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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001919-MR

MICHELLE PATRICK — APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 05-CI-00002

CORRECTIONS CORPORATION OF AMERICA, D/B/A LEE COUNTY ADJUSTMENT CENTER; BESSIE HUGHES; ARCHIE MOORE; AND RANDY STOVALL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Michelle Patrick, appeals from an order of the Lee Circuit Court granting summary judgment in favor of Appellees, Corrections Corporation of America, d/b/a Lee County Adjustment Center, Captain Bessie

Hughes, Archie Moore, and Warden Randy Stovall. Finding no genuine issues of material fact in the record to preclude summary judgment, we affirm the trial court.

In March 2004, Patrick was hired as a correctional officer at the Lee County Adjustment Center ("LAC") in Beattyville, Kentucky, which is owned and operated by the Corrections Corporation of America ("CCA"). On August 18, 2004, Patrick complained to her unit manager, James Combs, that one of her supervisors, Bessie Hughes, had made inappropriate statements to her on several occasions. Following the CCA/LAC's sexual harassment policy, Combs took Patrick to the human resource department to report her concerns.

On the same day, Internal Affairs investigator, Archie Moore, requested that Patrick file a written complaint. Therein, Patrick alleged the following incidents:

> 1. In July, 2004, Hughes said to Patrick, "Men are crazy, why [sic] do you need a man for? Well, if it's for that, I can help you. You can get them 'bout anywhere, batteries are cheap and most of thems [sic] rechargeable."
>
> 2. On August 16, 2004, as some of the male employees were "carrying on" Hughes said to Patrick, "you know, you've got two main things you can control him with . . . ."
>
> 3. On August 17, 2004, when Patrick told Hughes that she had fallen off of a horse and hurt her ankle, Hughes said something about Patrick having a "sore ass."

Moore thereafter interviewed Hughes, who essentially admitted to having made the first two statements. On September 7, 2004, Moore met with Patrick and asked her what she would like to see happen in the case since Hughes

had admitted the conduct. It is undisputed that Patrick did not want to see Hughes fired but thought that she should receive some form of punishment. During the same meeting, Patrick confirmed that no further objectionable statements had been made by Hughes. However, Patrick complained that Hughes had moved her from her normal work post to other locations on several shifts.

Moore completed his report on September 9, 2004, recommending that Hughes receive counseling for her unprofessional conduct. Further, Moore determined that Patrick's reassignment to other work posts was made because two staff members had been placed on light duty for medical reasons. In addition, the records established that Patrick had not just been moved by Hughes, but also by other supervisors for the same reason.

In order to close the matter, Patrick was scheduled to meet with then-warden, Randy Eckman. However, on September 14, 2004, a riot occurred at LAC while Warden Eckman was away, and he was thereafter terminated. On September 18, 2004, Warden Stovall was assigned to LAC. After being made aware of Patrick's sexual harassment complaint, Warden Stovall requested that Patrick fill out a second report, dated September 28, 2004. On October 6, 2004, prior to meeting with Warden Stovall, Patrick quit her employment at LAC.

On January 7, 2005, Patrick filed a sexual harassment action[1] in the Lee Circuit Court against CCA, Hughes, Moore and Stovall. Therein, Patrick alleged that Hughes sexually harassed her on three occasions by making offensive

[1] Patrick's complaint did not allege violation of any state or federal statutory laws even though the facts were consistent with a sexual harassment cause of action.

comments. Further, Patrick claimed that Hughes' reassignment of her to different posts constituted retaliation for reporting the harassment. Finally, Patrick alleged that not only was Moore's investigation improperly conducted, but Moore and Warden Stovall were liable for Hughes' conduct by failing to take proper action to prevent or resolve it.

On October 9, 2009, the trial court granted Appellees' motion for summary judgment, finding:

> There simply is no factual basis here for one who admits she did not want an alleged tortfeasor terminated, did not follow the standard procedures as outlined by the institution for sexual harassment and then voluntarily quit before the newly-hired warden could respond to her report. Additionally, the comments, if made, were not about Ms. Patrick, were not initially reported, and were made over the course of a short period of time. Once the comments were reported, action was taken, and afterwards, by Ms. Patrick's own admission, Capt. Hughes was overly nice. Thereafter Ms. Patrick quit and obtained other employment. Furthermore, it is undisputed . . . that the transfers of position of Ms. Patrick were within her job description and were under different superior officers. Therefore, the court does not see how any reasonable jury could conclude that the conduct complained of herein was severe and pervasive. While this Court does not condone the actions of Capt. Hughes, it agrees . . . that these were indeed merely offensive utterances, and Ms. Patrick's action in not reporting these matters indicates that she felt the same way. Most importantly, once it was reported and investigated, the conduct stopped, and Ms. Patrick did not wait for a satisfactory resolution from the newly-appointed warden . . . .

Patrick now appeals to this Court as a matter of right.

The proper standard of review in an appeal from a summary judgment is concisely set forth in *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) as follows:

> The standard of review on appeal when a trial court grants a motion for summary judgment 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." (Citations omitted).

See also 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. v. Scansteel Serv Ctr*, 807 S.W.2d 476, 480 (Ky. 1991). Because no factual issues are involved and only legal issues are before the court on a motion for summary judgment, we do not defer to the trial court and our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

Patrick argues that the trial court erred in finding that no genuine issues of material fact existed regarding her hostile work environment/sexual harassment claim. In fact, citing to *Kirkwood v. Courier Journal*, 858 S.W.2d 194,

198 (Ky. App. 1993), Patrick contends that "claims of discriminatory workplace harassment are rarely dismissed where there is any colorable evidence of such harassment."

Consistent with Title VII of the 1964 Federal Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), the Kentucky Civil Rights Act prohibits sexual harassment in the workplace that creates "a hostile or abusive work environment." *Ammerman v. Bd. of Educ., Nicholas County,* 30 S.W.3d 793, 798 (Ky. 2000). However, in order for a sexual harassment claim based upon a hostile or abusive work environment to be actionable, it must be sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment. *Meritor Saving Bank v. Vinson* , 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). As explained by our Supreme Court in *Ammerman v. Bd. of Educ., Nicholas County*, 30 S.W.3d at 798:

> [H]ostile environment discrimination exists "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." [*Williams v. General Motors Corp*., 187 F.3d 553, 560 (6th Cir. 1999)(*Citing Harris v. Forklift Sys*., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993))]. Moreover, the "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." [*Carrero v. New York City Hous. Auth*., 890 F.2d 569, 577 (2d Cir. 1989)].

Furthermore, the harassment must also be both objectively and subjectively offensive as determined by "looking at all the circumstances." *Harris v. Forklift*

Sys., 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993). These circumstances 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." *Id.*

As the United States Supreme Court has observed, "offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in 'the terms and conditions of employment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-87, 118 S.Ct. 2275, 2283, 141 L.Ed.2d 662 (1998).

> These 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.

We agree with the trial court herein that Hughes' conduct was not, as a matter of law, sufficiently severe or pervasive so as to alter the conditions of Patrick's employment. *Cf. Kirkwood*, 858 S.W.2d 194. To be sure, Hughes' comments were inappropriate, unprofessional, and undoubtedly made Patrick uncomfortable. Nevertheless, under the objective standard mandated by *Faragher*, 524 U.S. at 787, 118 S.Ct. at 2283, they simply did not create an actionable hostile

work environment. No allegations of physical contact or threats were alleged by Patrick. Furthermore, there is no evidence in the record that Hughes' actions interfered with Patrick's work performance. In fact, it is undisputed that Patrick did not even report any harassment until August 18, 2004, after which no further incidents occurred.

Patrick next argues that the trial court erred in finding that neither Hughes nor CCA retaliated against her after she filed her report against Hughes. Patrick claims that after reporting Hughes' conduct, Patrick was frequently moved from her usual assignments to different less desirable locations. Again, we disagree.

KRS 344.280(1) makes it unlawful for one or more persons "[t]o retaliate or discriminate in any manner against a person ... because he has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under the chapter." (Emphasis added). Unlawful retaliation under the KCRA is consistent with the interpretation of unlawful retaliation under federal law. Under federal law, a "plaintiff must identify a materially adverse change in the terms and conditions of his employment to state a claim for retaliation under Title VII." *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999).

> A materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a

> decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Id. (*Quoting Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993). Further, a plaintiff must show that "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345 (2006) (Internal quotations omitted).

Herein, Patrick failed to demonstrate that the assignment to different posts within LAC were materially adverse. The evidence established that Patrick was reassigned because two other employees had medical restrictions. Neither her duties nor her pay ever changed. In fact, it appears that each time Patrick was reassigned, it was simply to a different wing of the same cell block. Moreover, the institutional records indicate that Patrick was moved twice as often by other supervisors as she was by Hughes. We simply cannot conclude that "a reasonable employee would have found the challenged action materially adverse" so as to support a finding of retaliation.

Finally, we find no merit in Patrick's claim that CCA is not entitled to an affirmative defense because it took adverse employment action through Hughes. Citing to *Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141

L.Ed.2d 633 (1998), Patrick essentially argues that CCA is vicariously liable for Hughes' actions because it did not exercise reasonable care to prevent either the sexually harassing behavior or the retaliation.

"When no tangible employment action is taken, 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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id*. (emphasis omitted).

We must agree with the trial court that CCA had standard procedures outlined for sexual harassment and that Patrick failed to timely avail herself of such. Further, once the report was made in August 2004, an immediate investigation was undertaken and the inappropriate conduct ceased. By her own admission, Patrick voluntarily quit her employment with CCA before Warden Stovall was given the opportunity to meet and discuss the complaint with her. Accordingly, we are of the opinion that the trial court correctly found that as a matter of law, Patrick could not prevail on her claims against any of the Appellees herein. As such, summary judgment was proper.

The order of the Lee Circuit Court grating summary judgment in favor of Appellees herein is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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