RENDERED: NOVEMBER 20, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002008-MR

PEGGY A. OVERLY — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 11-CI-90259

MOREHEAD STATE UNIVERSITY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

ACREE, CHIEF JUDGE: Appellant Peggy Overly appeals the Rowan Circuit Court's summary judgment and order dismissing her race discrimination and retaliation claim against Appellee Morehead State University (MSU). We find no error and affirm.

I. Facts and Procedure

MSU hired Overly, an African-American, in 1985 as a Minority Student Recruiter in the Office of Admissions. Her career lasted twenty-seven years until she retired in October 2012. During her tenure, MSU restructured and reorganized numerous times. Each of these events had a significant effect on Overly's job title, responsibilities and/or physical work-place location.

In 1987, Overly's position was reassigned from the Office of Admissions to the Office of Minority Student Affairs. Several years later, in 1993, Overly applied for and was denied the position of Minority Recruitment Specialist. She filed a complaint against MSU with the Equal Employment Opportunity Commission (EEOC) alleging she was denied the position on the basis of her sex. Finding no factual predicate of sex discrimination, the EEOC dismissed Overly's claim.

Later that year, as part of a University-wide reorganization, Overly's position was transferred back to the Admissions Office. She objected to her removal from the Office of Minority Student Affairs, which she described as a "forced move," but ultimately submitted to the transfer.

A short while later, MSU obtained the services of an external consultant to evaluate the university's recruitment and retention efforts. The consultant recommended that all recruiters recruit all students. Overly objected to this approach. She wanted to recruit minority students only. Overly filed a

complaint of racial harassment with the University and demanded that she be permitted to continue in a position, regardless of title, that would allow her to be primarily responsible for the recruitment and retention of minority students. MSU considered her complaint but concluded that it lacked merit as there was no evidence of racial harassment and her job's change in emphasis was fully in line with the restructuring plan recommended by the external consultant. However, to appease Overly, MSU offered her the opportunity to transfer back to the Office of Minority Student Affairs as the Assistant Director, along with an increase in salary. Overly accepted the position, but objected to the "insufficient" salary increase.

In July 1998, Francene Botts-Butler, an African-American female, assumed the position of Director of Minority Student Affairs. Overly's job title changed to Minority Student Services Coordinator. Botts-Butler and Overly suffered a strained working relationship. These circumstances persisted until they peaked in 2003, culminating in cross-complaints of unprofessionalism and disrespect. Notably, Botts-Butler accused Overly of harassment, unprofessional behavior, and insubordination, and described the office atmosphere as an extremely hostile environment that she had tolerated since 1998. The Vice-President for Student Life thought Overly's conduct warranted termination and recommended it. MSU's President chose not to terminate Overly due to her long service at the university. Instead, in January 2004, Overly was reassigned as the Career Advisor in the Office of Career Services, placed on six months' probation, and advised by the President that "[d]ue to your long tenure with the University, I

am taking the above action [reassignment] in lieu of discipline. I am aware of the considerable problems you had had with supervisors and your work over a period of time." (R. at 250).

Despite the title Career Advisor, Overly's role focused primarily on academic advising. Another employee in the unit, Rhonda Crisp, a Caucasian female, was assigned career counseling and employer-relation duties.

In 2005, MSU hired a new president. He ordered a review of all departments and found the Career Services unit lacking in many ways. MSU hired Julia Hawkins as Career Services Director in August 2006. Hawkins suggested, in a detailed report, that Career Services adopt a business-model approach which was more in line with the department's stated purpose and mission of preparing students for the workforce.

In the spring of 2008, on the recommendation of a new provost, MSU separated Career Services from Academic Services. This resulted in a physical move of the office across campus. The provost extended Overly and Crisp the option of remaining with Academic Services in their current space or voluntarily moving to the new Career Center. They both chose the latter.

Effective July 2008, Hawkins became Overly's and Crisp's direct supervisor, and their job responsibilities shifted from academic advising to career services. Importantly, Overly's role evolved from student academic advising into a student resource and administrative position focusing on post-graduation placement. Between the summer of 2008 and the fall of 2009, Hawkins held

numerous staff meetings, planning sessions, and training seminars to educate and prepare Overly and Crisp for their new responsibilities in the Career Center. Despite the training, Overly struggled, according to Hawkins, to grasp basic career-related concepts and ineptly carried out her job duties.

As part of an annual review of all employees, Hawkins evaluated Overly for the first time in 2008. Employees were evaluated on a scale of 1 to 5 in numerous categories of employee work performance. Hawkins scored Overly as a 2 (minimally meets performance requirements; performance needs improvement) in the categories of: (1) employer relations; (2) data and technical; (3) career advising; (4) job knowledge; (5) quality of work; (6) quantity of work; and (7) initiative. Overly received much higher scores, exceeding or significantly exceeding expectations in those other areas, resulting in an overall rating of 3.21. Hawkins commented:

> [Overly] does not have the educational background, experience, or training for career counseling. She has never been exposed to the profession before being assigned to this department. She has never done employer relations, internships, or career inventories prior to this appointment. She is trying, but struggles to grasp basic career processes.

(R. at 286).

This was not the first time Overly received low ratings on performance reviews. Overly received an overall rating of 3.11 in 2003, but scored only a 2 in several categories, including: (1) communications; (2) teamwork; (3) initiative; and (4) problem solving. Her supervisor, Madonna Weathers,

commented that the "scores of 2 [reflect an] inability to build a positive working relationship with supervisor and develop/maintain effective and appropriate communication with campus community. [Overly i]s not perceived as a team member promoting loyalty to the organization and associates." (R. at 258).

For her 2004 annual review, Overly received an overall rating of 3.0 and comments by her supervisor that Overly needed "more knowledge of academic advising procedures and career development materials and resources [which] will enable Ms. Overly to extend her effectiveness with students." (R. at 264). The review included the suggestion of a joint action plan by which Overly and her supervisor would conduct monthly meetings "to discuss progress on accountabilities, opportunities for professional development, and to promote communication on mutual concerns about the position." (*Id.*).

In 2009, Career Services was transferred from Academic Affairs to University Advancement, under the oversight of Vice President James Shaw. This resulted in yet another physical move of the office. Around the same time, Overly's job title changed from Career Advisor to Student Resource Specialist. She objected to her new title, which she viewed as a demotion. No reduction in salary or benefits occurred. Crisp's title also changed from Administrative Secretary to Employer Relations Coordinator.

It is unclear exactly when the professional relationship between Overly and Hawkins began to decline. What is clear is that Overly believed Hawkins treated her unfairly due to her race and age. On December 10, 2009,

Overly filed a discrimination complaint against MSU with the EEOC alleging disparate treatment by Hawkins on the basis of race.[1] Overly claimed that in 2009 "my job position was changed and I was placed in a new position that is normally for a lower paid, less experienced professional." (R. at 294).

Overly's job performance in 2010 did not improve. Her 2010 annual performance review, conducted by Hawkins on March 16, 2011, yielded an overall rating of 2.09. Hawkins issued low marks ranging from 1.5 to 2.75 for every category, including: (1) job accountabilities and knowledge; (2) quality of work; (3) accountability; (4) communication; (5) teamwork; and (6) initiative. Hawkins' review identified numerous shortcomings, such as Overly's failure to improve her internship knowledge, a failure to market the "suit bank"[2] and to send receipts to contributors, her difficulty with follow-through, her failure to take initiative, her lack of cooperation with other office staff, her lack of adequate career services knowledge as reflected in her presentations and workshops, her routine of referring simple questions about JOB LINK[3] to other staff members, and her need for assistance from other staff members for routine office tasks such as use of Outlook and voicemail. Hawkins concluded the evaluation with the following comment:

> [Overly] has had the title Career Advisor for more than 8 years, which is ample time to adjust to the field, the organization, and new surroundings. Behavior and ability scores for her were difficult to determine and

[1] A claim of age discrimination was subsequently abandoned and is not a subject of this appeal.
[2] The "suit bank" is a career services resource that collects professional attire donated to MSU for use by students interviewing for post-graduation positions.

[3] JOB LINK is another career services resource.

> scored lower this year due to lack of consistency in her performance. [Overly] is capable of doing this job. Indeed, she performs better right after planning retreat, and just before evaluations, implying that she was becoming competent in the field. Then the quality of her work would lapse and she would fail to be accountable. Teamwork improved right after a new staff member was hired (optimistic that she would work well with her), but inconsistency returned.

(R. at 299).

To combat Overly's poor 2010 annual review, MSU placed her on probationary status and issued a three-month corrective action plan, starting May 16, 2011. Overly met with Hawkins and other human-resources personnel on several occasions to discuss her progress. Overly's performance failed to reach acceptable levels during the probation period. On the final evaluation of August 22, 2011, Hawkins commented:

> [Overly h]as not successfully completed probation plan as a professional career advisor. Knowledge of the field and use of basic career terminology is weak. Learning career and basic office technology is not acceptable. Needs repeated training on tasks. Presentation lacks real world examples and often are not correct to the target audience. Still struggles with basic career terminology and can not answer basic questions in a presentation. . . . Presentations and career advice that is out-dated, incorrect, or miscommunicated are unacceptable.

(R. at 317).

Though MSU policy mandated dismissal upon an unsuccessful probation period, MSU's President offered to assign Overly to a temporary position – not under Hawkin's supervision – to allow her to complete twenty-seven years of

service and retire with full benefits under the Kentucky Teachers' Retirement System. Overly accepted the offer and retired, under compulsion, on October 31, 2012.

On July 26, 2011 (while on probation), Overly filed a complaint in Rowan Circuit Court alleging race discrimination and retaliation. She claimed Hawkins discriminated against her, solely due to her race, when she changed the terms and conditions of her employment by removing job duties and assigning her clerical tasks, and when she spoke to her in a condescending manner. Overly also claimed Hawkins retaliated against her in the form of an unfavorable evaluation and a performance improvement plan in response to her December 2009 EEOC complaint. After two years of discovery, MSU moved for summary judgment. By succinct order entered October 1, 2013, the circuit court granted MSU's motion, stating "[t]he Court finds from the record that [Overly] has failed to put forth evidence to support her claims herein other than her personal opinions and subjective beliefs." Overly appealed. We will discuss additional facts as needed.

II. Standard of Review

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Under this standard, an action may be terminated "when no questions of material fact exist or when only one reasonable conclusion can be reached[.]" *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901,

916 (Ky. 2013). Our review is *de novo*. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

"The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present" evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). That is, "[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

III. Analysis

Overly argues the circuit court's issuance of summary judgment was improper because there is ample evidence in the record demonstrating a genuine issue of material fact for trial, both as to her discrimination claim and her retaliation claim. We are not persuaded.

A. The Race Discrimination Claim

Under Kentucky's anti-discrimination statute, it is unlawful for an employer "to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race[.]" KRS[4] 344.040(1)(a). Absent direct evidence of discrimination, Kentucky utilizes the

[4] Kentucky Revised Statute.

burden-shifting formula articulated in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 804, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973) as the procedural framework within which to evaluate the merits of a discrimination claim. *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 25 (Ky. 2008). This construct allows a plaintiff, such as Overly, to establish her case through "inferential and circumstantial proof" when direct evidence of discrimination "is hard to come by" or is simply unavailable. *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 495-96 (Ky. 2005).

The *McDonnell Douglas* formula first requires the plaintiff to make a *prima facie* case of discrimination. *Childers Oil,* 256 S.W.3d at 26 (citing *McDonnell Douglas*, 411 U.S. at 802-03, 93 S.Ct. at 1824). Second, if the plaintiff establishes a *prima facie* case, the burden of production – but not persuasion – shifts to the defendant to articulate a legitimate nondiscriminatory reason for the adverse employment action. *Id.* And, third, if the defendant successfully produces a legitimate reason for the adverse employment action, then the burden reverts back to the plaintiff to demonstrate by a preponderance of the evidence that the defendant's proffered reason is a mere pretext for discrimination. *Id.*

(i) No Prima Facie Case of Race Discrimination

This is not a discrimination case based on an employee's discharge or the employer's failure or refusal to hire a job applicant as most discrimination cases are.[5] Rather, this is a case based on the statutory prohibition of an employer

[5] It appears, in Kentucky, that the claimed "discrimination" in most race-based cases occurs when the employer fails to hire or fails to promote a candidate due to the candidate's race. *See,*

"otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment[.]" KRS 344.040(1)(a). But the elements of the *prima facie* case are the same: "[T]he plaintiff must demonstrate that (1) he [or she] was a member of a protected class; (2) that he [or she] suffered an adverse employment action; (3) that he [or she] was qualified for the position; and (4) that a person outside the protected class was treated more favorably than him [or her]." C*lay v. United Parcel Service, Inc.*, 501 F.3d 695, 703 (6th Cir. 2007) (citation omitted).[6]

"The key question is always whether, under the particular facts and context of the case at hand, the plaintiff has presented sufficient evidence that he or she suffered an adverse employment action under circumstances which give rise to an inference of unlawful discrimination." *Id.* (citation omitted).

Overly is a member of a protected class and was objectively qualified for the position of Student Resources Specialist and, therefore, she has satisfied the first and third elements of the *prima face* case. The record, however, does not include evidence from which a reasonable inference can be drawn that she suffered an adverse employment action and that a person outside of the protected class was

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e.g., Brooks v. Lexington-Fayette Urban County Housing Authority, 132 S.W.3d 790, 796 (Ky. 2004) (failure to hire/promote); *Jefferson County v. Zaring*, 91 S.W.3d 583, 591 (Ky. 2002) (same); *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 699 (Ky. App. 1991) (same); *Woods v. Western Kentucky University*, 303 S.W.3d 484, 486 (Ky. App. 2009) (same); *Irvin v. Aubrey*, 92 S.W.3d 87, 91 (Ky. App. 2001) (same).

[6] Kentucky courts have "consistently interpreted the civil rights provisions of KRS Chapter 344 consistent with the applicable federal anti-discrimination laws." *Williams v. Wal-Mart Stores*, Inc., 184 S.W.3d 492, 495 (Ky. 2005). Where warranted, we will turn to federal authority to supplement and bolster our analysis of Overly's race and retaliation discrimination claims.

treated more favorably than her – the second and fourth elements of a *prima facie* case.

(a) No Adverse Employment Action

An adverse action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 2268, 141 L.Ed.2d 633 (1998). The Supreme Court of Kentucky has found that "[a] material modification in duties and loss of prestige may rise to the level of adverse action." *Brooks v. Lexington-Fayette Urban County Housing Auth.*, 132 S.W.3d 790, 803 (Ky. 2004). Discrimination cases are often unique on their facts and "other indices [suggesting an adverse employment action] that might be unique to a particular situation" must not be ignored or casually cast aside. *White v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789, 798 (6th Cir. 2004) (quoting *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 886 (6th Cir. 1996)). On the other hand, "[*d*]*e minimis* employment actions are not actionable; the 'change in employment conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Vitt v. City of Cincinnati*, 97 F. App'x 634, 639 (6th Cir. 2004) (quoting *Kocsis*, 97 F.3d at 886).

It is undisputed that Overly herself elected transfer to the new Career Center under Hawkins' authority. While this resulted in a substantial change of her job duties, the voluntary nature of the change cannot, in and of itself, constitute

an adverse employment action. Beyond that, we see no other evidence that Overly sustained "a significant change in employment status" amounting to adverse action. *Ellerth*, 524 U.S. at 761, 118 S.Ct. at 2268.

Overly asserts her job duties were materially modified when Hawkins removed from her list of duties making presentations to the community and MSU students, a job responsibility Overly conducted for many years. However, the record reflects Overly facilitated four workshops and conducted two class presentations in 2009; was assigned five presentations in the fall of 2010; and made four presentations[7] in the summer of 2011. Furthermore, her corrective action plan expressly required her to assume responsibility for half of all the Center's presentations, workshops, and events. There is no genuine issue of material fact here.

Overly complains Hawkins embarrassed and belittled her by requiring her – and only her – to "dry run" her presentations for critique. The record contains no evidence to support Overly's bald assertion. In fact, documentation in the record indicates every Career Services employee, including Hawkins, was required to practice his or her presentations before the other staff. Again, there is no genuine issue of material fact regarding this allegation.

Overly maintains Hawkins demoted her when she changed her title to Student Resource Specialist, and Hawkins embarrassed her by printing business

[7] Those presentations included the teen workshop on June 17, 2011; a dress for success presentation on July 20, 2011; an interviewing workshop on July 26, 2011; and resume workshop on July 29, 2011.

cards reflecting this title. Along these same lines, Overly claims, as a Student Resource Specialist, she was nothing more than a clerical worker required to answer telephone calls and emails. But Overly testified that the increased demands of her new position motivated her to request a salary increase. Overly was also responsible for numerous tasks in the Career Center beyond answering the telephone and e-mails. She was in charge of the student suit bank, coordinated the "Eagles in Flight" program, and had charge of the "Resume Blitz" event. As previously noted, she was also responsible for numerous presentations and workshops. Additionally, she was required to assist with the Career Fair event; she was responsible for advising and counseling students as to possible career choices, choosing a major, internships, and resume improvement; and she was assigned to guide students through JOB LINK. The career-advising tasks alone suggest responsibilities beyond that of a normal clerical worker. There is no genuine issue of material fact that the shift in title from Career Advisor to Student Resource Specialist did not constitute an adverse employment action.

Overly also complains about her workspace – that it had no door and was situated near the front of the office giving visitors the perception that she was nothing more than a glorified receptionist – and complains that she was left out of the office camaraderie when not invited to lunch by Hawkins and Crisp. These are the type of "petty slights or minor annoyances that often take place at work and that all employees experience"; they do not rise to the level of actionable adverse

employment actions. *Gilbert v. Des Moines Area Cmty. Coll.*, 495 F.3d 906, 918 (8th Cir. 2007).

Overly also asserts her employment record at MSU was unblemished prior to her supervision by Hawkins. The record sustains the opposite conclusion. Overly had many contentious encounters with supervisors and others at MSU during her tenure there, including a few less-than-favorable annual performance evaluations and two prior complaints (by Overly) of discrimination and harassment. Overly narrowly avoided termination due to inappropriate workplace conduct in 2003 when her supervisor was an African-American, five years before Overly joined the Career Center and Hawkins became her supervisor. To say her employment record at MSU was "unblemished" prior to Hawkins is a gross mischaracterization. There is no genuine issue of material fact here.

In sum, we find Overly's *prima facie* claim of an adverse employment action fails because she is unable to produce such evidence sufficient to create a genuine issue of material fact. Overly presents nothing more than her own opinions and beliefs without supporting documentation or evidence. *Chapman*, 38 S.W.3d at 390 (party opposing summary judgment must present affirmative evidence demonstrating the existence of a genuine issue of material fact for trial to survive summary judgment). "A party's subjective belief about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment." *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007); *see also Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990).

We can affirm the summary judgment on the basis of this analysis alone. However, we conclude there is no genuine issue of material fact as to other elements of the claim and this also entitles MSU to judgment as a matter of law.

(b). Favorable Treatment of Person Outside the Protected Class

The *prima facie* case of employment discrimination requires proof of disparate treatment; *i.e.*, that another individual similarly situated and under similar circumstances was treated favorably by the employer.

> In order for two or more employees to be considered similarly-situated for the purpose of creating an inference of disparate treatment, the plaintiff must prove that all of the relevant aspects of [her] employment situation are nearly identical to those of the . . . employees who she alleges were treated more favorably. The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances.
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> . . . .
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> Being similarly situated also requires that the employees have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Commonwealth v. Solly, 253 S.W.3d 537, 542 (Ky. 2008) (internal citations and quotations omitted).

Overly presents little argument and less evidence that persons outside the protected class were treated more favorably than her. In fact, her complaint makes no such allegation at all. We glean from her brief two incidents of favorable treatment of persons outside the protected class. First, Overly states

"Hawkins began to assign more duties that had been performed by [Overly] to her co-worker, [Crisp]." (Appellant's Brief at 3). Overly does not identify these duties, or explain why they were taken from Overly, or explain why Hawkins assigned them to Crisp. Second, Overly states that Hawkins "farmed out" presentations to white graduate assistants (GAs).

The fundamental problem with Overly's argument is that she has not attempted to establish that her position was identical in all relevant respects to that held by Crisp and the GAs. Crisp was an Administrative Secretary for much of her time at MSU; it was not until 2009 that her position changed to Employer Relations Coordinator. Furthermore, the evidence of record indicates Crisp was responsible for employer-relations, as her title suggests, and Overly was responsible for student-related issues. As for the GAs, there is nothing to indicate their responsibilities were even close to that of Overly's. The GAs were part-time employees who changed frequently as students graduated. The record is silent as to their specific duties and responsibilities while in the office. Accordingly, we find Overly has failed to carry her burden of presenting evidence that MSU treated persons outside the protected class more favorably.

We are unable to perceive a *genuine* issue of *material* fact related either to the second or fourth elements of a *prima facie* case.

However, we also note that MSU provided a legitimate justification for each employment decision that affected Overly, including placing Overly on an improvement plan following her unfavorable 2010 employee evaluation. MSU's

decision to transfer her to a temporary position culminating in non-optional retirement was prompted by Overly's failure to satisfactorily complete that plan. The reasons provided satisfy MSU's burden under *McDonnell Douglas*. Hawkins identified Overly's job responsibilities in both her 2010 evaluation and her performance improvement plan and explained, in detail, how Overly failed to perform those duties at an acceptable level. An employee's inability to execute her job duties is certainly grounds to place that employee on an improvement plan or to dismiss him or her. *Kentucky Ctr. for the Arts v. Handley*, 827 S.W.2d 697, 700 (Ky. App. 1991) ("Attitude, commitment to the work, flexibility, and other nondiscriminatory criteria are legitimate reasons to [terminate] an individual.").

Because MSU was forthcoming with legitimate justifications for its employment decisions, Overly was required to come forth with evidence to create a genuine issue of material fact that could tend to demonstrate that MSU's stated reasons were merely pretextual to disguise its actual discrimination.

(ii) No Evidence or Inference of Pretext

Overly could meet the burden of demonstrating pretext by "showing (1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate [the employment decision], or (3) that the proffered reason was not sufficient to motivate [the employment decision]." *Woods v. Western Kentucky University*, 303 S.W.3d 484, 487 (Ky. App. 2009) (citation omitted). "[P]roof that 'the employer's proffered reason is unpersuasive, or even obviously

contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct.'" *Williams*, 184 S.W.3d at 498-99 (citation omitted).

Overly presented no evidence to counter MSU's claim that she failed to adequately perform her job duties or to otherwise call into doubt MSU's reasons for its decision. "Moreover, 'a plaintiff's own opinions about her work performance or qualifications do not sufficiently cast doubt on the legitimacy of her employer's proffered reasons for its employment actions.'" *Woods*, 303 S.W.3d at 488 (quoting *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 441 (7th Cir. 1996)). Overly has produced no evidence to refute or dismantle MSU's justifications.

In race-discrimination cases, we must never lose sight of the fact that, "[t]he ultimate question is whether the employer intentionally discriminated[.]" *Williams*, 184 S.W.3d at 498. To survive a properly supported motion for summary judgment, the plaintiff must put forth "cold hard facts . . . from which the inference can be drawn that race or sex was a determining factor." *Handley*, 827 S.W.2d at 700. Here, we find Overly has simply failed to establish evidence giving rise to the inference that her race was a determining or even contributing factor to the changes in her job responsibilities or her forced retirement. We affirm the circuit court's decision to grant summary judgment on this claim.

B. The Retaliation Claim

KRS 344.280(1) forbids any person "[t]o retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by

this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter[.]" Retaliation claims driven by circumstantial evidence are analyzed under the same *McDonnell Douglas* burden-shifting framework discussed above. *Fuhr v. Hazel Park School District*, 710 F.3d 668, 674 (6th Cir. 2013).

To establish a *prima facie* case of retaliation, the plaintiff must prove: (1) that he engaged in a protected activity; (2) the defendant employer knew that the plaintiff had done so; (3) the employer subsequently took an adverse employment action against the employee; and (4) the existence of a causal connection between the protected activity and the adverse-employment action. *Brooks*, 132 S.W.3d at 803 (citation omitted). Overly has satisfied the first two criteria. She filed a discrimination complaint with the EEOC in December 2009, and MSU knew that she had done so. *Kentucky Dep't of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2004) ("Filing an EEOC complaint is a protected activity."). What remains to be decided is whether MSU retaliated against Overly by means of an adverse employment action.

We concluded earlier that Overly did not present sufficient proof to create a genuine issue of material fact to support her claim of discrimination. We incorporate that analysis here. Without such proof, the claim of retaliation could not survive the summary judgment motion.

Additionally, we find Overly's claim fails because there is no evidence of a causal connection between the protected activity and the adverse

employment action. A causal connection between the protected activity and the adverse employment action must be established by circumstantial evidence when no direct evidence exists. *Brooks*, 132 S.W.3d at 804 (citing *Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000)). "Circumstantial evidence of a causal connection is 'evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action.'" *Id.* (citation omitted). This is often achieved by demonstrating a temporal proximity between the protected activity and the adverse action. *Id.* "The sooner adverse action is taken after the protected activity, the stronger the implication that the protected activity caused the adverse action, particularly if no legitimate reason for the adverse action is evident." *McCullough*, 123 S.W.3d at 135 (citation omitted).

Overly filed her EEOC complaint in December 2009. Her 2010 annual performance evaluation did not occur until March 2011, some fifteen months after she filed her complaint, and she was not placed on the improvement plan until May 2011. This length of delay militates against the inference that the 2009 EEOC complaint was the likely reason for the unfavorable review and subsequent corrective action plan. We find nothing in the record indentifying protective activity occurring in temporal proximity to the unfavorable 2010 annual

performance evaluation.[8] Furthermore, Overly's 2010 evaluation was not inconsistent with her earlier evaluations.

Absent the requisite causal connection, Overly has failed to prove a *prima facie* case of retaliation sufficient that would survive summary judgment. Even if Overly could establish a *prima facie* case of retaliation, she cannot show that MSU's non-retaliatory reasons for forcing her to retire were pretextual. MSU chose to place Overly in a temporary position culminating in termination or forced retirement because Overly failed to complete the mandates of her corrective action plan. This is well-documented in the record, and Overly has produced no evidence to contradict it. Additionally, Hawkins' concerns about Overly's performance did not initiate after the filing of the EEOC complaint. Hawkins had expressed such concerns since the fall of 2008. Furthermore, unease about Overly's professionalism and job readiness certainly pre-dated Hawkins. The record indicates Overly had a history of discord with her supervisors at MSU. Overly was subject to a probationary period for unprofessional conduct in 2004, and was almost discharged for it. MSU has identified adequate, non-retaliatory reasons for its employment decisions and Overly has offered no evidence to rebut or refute them.

IV. Conclusion

[8] Without citation to the record, Overly states in her brief that an EEOC mediation occurred in either April 2010 or March 2011, and thus the March 2011 annual performance review was in close temporal proximity to this event. We have scoured the record and can find no evidence of when the EEOC mediation occurred. We refuse to accept as true statements of fact contained in the brief that lack supporting citation to the record.

We affirm the October 1, 2013, order of the Rowan Circuit Court granting summary judgment to MSU on Overly's claims of race discrimination and retaliation.

ALL CONCUR.

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