faragher*, 524 U.S. at 787, 118 S.Ct. at 2283, they did not create an actionable hostile work environment. Again, Gernheuser's

comments were improper, in poor taste, and demonstrative of bad manners, but they did not create a pervasive, abusive work atmosphere.

Furthermore, no evidence in the record supports a claim that Gernheuser's actions interfered with Becker's work performance. The record amply demonstrates that Becker had made no appointments for the sales counselors since approximately August 2007, two months before Gernheuser arrived.

IV. Employer Liability

The trial court also determined that Becker failed to establish a genuine issue of material fact as to employer liability. "When no tangible employment action is taken,[5] a defending employer may raise an affirmative defense to liability or damages[.]" *Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540, 544 (Ky. 2001) (citations and internal quotations omitted). "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any

[5] Becker claimed at the trial court level that a genuine issue of material fact existed as to whether Saber and Goodsir were entitled to assert this affirmative defense since a tangible employment action was taken against her, i.e., she was fired almost immediately after she made her second complaint of ongoing harassment by Gernheuser. The trial court held that Becker was "judicially estopped" from asserting such a claim, however, since she failed to plead in her complaint that she was discharged due to "harassment." Rather, Becker's complaint only asserted discharge due to "retaliation" for the reporting of harassment. Becker has abandoned her claim of strict liability due to a tangible employment action on appeal. Accordingly, we do not address or make any opinions as to the propriety of the trial court's ruling on this issue in this appeal.

preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* (emphasis omitted).

To support its conclusion that, as a matter of law, Saber was not liable for any sexual harassment perpetrated by Gernheuser against Becker, the trial court found the following: (1) Saber implemented and posted a sexual harassment policy, which Becker acknowledged receiving in writing; (2) a specific complaint procedure was outlined in this policy; (3) this complaint procedure directed Becker to notify either a supervisor, a manager, or the President, and to call Human Resources to report sexual harassment; (4) Becker did not comply with the policy since she only reported the harassment to Mattingly, who was not a supervisor, manager, or President, and she did not call Human Resources; and (5) Saber acted promptly and immediately in remedying the situation once it was reported by Mattingly.

Becker argues that the trial court's findings are insufficient to support the conclusion that no genuine issues of material fact existed as to whether Saber satisfied the two elements of the affirmative defense. We disagree. Becker concedes that Saber had a sexual harassment policy and acted quickly to remove Gernheuser from the office upon being notified of his conduct. In fact, Saber removed Gernheuser from the Campbellsville office on the day it became aware of his inappropriate conduct, and it terminated his employment altogether within a month. Although Becker argues that she and other female employees continued to receive unwanted contact from Gernheuser for a few days after his removal, the

record is clear that Gernheuser stopped calling once Goodsir told him to stop. Thus, summary judgment was appropriate as to the first element of this affirmative defense.

The second element pertains to whether Becker "unreasonably failed to take advantage of any preventive or corrective opportunities provided by [Saber] or to avoid harm otherwise." *Bank One*, 52 S.W.3d at 544. As set forth in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342 (2004), the second element of an employer's affirmative defense does not mandate strict adherence to form over substance when determining whether an employee reasonably took advantage of the employer's complaint procedure, but rather "borrows from tort law the avoidable consequences doctrine, under which victims have a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute . . . ." 542 U.S. at 146, 124 S.Ct. at 2354 (internal quotations and citations omitted). *See also Thornton v. Fed. Express Corp.*, 530 F.3d 451, 456 (6th Cir. 2008) (holding that an effective sexual harassment policy should provide for both formal and informal complaints of sexual harassment to be made).

While issues may exist as to (1) whether Mattingly was a supervisor under the terms of Saber's policy, or (2) whether Mattingly reported the harassment to Saber Management on Friday, November 2, or Saturday, November 3, no dispute exists that Becker only reported the harassment and Mattingly, at the earliest, learned of it only on Thursday, November 1, or Friday, November 2. The

record does not disclose over how long a period Gernheuser's actions took place. If they started upon his arrival, then Becker's delay in notifying Mattingly was unreasonable, given Saber's prompt reaction once it learned what occurred. Saber's reaction was immediately to remove Gernheuser from the Campbellsville's office. *See Collette v. Stein-Mart, Inc.*, 126 Fed. Appx. 678, 686 (6th Cir. 2005) (stating that "'[t]he most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation.'") (quoting Swenson v. Potter, 271 F.3d 1184, 1193 (9th Cir. 2001)). To paraphrase the Sixth Circuit Court of Appeals, Saber's "corrective measures epitomized how a responsible employer should act when confronted with an allegation of employment discrimination." *Collette*, 126 Fed. Appx. at 686.

This situation is not one of long-term sexual harassment that was either unreported despite the existence of a complaint procedure, or implicitly ignored by the turning of a blind eye by low-level managers or supervisors. Instead, this situation was one of short duration that Mattingly immediately reported, either the same day or one day later after it was reported to her by Becker, and that immediately was addressed by Saber. Thus, summary judgment in favor of Saber as to the second prong of the employer liability test was appropriate.

IV. Retaliation

Becker also appeals the trial court's summary dismissal of her retaliation claim. KRS 344.280(1) prohibits an employer's retaliatory response to

an employee's report or complaint about conduct which violates the KCRA. "[I]nterpreting unlawful retaliation under the KCRA consistent with the interpretation of unlawful retaliation under federal law[,]" *Brooks v. Lexington-Fayette Urban County Hous. Auth.*, 132 S.W.3d 790, 802 (Ky. 2004), the Kentucky Supreme Court has set forth the elements of a *prima facie* case of retaliation under KRS 344.280 as follows: (1) an employee was engaged in a protected activity; (2) the exercise of the employee's civil rights was known by the employer; (3) the employer thereafter took an employment action adverse to the employee; and (4) a causal connection existed "between the protected activity and the adverse employment action." *Id*. at 803.

Once a *prima facie* case of retaliation is established, the employer must "articulate some legitimate, nondiscriminatory reason for its actions." *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 793 (6th Cir. 2000) (internal quotation and citation omitted). If such a legitimate reason is articulated, the employee's burden is to "demonstrate that the proffered reason was not the true reason for the employment decision." *Id.* (internal quotation and citation omitted). In order to withstand summary judgment on the issue of pretext, the employee "must produce evidence that either the proffered reason: (1) has no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was insufficient to warrant the adverse action." *Ladd v. Grand Trunk W. R.R.,* 552 F.3d 495, 502 (6th Cir. 2009).

Here, regardless of whether Becker could establish a *prima facie* case, the record is devoid of any evidence to suggest that the legitimate, nondiscriminatory reason given by Saber and Goodsir for discharging Becker was mere pretext. Instead, the record clearly establishes the existence of a sufficient reason for the adverse action against Becker, as the Campbellsville office needed a full-time telemarketer to provide sales appointments for its newly increased sales force. Undisputed evidence in the record establishes that Becker had failed to make any sales appointments for some period of time and that she was not available to work full-time.

As to the issue of whether the stated legitimate business and resource considerations were the actual motivation behind Becker's discharge, the record shows that other, similarly-situated female sales counselors also complained of and reported sexual harassment by Gernheuser to Saber and Goodsir. Yet, these sales counselors were not terminated or subjected to adverse employment actions based on their exercise of protected conduct. Becker herself reported that she was not subjected to any negative reactions when she made her reports and complaints. In fact, the record demonstrates that Becker received empathy and affirmation from both Mattingly and Goodsir when making her reports. Moreover, the record shows that Saber and Goodsir followed through with the hiring of a full-time telemarketer, who happened to be female, for the purpose of producing more leads for the increased sales staff.

Becker counters that other facts in the record suggest retaliatory intent. She points to a calendar discrepancy on her termination paperwork which suggests that Goodsir may have decided to fire Becker prior to his observation of her work. She further points to an alleged quip by Saber's president, downplaying the seriousness of the allegations against Gernheuser. Becker argues that this evidence, coupled with the timing of her termination, is sufficient to withstand summary judgment on the issue of pretext. We disagree, as we find nothing of substance in the evidence which a reasonable juror could rely on to support a judgment in Becker's favor. *See Kentucky Ctr. for the Arts v. Handley,* 827 S.W.2d 697, 700 (Ky.App. 1991) ("cold hard facts [must be] presented from which the inference can be drawn" that employer's proffered reasons are pretextual). *Cf. Ladd*, 552 F.3d at 503 (summary judgment in favor of employer was appropriate as to question of pretext where evidence, while disputed, suggested that employer in good faith discharged employee for falsifying injury report and no evidence showed that employee was treated differently from others who were found to have falsified reports).

When the record is viewed in its entirety, we can discern no colorable evidence or explanation to support a conclusion that the legitimate, nondiscriminatory reason proffered by Saber and Goodsir for discharging Becker was merely a pretext for unlawful retaliation. We therefore find no error in the trial court's determination that Saber and Goodsir were entitled to summary

judgment as a matter of law on Becker's claim of unlawful retaliation in violation of KRS 344.280(1).

V. Conclusion

Having considered all of the arguments set forth in this appeal, we hereby affirm the Taylor Circuit Court's summary judgment dismissing Becker's KCRA claims for hostile work environment/sexual harassment and retaliation.

HENRY, SENIOR JUDGE, CONCURS.

LAMBERT, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

LAMBERT, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority's well-reasoned opinion insofar as it affirms the trial court's ruling that Becker's claim of retaliation under KRS 344.280(1) fails as a matter of law. As held by the majority, there is simply no colorable evidence or pretext to justify advancing Becker's claim to a jury.

However, I am compelled to dissent to that portion of the majority's opinion affirming the trial court's ruling that Becker's claim of sexual harassment under KRS 344.040 also fails as a matter of law. While this is undoubtedly a very close call due to the limited period of Becker's exposure to an abusive and hostile work environment, our case law mandates that all doubts are to be resolved in favor of the party opposing summary judgment. *See Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Believing that a party is unlikely to prevail at trial is not sufficient grounds for granting a summary judgment motion. *Id.* Indeed, our Supreme Court has discussed the compelling reasons that justify the exercise of caution in the granting of motions that deprive litigants of their day in court:

> The role of the jury in interpreting the evidence and finding the ultimate facts is an American tradition so fundamental as to merit constitutional recognition. U.S. Const.Amend. VII; Ky.Const. Sec. 7. The conscience of the community speaks through the verdict of the jury, not the judge's view of the evidence. . . . [If] deciding when to take a case from the jury is a matter of degree, a line drawn in sand . . . this is all the more reason why the judiciary should be careful not to overstep the line.

Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 822 (Ky. 1992) (quoting *Horton v. Union Light, Heat and Power Co.*, 690 S.W.2d 382, 385 (Ky. 1985)).

The majority pins its holding on two grounds: (1) Becker failed to establish, as a matter of law, that the sexual harassment perpetrated by Gernheuser was "sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment," *Ammerman v. Board of Ed. of Nicholas County*, 30 S.W.3d 793, 797 (Ky. 2000); and (2) Becker failed to establish a genuine issue of material fact as to employer liability. While I agree that it is certainly a close case as to the first grounds, I disagree with the majority's holding regarding the second.

Determining the "sufficiently severe or pervasive" element of any KCRA sexual harassment claim "is not a question of law but a question of fact, albeit a question of ultimate fact." *Meyers*, 849 S.W.2d at 821. Thus, summary

dismissal is simply not appropriate on this question "where there is any colorable evidence of such harassment." *Kirkwood v. Courier-Journal*, 858 S.W.2d 194, 198 (Ky. App. 1993).

In this case, I believe Becker set forth sufficient evidence to support a colorable claim of sexual harassment. It is significant that Becker was a 17-year-old girl at the time she was subject to her 57-year-old supervisor's continuous and repeated unwanted comments and advances. As held in *Kirkwood*, "a plethora of [] subjective and objective factors" such as "the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, [and] the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs" are relevant in making the above determination. *Id.* (internal quotation and citation omitted).

What the majority focuses on in this case is the very limited period of Becker's exposure to Gernheuser and the immediacy of Saber Management's response upon learning of Gernheuser's conduct. I, too, find these facts to be extremely relevant to the strength of Becker's claim, however, I do not believe they operate, as a matter of law, to deprive her of her day in court.

As held by the majority, a plaintiff meets his or her burden of establishing a *prime facie* claim for sexual harassment by setting forth colorable evidence that a hostile work environment was so severe and pervasive that it altered the conditions of the plaintiff's employment. *Faragher v. City of Boca*

Raton, 524 U.S. 775, 787, 118 S.Ct. 2275, 2283, 141 L.Ed.2d 662 (1998). Offensive conduct must be more than isolated or episodic to meet this standard. *Id.*

In this case, it is without dispute that Gernheuser's unwanted comments and advances towards his 17-year-old employee were more than isolated or episodic. Becker set forth facts suggesting that she was repeatedly and continuously exposed to such conduct during the entirety of Gernheuser's employment at the Campbellsville office and for a period of time thereafter. The totality of Gernheuser's conduct was characterized as being "creepy" and "weird," which is a far cry from occasional or sporadic inappropriateness or irritating behavior. This is certainly colorable evidence to allow a reasonable juror to believe that Gernheuser's conduct went beyond "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Id.*

While Becker's exposure to this continuous and repeated conduct was brief (no more than three weeks), I believe that this important fact speaks more to the issue of whether Becker could have suffered any significant damages during this abbreviated time period rather than whether the terms of her employment were altered, however briefly, by Gernheuser's conduct. In *Lumpkins ex rel. Lumpkins v. City of Louisville*, 157 S.W.3d 601 (Ky. 2005), our Supreme Court rejected an argument that a claim for hostile work environment could not be sustained due to the fact that the victims were only exposed to this environment during the course

of a single summer. *Id.* at 605-606. While none of the incidents in that case were particularly extreme or severe, the Supreme Court nevertheless agreed that the victims' continuous and repeated exposure to the non-violent, yet hostile environment was sufficient to alter the terms of their employment. *Id.*

It is also without dispute that the entirety of the female staff to which Gernheuser was exposed were equally offended and upset by Gernheuser's sexually-oriented conduct. Thus, I believe there is little doubt that Becker's perceptions as to the offensiveness of the sexually objectionable environment created by Gernheuser were both subjectively and objectively reasonable. *See Faragher*, 524 U.S. at 787, 118 S.Ct. 2275 at 2283.

Certainly, this case comes very close to that line drawn in the sand between protecting one's right to have the conscience of his or her community speak through the verdict of the jury and weeding out clearly non-meritorious cases. However, the standard in Kentucky remains that summary judgment should not be granted unless "judgment is shown with such clarity that there is no room left for controversy." *Steelvest*, 807 S.W.2d at 482. Given the unique facts of this case, Becker's young age, the harasser's age and status as a direct supervisor, the corroborating reactions of the other older and grown women, and the frequency of the harasser's clearly offensive conduct over such a short period of time, I believe there is certainly room for controversy here. Accordingly, I must respectfully dissent to the majority's holding that Becker should be deprived of her right to submit this question to a jury.

I also disagree with the majority's alternative holding that even if the trial court erred as set forth above, Appellees were nevertheless entitled to summary judgment because there were no genuine issues of material fact as to employer liability. As set forth by the majority, an employer may avoid liability for sexual harassment perpetrated by its employee upon the satisfaction of two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540, 544 (Ky. 2001) (internal quotation and citation omitted).

Even if summary judgment was appropriate as to the first element of this affirmative defense,[6] it certainly was not appropriate as to the second element of the defense. The majority mischaracterizes this element as one which assesses the promptness or reasonableness of the employer's response to any complaints that may be alleged by its employees. Yet, that is not a relevant inquiry. Rather,

[6] There is dispute as to whether Saber Management exercised "reasonable care to prevent and correct promptly any sexually harassing behavior." *Murphy,* 52 S.W.3d at 544. As argued by Becker, despite the steps taken by Saber Management to transfer Gernheuser to another location, Becker, as well as other female employees, continued to receive unwanted contact from Gernheuser for a period of time after Gernheuser's transfer. It is not apparent from this record what steps, if any, were taken by Saber Management to confront Gernheuser with the allegations of sexual harassment or to prevent Gernheuser from continuing to engage in such conduct subsequent to his transfer. *See Murphy*, 52 S.W.3d at 545 (genuine issue of material fact existed where it was unresolved on record whether employer confronted alleged harasser with prior allegations of harassment and took reasonable steps to ensure that harasser would not engage in such conduct again). Thus, I am not convinced that summary judgment was appropriate even as to the first element of this affirmative defense.

the relevant inquiry is whether the *employee* failed to take advantage of preventative or corrective opportunities provided by the employer. Here, there is absolutely no evidence to suggest that Becker failed to take advantage of any such opportunities. In fact, the very reason this harassment was so short-lived was because Becker promptly reported it and Appellee's promptly responded to the report. Thus, the second element of this affirmative defense is simply not applicable in these circumstances.

The majority's suggestion that Becker's claim was precluded as a matter of law due the minimal delay between when the harassment first started and when Becker finally had a chance to discuss the situation with Mattingly is simply not persuasive. Besides, any question as to whether this delay was meaningful is a question of fact that must be reserved for a jury. *See Meyers*, 840 S.W.2d at 822 (determination of essential questions of fact in sexual harassment claims are within the sole province of a jury and trial courts are bound to respect the jury's constitutionally protected role to determine such questions); *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 277 (6th Cir. 2009) (determination of employer liability presented "classic questions of fact" that precluded summary judgment).

For these reasons, I would affirm the portion of the trial court's January 7, 2009, order summarily dismissing Becker's KCRA claim for retaliation as Appellees were entitled to summary judgment on this claim as a matter of law. However, I would reverse the portion of the trial court's January 7, 2009, order

summarily dismissing Becker's KCRA claim for hostile work environment/sexual harassment as genuine issues of material fact existed to preclude summary judgment of this claim.

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