

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000235-MR

AMY PHILPOT,
NAIZA MORRIS (NOW GUZMAN),
AND JOSHUA HILL

APPELLANTS

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 07-CI-01558

BEST BUY, D/B/A GEEK SQUAD CITY;
JOHN FLANNIGAN; AND REGINA PHILLIPS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT AND MAZE, JUDGES.

MAZE, JUDGE: Amy Philpot, Naiza Morris (now Guzman) and Joshua Hill (collectively, “the Appellants”) appeal from a summary judgment dismissing their defamation and retaliation claims against Best Buy d/b/a Geek Squad City (“Best Buy”), John Flannigan (“Flannigan”), and Regina Phillips (“Phillips”). The

Appellants argue that there were genuine issues of material facts on these claims and that Best Buy, Flannigan and Phillips failed to show that they were entitled to judgment as a matter of law. After considering the evidence of record, we conclude that summary judgment was appropriate. Hence, we affirm.

The Appellants, Philpot, Morris and Hill, were employed by Best Buy at its Geek Squad City facility in Brooks, Kentucky. Geek Squad City is a parts warehouse and technical center. Philpot and Morris are female, and Hill is male. The Appellants worked together as “Parts Processors.” Their job duties involved filling orders for computer technicians who also worked in the facility. The Appellants worked under the supervision of Robert DeHart, who in turn was supervised by Flannigan and Phillips.

During the early part of 2007, DeHart was accused of sexual harassment on three separate occasions. After the third complaint, Flannigan and Phillips suspended DeHart and commenced an investigation into the allegations. While this investigation was proceeding, the Appellants submitted a letter which supported DeHart and stated that they had never seen DeHart engage in any improper conduct.

At the conclusion of the investigation, Best Buy terminated DeHart’s employment. But during the course of that investigation, Flannigan and Phillips received allegations from five other employees accusing each of the Appellants of sexual misconduct at work. The complaints described acts such as grabbing of private parts, public displays of kissing, rubbing and biting of the breasts, and

imitation of sexual acts. Best Buy suspended the Appellants pending the outcome of further investigation. After completion of the investigation, Best Buy terminated the Appellants' employment on June 12, 2007.

After being fired, Philpot and Morris filed for unemployment benefits, but Best Buy challenged their application on the grounds that they had been terminated for misconduct. Flannigan and Phillips testified at that proceeding about their investigation of the allegations. Morris failed to appear at the referee hearing and the denial of her claim was upheld. However, the referee concluded that the evidence of Philpot's misconduct was based only on hearsay and was not competent to support a denial of her benefits.

Thereafter, the Appellants filed a complaint against Best Buy, Flannigan and Phillips. The complaint alleged five separate claims: (1) gender discrimination under the Kentucky Civil Rights Act, Kentucky Revised Statutes (KRS) 344.010 *et seq.*; (2) retaliation under KRS 344.280; (3) sexual harassment; (4) common-law defamation; and (5) wage discrimination under KRS 337.430. Best Buy sought to remove the case to Federal Court based on diversity and the assertion of a class-action claim for wage discrimination. The United States District Court for the Western District of Kentucky ultimately determined that its jurisdiction had not been properly invoked either by diversity or by a sufficient amount in controversy. Consequently, the matter was remanded back to the Bullitt Circuit Court.

Following the remand, the parties engaged in discovery and the depositions of the Appellants were taken. In December of 2009, Best Buy moved for summary judgment. Shortly after the filing of this motion, the Appellants' counsel moved to withdraw, citing a lack of communication and cooperation from his clients. The trial court granted the motion on February 1, 2010.

No further action appears in the record until May of 2011, when the trial court sent out a notice to dismiss for lack of prosecution pursuant to Kentucky Rules of Civil Procedure (CR) CR 77.02. The Appellants' prior counsel submitted a new entry of appearance and a response stating that the Appellants still wished to pursue the action. Best Buy opposed any further delay in the case, and moved for dismissal pursuant to CR 41.02. In the alternative, Best Buy also renewed its motion for summary judgment.

Following a hearing and submission of additional pleadings, the trial court granted Best Buy's motion for summary judgment on January 6, 2012. The trial court addressed each of the Appellants' claims and found that they had failed to meet their burden of going forward on any of those claims. This appeal followed.

Although the Appellants raised a number of claims before the trial court, they only appeal from the dismissal of two of those claims; the defamation claim and the retaliation claim. The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that

the moving party was entitled to a judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate “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.

In *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that “the proper function of summary judgment is 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.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Since a summary judgment involves no fact-finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

In their complaint, the Appellants alleged that Best Buy, through its agents Flannigan and Phillips, published defamatory words against them causing their eventual termination. Philpot and Morris also allege that the defamatory words were again published against them during the Unemployment Insurance proceedings. But during oral arguments, counsel for the Appellants stated that they were abandoning any argument for defamation based on Best Buy's

publication of the allegations to the Unemployment Insurance Commission.

However, the Appellants did not vigorously pursue their defamation claims arising from Best Buy's investigation of the allegations against them. Furthermore, those claims were not addressed during the summary judgment proceedings below. As a result, we question whether any defamation claims are presented properly to this Court for review.

In any event, the trial court did not err in granting summary judgment on the defamation claims. To establish a case of defamation in Kentucky, four elements must be proven. The plaintiff must prove: (1) defamatory language, (2) about the plaintiff, (3) which is published, and (4) which causes injury to reputation. *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981). Words are defamatory when the words tend “to (1) bring a person into public hatred, contempt or ridicule; (2) cause him to be shunned or avoided; or, (3) injure him in his business or occupation.” *McCall v. Courier–Journal and Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981).

In *Stringer v. Wal-Mart Stores*, 151 S.W.3d 781, 794 (Ky. 2004), the Kentucky Supreme Court recognized a qualified privilege for defamatory statements relating to the conduct of employees. When a qualified privilege is established, the presumption of malice disappears, and false and defamatory statements will not give rise to a cause of action unless maliciously uttered. *Stringer*, 151 S.W.3d at 797-98. The Court in *Stringer* recognized that the

qualified privilege must be exercised in a reasonable manner and for a proper purpose. *Id.* at 797.

The Appellants do not allege that Best Buy published the statements beyond the reasonable scope of the employment relationship. In fact, unlike in *Stringer*, the Appellants do not allege that Flannigan and Phillips published the particular allegations within or beyond Best Buy. Rather, they contend only that Flannigan and Phillips received the allegedly false allegations from other employees and they acted on these allegations without adequately investigating their truth or falsity. The paperwork provided to the Appellants stated that they had “engaged in inappropriate conduct of a sexual nature” and were terminated for violations of Best Buy’s Sexual Harassment policies. We seriously question whether this would meet the publication element necessary for a defamation claim.

And even if it is sufficient, such statements are subject to a qualified privilege, and the burden of going forward returns to the Appellants to show that the statements were maliciously uttered. *Id.* at 798. Actual malice requires a showing of knowledge of falsity of the defamatory statement or reckless disregard of its truth or falsity. *Id.* at 799. *See also McFall v. Courier Journal and Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), and *Thompson v. Bridges*, 209 Ky. 710, 273 S.W. 529 (1925). Parties opposing a properly supported motion for summary judgment may not rely only on the allegations in their complaint. They must present some affirmative evidence showing that there is a genuine issue of material fact for trial. *Steevest*, 807 S.W.2d at 482.

The Appellants do not deny that the allegations against them were made during the course of the internal investigation. Although the Appellants question the sufficiency of the investigation, they did not take the opportunity to depose Flannigan or Phillips about the conduct of their investigation, nor have they pointed to any evidence substantiating the alleged deficiencies of the internal investigation. As the record in this case now stands, the Appellants have failed to show that there is evidence showing that the statements were maliciously uttered.

As noted above, the Appellants have abandoned any defamation claims arising out of Best Buy's publication of the allegations during the course of the unemployment proceedings. Furthermore, this Court has recognized a qualified privilege for statements provided in the course of quasi-judicial or administrative proceedings. *Hawkins v. Miller*, 301 S.W.3d 507, 509 (Ky. App. 2009). Since Philpot and Morris have failed to present any evidence showing that the statements were made maliciously, the trial court properly dismissed these claims as well.

We next turn to the Appellants' retaliation claims. KRS 344.280 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 Kentucky Civil Rights Act]." A *prima facie* case for retaliation requires a plaintiff to demonstrate that (1) he engaged in protected activity; (2) that the exercise of the protected activity 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). *See also Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003).

The trial court found no evidence that the Appellants had engaged in protected activity within the scope of the Civil Rights Act. Rather, the court noted that they simply wrote a letter which supported DeHart and stated that they had never witnessed him engage in any misconduct. The Appellants maintain that their informal participation in the investigation of sexual harassment complaints against DeHart was protected activity within the meaning of KRS 344.280.

We disagree. Protected activity includes any communication made in opposition to discriminatory conduct or policies. *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271, 276, 129 S. Ct. 846, 850-51, 172 L. Ed. 2d 650 (2009). In writing their letter of support of DeHart, the Appellants did not express any concern about discriminatory conduct or policies. They merely generally denied that DeHart had engaged in improper conduct and stated that any such allegations were false. Their letter does not invoke any complaints of discrimination under the Civil Rights Act. Therefore, the Appellants failed to meet an essential element of their *prima facie* case for retaliation, and the trial court properly dismissed this claim as well.

Accordingly, the summary judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENTS
FOR APPELLANTS:

Philip C. Kimball
Louisville, Kentucky

BRIEF FOR APPELLEES:

Richard S. Cleary
Louisville, Kentucky

ORAL ARGUMENTS FOR
APPELLEES:

George A. Stohner
Washington, DC