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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001657-MR

FELICIA HUTCHISON AND
CAROL HISLE APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 11-CI-008132

WENDY'S OF LOUISVILLE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: This is an appeal from a summary judgment granted by the Jefferson Circuit Court in the sexual harassment and retaliation claims brought by the Appellants. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

B.F. South is a privately owned business in Kentucky which owns and operates several Wendy's restaurants. Robert Blackwell was a manager for the Wendy's in Louisville, Kentucky, which is the subject of this action. Appellants, Felicia Hutchison and Carol Hisle, were employees at the Wendy's where Blackwell was manager.

On November 16, 2011, Hutchison called the Wendy's District Manager, Paul Tadatada, and told him Blackwell had been inappropriate with her while they were on the job. Specifically, she stated that he asked her to give him a hug, pointed to his cheek for a kiss and touched her arm. Tadatada arranged a meeting the next day with Hutchison, Blackwell and Tene Miller (the other manager of the Wendy's where Blackwell and Hutchison worked). At the meeting, Blackwell apologized to Hutchison for his actions and stated that he would not do anything similar in the future. Tadatada then asked Hutchison if she could work with Blackwell after the incident and she informed him that she could.

On November 25, 2011, Hisle informed Tadatada that Blackwell had tried to hug her and had made inappropriate comments to her. Specifically, Hisle reported that Blackwell made comments about the two of them having an affair and that she was sexy as well as asking her to touch his bald head. After an investigation into the complaints, Blackwell was terminated from his employment with Wendy's on December 15, 2011.

Hisle and Hutchison filed a joint complaint in Jefferson Circuit Court on December 19, 2011, in which both individuals asserted claims for hostile work environment due to sexual harassment and retaliation. In the Complaint, Hisle set forth that she was terminated after she complained about Blackwell's conduct. Hutchison, who was still employed by B.F. South at the time the Complaint was filed, alleged that her work hours had been reduced.

B .F. South moved the trial court for summary judgment asserting that the incidents complained of were neither so severe nor pervasive as to alter the conditions of Hisle and Hutchison's employment. B.F. South also argued that the reason it had terminated Hisle's employment was because it had discovered that she had been falsifying time records for herself and her son, who was also an employee at Wendy's. As for Hutchison, B.F. South argued that many other employees had also received reduced hours during Thanksgiving week due to the decreased sales at Wendy's during the holiday period.

The trial court granted summary judgment as to everything except Hutchison's retaliation claims, finding that the alleged conduct was neither severe nor pervasive and that falsifying time cards was a legitimate, nondiscriminatory reason for terminating Hisle's employment. B.F. South then moved the trial court for a summary judgment on the issue of retaliation against Hutchison. The trial court found that Hutchison could not establish that the reduction in her hours during Thanksgiving week was a retaliatory act by B.F. South and granted summary judgment on this issue as well.

The Appellants then brought this appeal.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine 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." Kentucky Rules of Civil Procedure (CR) 56.03.

"[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . 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." *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court's decision and must review the issue *de novo*. *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the issues before us.

DISCUSSION

The Appellants first argue that they are entitled to relief under CR 61.02 which provides that:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

The Appellants have not, however, shown how palpable error applies.

Appellants next assert that the trial court erred and abused its discretion when it denied their motion to compel the discovery of addresses of certain employees of Wendy's. After a hearing before the trial court, however, the issue was determined to be moot since B.F. South had presented the information to the Appellants through previous interrogatories. Thus, we affirm the trial court's decision on this issue.

Appellants also argue that the trial court erred in its ruling granting summary judgment when it determined that Blackwell's behavior was not so pervasive or severe as to be the basis of a discrimination claim. B.F. South contends that the trial court correctly held that the incidents complained of were isolated and did not affect the terms of their employment.

The Kentucky Civil Rights Act, Kentucky Revised Statutes (KRS) Chapter 344, provides that it is unlawful for an employer "to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin,

sex… [or to] limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee[.]" KRS 344.040(1)(a)(b). In *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992), the Kentucky Supreme Court held that it should be interpreted consistent with Title VII of the Federal Civil Rights Act of 1964, codified at 42 U.S.C. §2000e-2(a)(1).

Title VII provides that a plaintiff who asserts a sexual harassment claim based upon a hostile work environment must set forth a *prima facie* case in order to survive a summary judgment motion. *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 270 (6th Cir. 2009). In establishing a *prima facie* case, the plaintiff must show that:

> (1) she is a member of a protected class (female); (2) she was subjected to harassment, either through words or actions, based on sex; (3) the harassment had the effect of unreasonably interfering with her work performance and creating an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer.

Id.

In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986), the United States Supreme Court held that there is no strict liability on an employer for sexual harassment claims and that in order to proceed in a harassment claim, the conduct complained of must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993).

After reviewing the asserted facts, the trial court held as follows:

> …Hutchison alleges that she was touched on her backside inappropriately and Hisle alleges that Blackwell asked her to rub his head while he touched himself. However, mere weeks after learning of Blackwell's behavior;[sic] Wendy's terminated Blackwell. The Court finds that Blackwell's behavior was not sufficiently severe or pervasive to be the basis of a claim for discrimination for either Hutchison or Hisle. Accordingly, the Court grants Wendy's Motion for Summary Judgment on Plaintiff's [sic] discrimination claims.

Trial Court Opinion at p. 4.

As set forth above, in *Meritor, supra*, the Supreme Court held that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." In order for the harassment to be actionable, it must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Henson v. City of Dundee*, 682 F.2d 897, 904 (Fla. Cir. 1982).

In determining whether conduct created a hostile work environment, the court must look to all the circumstances, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993), and examine the environment of the workplace as a whole. *Gallagher*, 567 F.3d at 274. Isolated incidents are rarely actionable under Title VII. *Clark County School District v. Breeden*, 532 U.S. 268, 271, 121 S.Ct. 1508, 1510, 149 L.Ed.2d 509 (2001).

The incidents described by both Hisle and Hutchison were isolated, of short duration, and neither physically threatening nor humiliating. Consequently, the

trial court did not err in determining that such acts did not constitute a hostile work environment under the Kentucky Civil Rights Act and Title VII. Thus, we affirm the decision of the trial court in its grant of summary judgment on this issue.

The Appellants next assert that the trial court erred in ruling that Wendy's had a valid, nondiscriminatory reason for terminating Hisle and that there was no causal connection between her opposition and participation in her termination. In order to establish a claim for retaliation, a plaintiff must establish that (1) he or she engaged in activity protected by Title VII; (2) defendant was disadvantaged by an act of his or her employer; and (3) there was a causal connection between the protected activity and the adverse employment action. *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 701 (Ky. App. 1991). If the employer can articulate a legitimate, nondiscriminatory reason for the termination, the employee must demonstrate that "but for" the protected activity, she would not have been terminated. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973).

B.F. South asserts that Hisle was falsifying time records for herself and her son and that this was the reason her employment was terminated. This is a legitimate, nondiscriminatory reason for terminating her employment and does not establish retaliation. Thus, the trial court correctly granted summary judgment to B.F. South on the issue of Hisle's retaliation claim.

Appellants' final assertion is that the trial court erred and abused its discretion when it ruled that Wendy's had sought summary judgment on the

retaliation claim of Hutchison. In its original June 4, 2013 Opinion and Order, the trial court failed to make a determination regarding Hutchison's retaliation claim. B.F. South filed a Motion to Amend the Opinion and Order to include dismissal of the claim. Hutchison then filed a Memorandum in Opposition to the Motion to Amend and had an opportunity to respond to arguments regarding her retaliation claim. In rulings on the issue, the trial court held as follows:

> Having reviewed the materials tendered by Wendy's, it is abundantly clear that it did, in fact, seek summary judgment on Plaintiff Hutchison's claim for retaliation. … it is clear that while Plaintiff Hutchison can demonstrate that she complained of Blackwell's conduct and then her hours were reduced during Thanksgiving week, she cannot establish the but-for causation required, see *Kentucky Center for the Arts v. Handley*, 827 S.W. 2d 697 (Ky. App. 1992). The time records unequivocally establish that all employees had reduced hours during that week.

Opinion and Order 9/5/13.

In her appeal, Hutchison asserts that had there been a traditional motion for summary judgment, she would have been able to show that she only worked 9.57 hours the week of Thanksgiving rather than the 15 hours Wendy's set forth she had worked. Regardless, however, the fact that her hours were cut during a time when the fast food restaurant industry has fewer customers is not proof of retaliation. Wendy's provided information that many of its employees received fewer hours during that week and Hutchison did not set forth evidence to the contrary. Thus, the trial court did not err in entering summary judgment on this issue either.

We therefore affirm the decision of the trial court.

ALL CONCUR.

ORAL ARGUMENT AND BRIEF FOR APPELLANTS:

Edwin C. Lester
Louisville, Kentucky

ORAL ARGUMENT AND BRIEF FOR APPELLEE:

Mark S. Fenzel
Dana L. Collins
Louisville, Kentucky