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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000138-MR

EMILY PULLIAM — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 11-CI-00264

MONESSEN HEARTH SYSTEMS CO. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: Emily Pulliam appeals from a Bourbon Circuit Court Opinion and Order granting summary judgment to her former employer, Monessen Hearth Systems Co. The issue is whether the circuit court correctly held that there was insufficient evidence of a causal connection between Pulliam's report of workplace sexual harassment and the termination of her employment with Monessen to sustain her retaliation claim. For the reasons stated, we reverse and remand.

Pulliam was initially hired by Precision Staffing, a temporary staffing agency, which arranged for her to work at Monessen in a "temp to permanent" program. Pulliam started working at Monessen on September 9, 2010. After she completed orientation, Pulliam was assigned to work in the foundry under team leader Eddie Acevedo. Pulliam worked large amounts of overtime, and had a good working relationship with Acevedo.

After Pulliam had been working at Monessen for about a month, she encountered Eric Kissick, a team leader who supervised the shift following Pulliam's. Pulliam knew Kissick slightly because he had worked with the father of Pulliam's child. She struck up a conversation with Kissick, who asked if she had seen the father of her child lately. Pulliam replied that she had seen him the other day. Kissick asked her, "Did you get any?" Pulliam Deposition at 52. Pulliam replied that it was none of his business. Kissick then told her, "If you ever need any let me know." Pulliam Deposition at 49.

At about the same time, Pulliam learned that Acevedo might be leaving his supervisory position. Pulliam asked him not to place her under Kissick's supervision because Kissick made her feel extremely uncomfortable, and had made inappropriate sexual advances. Acevedo told her to report her concerns to his supervisor, Anthony Nash. Nash advised Pulliam to file a formal complaint with Monessen's Human Resources Department, which she did.

The day after Pulliam had complained about Kissick, he came to work before his scheduled shift and stared at Pulliam. Pulliam's supervisor allowed her

to move to another area, but Kissick followed her and continued to stare at her for thirty minutes.

On October 7, 2010, Pulliam reported to Nash that Kissick had stalked her. Two days later, on October 9, 2010, Monessen's leadership team met and decided to terminate Pulliam's employment. She was escorted from the building at lunchtime that day.

Tina Fowler of Precision Staffing notified Pulliam on October 11, 2010, that her assignment at Monessen was ending because Pulliam had used foul language in the workplace in violation of Monessen's policy. During Pulliam's employment at Monessen, Plant Manager Michael Paul held a plant-wide meeting at which he specifically told all employees that the use of foul language on the floor would not be tolerated. After this meeting, and before her encounter with Kissick, Pulliam and another temporary worker exchanged words, and Pulliam cursed at him. Pulliam also acted in a harsh manner towards this employee, apparently yelling at him for being slow. Precision's employment records state that her assignment was ended due to using "foul language on the floor at Monessen toward a fellow employee and being heavy handed toward the same employee." Opinion and Order at 2. Fowler was not aware of Pulliam's allegation of sexual harassment, although she knew that Pulliam claimed that a Monessen employee had made an offensive statement to her. Fowler was told by the Monessen Plant Manager that they had inadequate grounds to terminate Kissick

because there were no witnesses to the alleged harassment, and Kissick denied Pulliam's allegations.

Pulliam filed suit against Monessen on July 21, 2011. Her complaint alleged violations of the Kentucky Civil Rights Act, Kentucky Revised Statutes (KRS) 344.010 *et seq.*, gender discrimination, sexual harassment, retaliation, and hostile work environment. The trial court granted summary judgment in favor of Monessen on all the claims on December 20, 2012. This appeal follows.

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) (citing Kentucky Rules of Civil Procedure 56.03). And, "[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 his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr, Inc*. 807 S.W.2d 476, 480 (Ky. 1991).

Pulliam's sole argument on appeal is that the trial court erred in granting summary judgment to Monessen on her retaliation claim. The pertinent portion of the Kentucky Civil Rights Act provides that "[i]t shall be an unlawful practice for a person, or for two (2) or more persons to conspire . . . [t]o retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter[.]" KRS 344.280(1)

To establish a prima facie case of retaliation, a plaintiff must demonstrate:

> (1) [T]hat plaintiff engaged in an activity protected by Title VII; (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) (citation and quotation marks omitted).

The trial court held that Pulliam had succeeded in showing the first three elements of her prima facie case, in that (1) her complaint of harassment by Kissick was a protected activity under the Civil Rights Act, (2) her complaint was made to Monessen's management and human resources department, and (3) her employment was terminated.

The trial court granted summary judgment to Monessen on the grounds that Pulliam had not offered sufficient evidence to prove the fourth element: the causal connection between the protected activity (her report of the alleged harassment by Kissick) and the adverse action (the termination of her employment by Monessen). The trial court held that the only evidence put forward by Pulliam to prove causation was the close temporal proximity of two days between these events. The trial court acknowledged that at the prima facie stage the plaintiff's burden of proof is minimal, "requiring the plaintiff to put forth some evidence to deduce a causal connection between the retaliatory action and the

protected activity and requiring the court to draw reasonable inferences from that evidence, providing it is credible." *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000). The trial court further held, however, in reliance on *Parnell v. West*, an unpublished case from the Sixth Circuit Court of Appeals, that temporal proximity, without other compelling evidence, is not enough to prove a prima facie case. *Parnell v. West*, 114 F.3d 1188 (1997 WL 271751) (6th Cir. 1997). In *Parnell*, the plaintiff alleged that she was demoted in October 1990 in retaliation for several discrimination complaints which she filed between 1985 and 1989. The appellate court found that she did not satisfy the fourth prong of the prima facie test because she failed to show a causal link between her demotion and the filing of the complaints. The appellate court stated as follows:

> A causal link can be shown by either of two methods: (1) through direct evidence; or (2) through knowledge coupled with a closeness in time that creates an inference of causation. However, temporal proximity alone will not
>
> support an inference of retaliatory discrimination when there is no other compelling evidence.

Id. at *2 (citations omitted).

The court concluded that Parnell had failed to establish a causal link because she did not provide any evidence in addition to her claim of temporal proximity, and because the time lag between the protected activity and the adverse employment action was seven months. The court noted that previous cases that have permitted a prima facie case to be made based on the proximity of time have all involved short periods, usually less than six months. *Id*.

Thus, the *Parnell* court did not rule out the possibility that a causal link could be inferred from temporal proximity alone. A more recent, published opinion from the Sixth Circuit Court of Appeals has addressed the apparent conflict between those cases that hold that temporal proximity alone can be sufficient and those that state that additional evidence is necessary to establish the fourth prong of the plaintiff's prima facie case:

> Although we acknowledge, as one district court recently noted, that some "confusion in the case law [exists] on this issue," *Eppes v. Enter. Rent-A-Car Co*., No. 3:05-CV-458, 2007 WL 1170741, at *7 (E.D.Tenn. April 18, 2007), the two lines of cases are fully reconcilable. Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation. But where some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality. See *Little*, 265 F.3d at 365 ("[T]emporal proximity, when considered with the other evidence of retaliatory conduct, is sufficient to create a genuine issue of material fact as to" a causal connection.).
>
> The reason for this distinction is simple: if an employer immediately retaliates against an employee upon learning of his protected activity, the employee would be unable to couple temporal proximity with any such other evidence of retaliation because the two actions happened consecutively, and little other than the protected activity could motivate the retaliation. Thus, employers who retaliate swiftly and immediately upon learning of protected activity would ironically have a stronger defense than those who delay in taking adverse retaliatory action. Moreover, such a holding would

> accord with cases from other circuits, which recognize that, in rare cases, temporal proximity alone may suffice to show a causal connection. *See Stone v. City of Indianapolis Pub. Util. Div.*, 281 F.3d 640, 644 (7th Cir.2002) ("[M]ere temporal proximity between the filing of the charge of discrimination and the action alleged to have been taken in retaliation for that filing will rarely be sufficient in and of itself to create a triable issue."); *O'Neal v. Ferguson Const. Co.*, 237 F.3d 1248, 1252 (10th Cir. 2001) (stating that "[u]nless there is very close temporal proximity between the protected activity and the retaliatory conduct, the plaintiff must offer additional evidence to establish causation," and noting that a prior case " 'held that a one and one-half month period between protected activity and adverse action may, by itself, establish causation' ") (quoting *Anderson v. Coors Brewing Co*., 181 F.3d 1171, 1179 (10th Cir.1999)); *Cardenas v. Massey*, 269 F.3d 251, 264 (3d Cir.2001) ("[T]emporal proximity alone will be insufficient to establish the necessary causal connection when the temporal relationship is not unusually suggestive.")

Mickey v. Zeidler Tool and Die Co., 516 F.3d 516, 525-26 (6th Cir. 2008).

Thus, temporal proximity may be enough to establish the causation prong of the prima facie case, if the period in question is very short. In Pulliam's case, only two days elapsed between her report of the alleged harassment and the termination of her employment. Furthermore, Pulliam offered other evidence in addition to temporal proximity to support the inference that her termination was retaliatory, specifically relating to the employer's ostensible motive.

If the plaintiff succeeds in establishing a prima facie case of retaliation, the burden of production shifts to the defendant to show a non-retaliatory reason for the adverse employment decision that disadvantaged the

plaintiff. *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003).

The burden of proof then shifts back to the plaintiff "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for [retaliation]." *McCullough*, 123 S.W.3d at 134 (citation omitted). Consequently, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the defendant's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully [retaliated against the plaintiff]." *Id*. at 134 (citation omitted).

The trial court held that, even if a *prima facie* case had been established, Monessen had articulated a legitimate, nondiscriminatory reason for terminating Pulliam's employment: her admitted violation of the company's policy against the use of bad language on the shop floor. The trial court further held that Pulliam had failed to prove by a preponderance of the evidence that Monessen's stated reason for the termination of her employment was pretextual. But the preponderance of the evidence standard governs the jury's assessment of the evidence; at the summary judgment stage, the party opposing the motion need only show there were genuine issues of material fact concerning the company's motivation for the adverse employment action. *Brooks*, 132 S.W.3d 790.

> Courts have recognized that in discrimination and retaliation cases, an employer's true motivations are particularly difficult to ascertain, *see United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983)

> (acknowledging that discrimination cases present difficult issues for the trier of fact, as "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"), thereby frequently making such factual determinations unsuitable for disposition at the summary judgment stage[.] . . . [O]nce a prima facie case is established . . . , summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the "elusive factual question of intentional discrimination," *Burdine*, 450 U.S. at 255 n. 8, 101 S.Ct. 1089. . . .

Singfield v. Akron Metropolitan Housing Authority, 389 F.3d 555, 564-65 (6th Cir. 2004).

Pulliam provided the following evidence to suggest that Monessen's stated reason for her termination was pretextual:

First, during her brief five-week job tenure, her record was positive and she was never the subject of any disciplinary action: she regularly worked over fifteen hours of overtime per week and had a strong working relationship with her supervisor, who was increasing her job responsibilities by delegating some of his work to her. Pulliam argues that it is unlikely that an employer would abruptly terminate a high-performing employee for what appears to be one instance of violating the company's policy against the use of foul language and for heavy handedness towards a fellow employee.

Second, no one from Monessen at any point in the discovery process was able to attribute any particular statements of foul language to Pulliam. Pulliam herself recalled that at one point she told another employee, "You don't need to f---ing talk to me that way." In her deposition, she stated that foul language was not

unusual in her department and was used by other employees there, including one of her supervisors at start-of-shift meetings. There is no evidence that any other employees were terminated for using bad language at the workplace.

Third, when Monessen terminated Pulliam, it failed to follow its own progressive disciplinary policy. According to the deposition testimony of Sheree Smiley, Human Resources Manager of Monessen, this policy consisted of a three-stage process: a written warning, followed by a suspension, and eventually, termination. Pulliam was never given a single verbal or written warning, or a suspension, prior to her termination.

Fourth, other employees who were terminated by Monessen in the past had committed much more serious offenses than using bad language. These included offenses such as bringing a gun to work, repeatedly showing other employees obscene sex material, or showing up for work under the influence of drugs and refusing to take a drug test. In one instance, two employees, one of whom had a long disciplinary record, got into a heated argument on the manufacturing floor, and made racial comments and threats of serious violence against each other. Monessen suspended these employees for three days.

Based on the record before this Court, we believe Pulliam has succeeded in providing sufficient evidence to cast doubt on the legitimacy of Monessen's proffered reason for her termination and to defeat a summary judgment motion. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of

a judge." *Hajizadeh v. Vanderbilt Univ.*, 879 F.Supp.2d 910, 923 (M.D. Tenn. 2012) (citation omitted).

The Opinion and Order granting summary judgment to Monessen Hearth Systems as to Pulliam's retaliation claim is therefore reversed, and the case is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Theodore W. Walton
Louisville, Kentucky

BRIEF FOR APPELLEE:

Sadhna G. True
Drew B. Millar
Lexington, Kentucky