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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001092-MR

DAWN THOMPSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 09-CI-003617

LOUISVILLE METRO GOVERNMENT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Dawn Thompson, an employee of the Louisville Metro Government's Department of Corrections (Department of Corrections), appeals the dismissal of her claims of sexual harassment, sex discrimination and retaliation.

Thompson began with the Department of Corrections as a correctional officer in 1997. While serving as a sergeant in 2004, she was assigned to the training division under Kevin Sidebottom and became friends with him.

In 2005, Sidebottom wrote Thompson a letter expressing an interest in pursuing a romantic relationship. After Thompson told him they could never be more than friends, Sidebottom did not continue to pursue her and their friendship faded. In the years that followed, Sidebottom never expressed any further interest in a romantic relationship.

Thompson, who had been promoted to lieutenant, began to occasionally hear rumors that she had been romantically involved with Sidebottom. These rumors did not interfere with her job performance and she never made any complaint about them.

In 2006, Thompson and Officer Bonilla had a confrontation when Thompson discovered they were both dating the same man. Bonilla filed an equal employment opportunity (EEO) complaint about the incident, which was later dropped. That same year, Thompson applied for one of two captain positions that became available. Although Thompson was ranked second overall based on the testing criteria, other criteria were also considered, and under the terms of the collective bargaining agreement, Director of Corrections Tom Campbell was able to pick among several of the top candidates.

In January 2007, the promotions were announced and Thompson did not receive either of them. One of the promotions went to a woman who had the

highest test scores and the other to Lieutenant Ashby, a man who ranked lower than Thompson on the testing criteria. Thompson claims this decision was made by Sidebottom, who was Deputy Director of Corrections under Campbell, to discriminate and retaliate against her because she did not accept his romantic overture two years earlier.

According to Campbell, he was solely responsible for deciding who should be promoted and he preferred Ashby over Thompson, because Ashby had more experience as a lieutenant and had done an excellent job supervising the training division and getting it reaccredited. While Thompson was well qualified, Campbell also did not want to set a bad example by promoting Thompson only months after her confrontation with Bonilla.

Thompson was promoted to captain two months later, in March 2007, when another opening occurred. In June 2007, Thompson heard new rumors linking her romantically to Sidebottom. She attributed the source of the rumors to Sidebottom and found these new rumors to be troublesome because she believed that Sidebottom was actively trying to prevent her advancement within the department. She also heard additional statements attributed to Sidebottom that made her believe that he tried unsuccessfully to prevent her from getting a position in the training department and would not promote her to major if he became director.

In the Spring of 2008, Thompson filed an EEO complaint claiming that Sidebottom was hindering her career by failing to promote her because she

would not engage in an intimate relationship with him. Although a preliminary report sustained her allegations, the final report found them to be unsubstantiated because Sidebottom had not made the decision regarding who would be promoted to captain. Thompson claims that after she filed this complaint, her co-workers treated her badly and she heard additional rumors about her involvement with Sidebottom.

Shortly thereafter, Campbell retired and Sidebottom resigned. Before Sidebottom left, he turned over a complaint against Thompson to the new director, who submitted it to the public integrity unit for investigation. The investigation did not result in any discipline to Thompson. Thompson continues to be an employee of the Department of Corrections.

Thompson filed suit against the Louisville Metro Government and Sidebottom individually, and in his professional capacity, claiming that she was subject to sexual harassment, sex discrimination and unlawful retaliation. The Louisville Metro Government and Sidebottom filed motions for summary judgment, which were granted as to all claims and defendants. The circuit court denied Thompson's subsequent motion to alter, amend or vacate. Thompson now appeals.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03.

“The standard of review on appeal of a 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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. Granting of a summary judgment motion “should only be used ‘to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.’” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

Under the Kentucky Civil Rights Act (KCRA), it is unlawful for an employer to discriminate against an individual because of that individual’s sex, and it is unlawful for any person to retaliate against an individual because that person has opposed such an unlawful practice. KRS 344.040; KRS 344.280. Kentucky interprets the KCRA consistently with Title VII of the Federal Civil Rights Act. *American General Life & Acc. Ins. Co. v. Hall*, 74 S.W.3d 688, 691 (Ky. 2002).

Thompson’s first claim is for discrimination on the basis of sex through a hostile work environment. To establish a *prima facie* case of hostile work environment under KCRA, a plaintiff must show that:

- (1) she is a member of a protected class;
- (2) she was subject 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 Service, Inc., 400 F.3d 341, 347 (6th Cir. 2005). Assuming that Thompson can show she was harassed on the basis of sex through rumors, Thompson has failed to establish that the rumors were “severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive,” and that she “subjectively regard[ed] that environment as abusive.” *Thornton v. Federal Express Corp.*, 530 F.3d 451, 455 (6th Cir. 2008) (citations omitted). Utterances, which are infrequent, merely offensive and do not unreasonably interfere with an employee’s work performance are not sufficient. *Clark*, 400 F.3d at 351.

The conduct that Thompson complains of was sporadic, only mildly offensive, and did not interfere with her work performance. Her later subjective feelings that similar rumors after the delay in her promotion were disruptive to her were not sufficient to create an objectively hostile work environment. Idle gossip about an alleged office romance alone is not a sufficient basis for a claim of a hostile work environment. *Spain v. Gallegos*, 26 F.3d 439, 449 (3d Cir. 1994).

Additionally, when harassment by a supervisor does not cause a tangible employment action, the employer may assert an affirmative defense. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 143, 124 S.Ct. 2342, 2352 (2004). This

affirmative defense is available if the employer can show by a preponderance of the evidence that:

(a) “the employer exercised reasonable care to prevent and promptly correct 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.”

Clark, 400 F.3d at 351 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275, 2293, 141 L.Ed.2d 662 (1998)). The Department of Corrections trained its employees about sexual harassment and offered its employees mechanisms for complaining about improper behavior including the option to file an EEO complaint. Thompson failed to take advantage of these mechanisms.

Thompson’s second claim is for discrimination on the basis of sex. To establish a *prima facie* case of discrimination on the basis of sex for failure to promote brought under KCRA, a plaintiff must show:

- (1) that she is a member of a protected class;
- (2) that she was qualified for and applied for an available position;
- (3) that she did not receive the job; and
- (4) that the position remained open and the employer sought other applicants.

Turner v. Pendennis Club, 19 S.W.3d 117, 119-120 (Ky.App. 2000). The plaintiff need only prove that she is objectively qualified for the position, not that she is as

qualified as the person who received the position or met the subjective qualifications the employer had for the position. *Kentucky Ctr. for the Arts v. Handley*, 827 S.W.2d 697, 699-700 (Ky.App. 1991). Thompson has established a *prima facie* case of discrimination on the basis of sex for failure to promote because she has established that she is female, was qualified and applied for the two open positions of captain, she did not receive the promotion, and one of the open positions went to another applicant who was male.

If the plaintiff can establish a *prima facie* case, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its action. *Turner*, 19 S.W.3d at 120. The Department of Corrections met this burden by stating that Ashby was chosen over Thompson because Ashby had more experience and a strong work performance, and Thompson showed some immaturity by getting into a conflict with a subordinate.

If the employer can meet its burden, then “the plaintiff bears the burden of showing by a preponderance of the evidence that the ‘legitimate reason’ propounded by the employer is merely a pretext to camouflage the true discriminatory reason underlying its actions.” *Id.* at 120. The plaintiff can meet this burden through direct or circumstantial evidence “showing that (1) the proffered reasons for the employment decision are false; (2) the proffered reasons did not actually motivate the decision; or (3) the reasons given were insufficient to motivate the decision.” *Flock v. Brown-Forman Corp.*, 344 S.W.3d 111, 116 (Ky.App. 2010). A plaintiff cannot prevail on a discrimination claim merely by

questioning or disagreeing with the soundness of the employer's business judgment or practices in deciding not to promote her; the plaintiff must show that her sex was a motivating factor in the denial of her promotion. *Id.* at 117-118.

Thompson cannot prevail because she is only questioning and disagreeing with the soundness of the Department of Correction's judgment in promoting Ashby over her and has failed to show that her sex was a motivating factor in the denial of her promotion. Thompson has failed to present any evidence to show that Sidebottom had the authority to deny her the promotion or that Campbell's action was motivated by her sex rather than by the articulated reasons.

Thompson's final claim is that she was retaliated against for refusing a romantic relationship with Sidebottom and for filing an EEO complaint. To establish a *prima facie* case of retaliation under KCRA, a plaintiff must show:

- (1) that plaintiff engaged in an activity protected by [the KCRA];
- (2) that the exercise of his civil rights was known by the defendant;
- (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and
- (4) that there was a causal connection between the protected activity and the adverse employment action.

Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790, 803 (Ky. 2004) (quoting *Christopher v. Stouder Memorial Hospital*, 936 F.2d 870, 877 (6th Cir. 1991)). The anti-retaliation provision only protects a plaintiff from retaliation that produces an injury or harm through an objective, material

employment action which might dissuade a reasonable worker from making a claim of discrimination. *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68, 126 S.Ct. 2405, 2414-2415 (2006). If a case of retaliation is being established through circumstantial evidence, this usually “requires proof that (1) the decision maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action.” *Brooks*, 132 S.W.3d at 804. A lapse of four months is too long to create an inference of causality. *Id.*

Thompson failed to establish a *prima facie* case of retaliation because she has not shown that her protected actions resulted in a materially adverse employment action. A lapse of two years between Thompson’s refusal to become romantically involved with Sidebottom and the claimed retaliatory actions of refusing to promote her (which we have already determined cannot be attributable to Sidebottom), trying to prevent her from receiving a position in training, and turning over a complaint against her for investigation are simply too removed in time from her protected action. Additionally, the ongoing rumors, the attempt to prevent her transfer or the attempt to cause her to be disciplined are not adverse employment actions.

Thompson’s claim of retaliation based on filing the EEO complaint similarly fails. The only actions post-EEO complaint that Thompson can point to are poor treatment by co-workers, additional rumors and Sidebottom’s submitting a

complaint against her. Negative comments by co-employees regarding a decision to file a complaint do not, in and of themselves, demonstrate an organized effort by an employer to undermine or ostracize a plaintiff and cannot be a basis for a retaliation claim. *Flock*, 344 S.W.3d at 119. As previously discussed, spreading rumors and the submission of a complaint against Thompson do not constitute adverse employment actions. Therefore, Thompson has failed to make out a *prima facie* case of retaliation.

Summary judgment, as a matter of law, was appropriate because there is insufficient evidence to support Thompson's claims of a hostile work environment, sex discrimination or retaliation. Accordingly, we affirm the Jefferson Circuit Court's denial of the motion to alter, amend or vacate its grant of summary judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Andrew S. Epstein
Louisville, Kentucky

BRIEF FOR APPELLEE:

Lisa A. Schweickart
Louisville, Kentucky