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# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-001340-MR

JACQUES RANSOM — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 12-CI-002989

B.F. SOUTH, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; J. LAMBERT AND VANMETER, JUDGES.

VANMETER, JUDGE: Jacques Ransom appeals from the Jefferson Circuit Court's July 3, 2013, order granting summary judgment in favor of B.F. South, Inc., a privately owned business based in Louisville, Kentucky, that owns and operates, among other things, Wendy's franchise restaurants. Ransom was employed at one of B.F. South's Wendy's restaurants in Louisville from 2007 until

she quit in December 2013. Before quitting, Ransom filed a complaint in May 2012 against B.F. South asserting two claims under the Kentucky Civil Rights Act (KCRA), as set forth in KRS[1] 344.040: (1) hostile work environment/sexual harassment; and (2) retaliation/unlawful discharge. Ransom also alleged that B.F. South's actions constituted intentional infliction of emotional distress (IIED). Ransom argues on appeal that the trial court erred by summarily dismissing her claims made pursuant to the KCRA.[2] Finding no genuine issues of material fact in the record to preclude summary judgment on these claims, we affirm.

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. CR[3] 56.03. In other words, summary judgment may be granted 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) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings, so an appellate court reviews the trial court's grant of summary judgment *de novo*. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

[1] Kentucky Revised Statutes.

[2] Ransom does not appeal the trial court's dismissal of her IIED claim; therefore, we will not address it.

[3] Kentucky Rules of Civil Procedure.

The relevant facts of this case are as follows. Although born a man, Ransom has undergone gender reassignment surgery to become a woman. Ransom claims that in the summer of 2011, her Wendy's co-worker, T.J., made several comments to other co-workers concerning Ransom's gender transformation. The comments were not made directly to Ransom; rather, Ransom claims that T.J. told another co-worker, "I know what's in between her legs" and made negative comments about Ransom using the woman's restroom. Ransom also claims that T.J. threatened to have her boyfriend "beat up" Ransom for her complaints.

Ransom reported T.J.'s comments to the store manager at that time, who told her to call the district manager. Two days later, the district manager met with the store manager, Ransom, and T.J. regarding Ransom's complaints. Thereafter, Ransom and T.J. did not work another shift together. A few weeks later, B.F. South transferred T.J. to another Wendy's location.

Ransom states in her deposition testimony that being a "transsexual" became the "talk of the store," even after T.J. left. But Ransom admits that the store manager "put a lid on the whole situation" by going to both shifts and telling the workers that the topic was not to be discussed further. Ransom further acknowledges that nothing of an offensive nature has occurred since T.J. was transferred and, in fact, her other co-workers have been, and continue to be, very supportive of her.

B.F. South moved for summary judgment, arguing: (1) discrimination on the basis of "sex," as prohibited by Title VII of the 1964 Federal Civil Rights Act, 42

U.S.C.[4] § 2000e-2(a)(1), has not been interpreted by the courts to include transsexuals; (2) the alleged conduct does not rise to the level of actionable harassment as a matter of law; (3) B.F. South is not liable for comments made by T.J. since it responded promptly and adequately after receiving a complaint about the alleged harassment; and (4) Ransom's retaliation claim must fail since no adverse action has been taken against her. The trial court agreed with the arguments advanced by B.F. South and granted summary judgment on all claims.

On appeal, Ransom first argues the trial court erred by determining that no genuine issue of material fact existed regarding her hostile work environment/sexual harassment claim. We disagree.

Pursuant to the KCRA, KRS 344.040, "it is unlawful for an employer, on the basis of sex, to 'discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment . . . [or] to limit, segregate, or classify employees in any way which would . . . tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee.'" *Ammerman v. Bd. of Educ.*, 30 S.W.3d 793, 797 (Ky. 2000). In other words, the KCRA forbids sexual harassment in the workplace that creates "a hostile or abusive work environment." *Id.* at 798. Given the similarity between the KCRA and Title VII, the KCRA should be interpreted consistently with federal law. *Id.* at 797-98.

[4] United States Code.

To make a *prima facie* showing that an employee was subject to a hostile work environment in violation of Title VII, the plaintiff employee must demonstrate:

> (1) he belongs to a protected group; (2) he was subject to unwelcome harassment; (3) the harassment was based on [sex]; (4) the harassment affected a term, condition, or privilege of employment and (5) defendant knew or should have known about the harassment and failed to take action. Harassment affects a "term, condition or privilege of employment" if it is sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and creates an abusive working environment. *See generally Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); *accord Scott v. Central School Supply, Co.,* 121 F.3d 709 (6th Cir.1997) (unpublished). In sum, the plaintiff's evidence must be sufficient to show that the alleged conduct constituted an unreasonably abusive or offensive work-related environment or adversely affected the employee's ability to do his or her job. *Erebia v. Chrysler Plastic Prods. Corp.,* 772 F.2d 1250, 1256 (6th Cir.1985).

*Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1078-79 (6th Cir. 1999). *See also Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 347 (6th Cir. 2005).

In this case, Ransom has failed to make the requisite showing that the alleged conduct rose to the level of actionable harassment as a matter of law, i.e., that the harassment affected a "term, condition or privilege of employment" so as to create an unreasonably abusive or offensive work environment which prevented her from doing her job.[5] To be actionable, the alleged harassment "must be

[5] Accordingly, we need not address whether transsexuals are a protected group. We note that the federal courts have disagreed as to whether Title VII encompasses discrimination claims made

sufficiently severe or pervasive 'to alter the conditions of (the victim's) employment and create an abusive working environment.'" *Jackson v. Quanex Corp.*, 191 F.3d 647, 658 (6th Cir. 1999) (quoting *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986)).

The objective component to this inquiry requires the court to consider the totality of the circumstances including "'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 performance.'" *Jackson*, 191 F.3d at 658 (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993)). "[T]he conduct in question must be judged by both an objective and a subjective standard: [t]he conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive." *Jackson*, 191 F.3d at 658 (internal quotations and citation omitted). "If the plaintiff can show that a hostile work environment existed, she must then prove that her employer 'tolerated or condoned the situation' or 'that the employer knew or should have known of the alleged conduct and failed to take prompt remedial action.'" *Id.* at 659 (citation omitted).

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by transsexuals. *See* 33 Am. Jur. *Trials* 257 § 11 (originally published in 1986) ("courts have held that harassment against transsexuals is not a prohibited or discriminatory practice within the ambit of Title VII"); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (discrimination based on person's status as a transsexual was not discrimination "because of sex" under Title VII). *But see Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008) (revocation of job offer after being advised applicant planned to change anatomical sex by undergoing gender reassignment surgery was discrimination "because of sex" in violation of Title VII).

Ransom acknowledged during her deposition that no one at Wendy's has made any offensive statements about her gender since the incidents with T.J.[6] The record reflects that after Ransom complained to the store manager about T.J.'s comments, B.F. South ensured that Ransom did not work another shift with T.J. A few weeks after being informed about T.J.'s comments to Ransom, B.F. South transferred T.J. to another store. Furthermore, the store manager of the Wendy's where Ransom worked at the time of the incident put a stop to any discussions by other employees about Ransom's gender when she was apprised that such discussions were taking place. Ransom stated during her deposition that nothing of an offensive nature has occurred since T.J. was transferred and that "it's been like smooth sailing." Indeed, she stated that her other co-workers including the store manager have been, and continue to be, supportive of her.

Based on the record, viewed in a light most favorable to Ransom, we believe T.J.'s comments did not create a pervasive, abusive work environment or interfere with Ransom's work performance. Neither objectively nor subjectively speaking did Ransom sufficiently allege that the conduct rose to the level of an actionable hostile work environment so as to survive summary judgment. Nor has Ransom demonstrated that B.F. South tolerated or condoned the situation, or failed to take

[6] The trial court noted that Ransom attached an affidavit to her response brief to B.F. South's motion for summary judgment which contradicted her deposition testimony in many areas. "[A]s a general proposition, a deposition is more reliable than an affidavit[.]" *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 736 (Ky. 2000) (internal quotations and citation omitted). While a post-deposition affidavit may be submitted to explain deposition testimony, "an affidavit which merely contradicts earlier testimony cannot be submitted for the purpose of attempting to create a genuine issue of material fact" to avoid summary judgment. *Id.*

proper remedial action. As a result, we affirm the trial court's grant of summary judgment on Ransom's hostile work environment/sexual harassment claim.

We likewise affirm the trial court's grant of summary judgment with respect to Ransom's retaliation/unlawful discharge claim. KRS 344.280(1) prohibits an employer's retaliatory response to an employee's report or complaint about conduct which violates the KCRA. Interpretation of an unlawful retaliation claim under the KCRA shall be consistent with interpretation of unlawful retaliation under federal law. *Brooks v. Lexington-Fayette Urban County Housing Auth.*, 132 S.W.3d 790, 802 (Ky. 2004).

To make a *prima facie* showing of unlawful retaliation under KRS 344.080, a plaintiff must demonstrate: (1) an employee was engaged in a protected activity; (2) the exercise of the employee's civil rights was known by the employer; (3) the employer thereafter took an employment action adverse to the employee; and (4) a causal connection existed "'between the protected activity and the adverse employment action.'" *Id.* at 803 (quoting *Christopher v. Stouder Mem'l Hosp.,* 936 F.2d 870, 877 (6th Cir.1991)).

> 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.

*Brooks*, 132 S.W.3d at 802 (quoting *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999)).

Ransom's complaint alleges that she was demoted from manager to regular crewmember after her complaints against T.J., and that B.F. South's actions constitute retaliation and unlawful discharge. But Ransom acknowledged during her deposition that her demotion from manager to crewmember occurred *prior* to her complaints about T.J. and, in fact, she was promoted to crew leader and given a raise *after* she lodged her complaints. Ransom was still employed at Wendy's when she filed her complaint and when she was deposed. Only later, in December 2013, did Ransom quit. Ransom was never terminated from Wendy's. Based on the evidence of record, the trial court correctly held that no adverse action had been taken against Ransom as plead in her complaint and therefore she failed to make a *prima facie* showing of unlawful retaliation. Accordingly, the trial court properly dismissed this claim as a matter of law.

For the foregoing reasons, we affirm the Jefferson Circuit Court's order granting summary judgment in favor of B.F. South.

ALL CONCUR.

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