

RENDERED: JANUARY 20, 2017; 10:00 A.M.  
TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2015-CA-001229-MR

ANGELA TUCKER

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 14-CI-03185

BLUEGRASS REGIONAL MENTAL HEALTH  
MENTAL RETARDATION BOARD  
D/B/A BLUEGRASS.ORG

APPELLEE

OPINION  
AFFIRMING

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BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: Angela Tucker appeals *pro se* from a Fayette Circuit Court order granting summary judgment to Bluegrass Regional Mental Health Mental Retardation Board d/b/a Bluegrass.org (“Bluegrass”). Finding no error, we affirm.

Tucker is a licensed clinical social worker. In 2003, she began working for Bluegrass in the Forensics unit. In 2005, she accepted an offer to work as a clinical coordinator at another Bluegrass location in Mercer County. Her job duties included managing other staff and providing counseling for patients. She assessed patients for suicidal ideation and performed mental health triages at detention centers. Her job performance was adequate and she received all “satisfactory” or higher ratings in her July 2008 competency evaluation. She requested a raise at that time, but budgeting constraints prevented Bluegrass from providing any employee with a salary increase. Tucker requested a salary increase again in June 2010, but was refused for the same reason. In June 2012, she received an incremental wage increase following her competency evaluation. At that time, she requested a thirty percent pay increase, stating that she believed that her pay was lower than that of other employees with less experience and responsibility.

In a meeting with the human resources director of Bluegrass, Tucker alleged for the first time that male staff members were being given larger raises, and she gave several examples of male employees she believed were being paid more than females. The director reviewed the salaries of these individuals and found no disproportionately large raises for the male staff. The director did, however, discover a discrepancy between Tucker’s salary and that of another clinical coordinator who had recently been hired. The director adjusted Tucker’s salary by

giving her a raise of nearly fifteen percent, thereby increasing her salary to \$55,000.00, effective July 2012.

At this point, according to Tucker, she began to be harassed, was given oral warnings, and had her work scrutinized without justification. In June 2013, she received an evaluation that contained some negative comments. She refused to sign the evaluation and filed an EEOC Charge of Discrimination. In the Charge, she alleged that she had received the poor evaluation in retaliation for complaining about gender-related wage discrimination.

Bluegrass received notice of the Charge in August 2013, and it responded by denying any adverse employment action and providing employee salary information demonstrating the absence of any gender-based disparities. The EEOC dismissed Tucker's Charge and provided her with a "right to sue" letter. The letter indicates that it was mailed on April 25, 2014; according to Bluegrass, it received the letter on May 6, 2014.

Meanwhile, on April 15, 2014, Tucker filed a 202A<sup>1</sup> petition for the involuntary hospitalization of a client. Upon review, Bluegrass determined that Tucker had inappropriately filed the petition in violation of Bluegrass's Client Rights Policy, which provides clients with the right to individualized treatment in the least restrictive environment possible. After meeting with the director, Tucker was suspended without pay on April 24, 2014. Following an investigation that,

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<sup>1</sup> The 202A petition refers to Form AOC-710, which is a Verified Petition for Involuntary Hospitalization or Involuntary Admission, pursuant to Kentucky Revised Statutes (KRS) Chapter 202A Hospitalization of the Mentally Ill.

according to Bluegrass, substantiated the events leading to the suspension, Tucker was offered a three-month correction plan, with her continued employment dependent upon her agreement to comply with the plan. Tucker refused to sign the agreement, and her employment was terminated in a letter dated May 7, 2014, and mailed the following day.

On August 21, 2014, Tucker filed a complaint in Fayette Circuit Court against Bluegrass, alleging gender discrimination pursuant to KRS 344.040 of the Kentucky Civil Rights Act and retaliation pursuant to KRS 344.280. Bluegrass filed an answer denying the allegations. Tucker's deposition was taken on November 6 and December 8, 2014.

On May 13, 2015, Tucker's counsel was permitted to withdraw from his representation on the grounds that a disagreement had arisen with Tucker concerning how to proceed with the case. The trial court allowed Tucker thirty days to retain new counsel or proceed *pro se*. On May 22, 2015, Tucker notified the court of her intent to proceed *pro se* while continuing to try to find counsel. On June 12, 2015, after the thirty days had expired, Bluegrass filed a motion for summary judgment, noticing the motion to be heard on June 26, 2105. Tucker did not respond to the motion or appear at the hearing. The trial court granted the motion for summary judgment. On June 30, 2015, Tucker filed a motion to amend her complaint to include any aliases of the defendant and requesting the court to permit more time to find another attorney.

On July 9, 2015, Tucker filed an objection to the summary judgment, requesting reconsideration and ninety days in which to find an attorney. She noticed the motion to be heard on July 17, 2015. At the hearing, she told the court that Bluegrass had been served with the motion that morning. The trial court denied the motion due to insufficient notice but told Tucker she could refile the motion with proper notice. Tucker accordingly refiled the motion objecting to the summary judgment. Bluegrass received the motion and filed a response. Following a brief hearing, at which Tucker informed the court that she was trying to find an attorney and wanted ninety days to do so, the trial court denied the motion to reconsider as untimely. This appeal followed.

In reviewing a grant of summary judgment, our inquiry focuses on “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); Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record “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 v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482. “An appellate court need not defer to the trial court’s decision on summary judgment and will review the issue *de novo* because only legal questions and no

factual findings are involved.” *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

To defeat a motion for summary judgment on a gender discrimination claim, the plaintiff must establish a *prima facie* case comprised of four elements. *Murray v. E. Kentucky Univ.*, 328 S.W.3d 679, 681–82 (Ky. App. 2009). The plaintiff must show “(1) she was a member of a protected group; (2) she was subjected to an adverse employment action; (3) she was qualified for the position; and (4) similarly situated males were treated more favorably.” *Bd. of Regents of N. Kentucky Univ. v. Weickgenannt*, 485 S.W.3d 299, 306 (Ky. 2016). If Tucker can establish such a claim, the burden then shifts to Bluegrass to offer a “legitimate, nondiscriminatory reason” for paying her less than her male colleagues. *Id.* The burden then shifts one more time, when Tucker must be afforded a “fair opportunity” to show that Bluegrass’s stated reason for allegedly paying her less was “in fact pretext” for discrimination. *Id.*

Tucker did not establish a *prima facie* case of gender discrimination because she failed to show that she was subjected to an adverse employment action. Although she claimed that she was paid less than her male colleagues, Bluegrass provided data, which Tucker was unable to refute, to show that this was not the case. Thus, as a matter of law, summary judgment was appropriate on her claim of discrimination.

In order to make a *prima facie* case of retaliation, a plaintiff must demonstrate “(1) that plaintiff engaged in an activity protected by Title VII; (2)

that the exercise of [her] 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 Cty. Hous. Auth.*, 132 S.W.3d 790, 803 (Ky. 2004), *as modified on denial of reh’g* (May 20, 2004) (quoting *Christopher v. Stouder Mem’l Hosp.*, 936 F.2d 870, 877 (6th Cir. 1991), *cert. denied*, 502 U.S. 1013, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991)).

Tucker established the first three elements of the *prima facie* case: first, “[f]iling an EEO complaint is a protected activity.” *Kentucky Dep’t of Corr. v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003), *as modified on denial of reh’g* (Jan. 22, 2004) (citing *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 1511, 149 L.Ed.2d 509, 515 (2001)). Second, Bluegrass was aware that Tucker had filed the EEOC complaint, and, third, it thereafter did take an adverse action in ultimately terminating her employment after she refused to participate in the three-month correction plan. Tucker has failed, however, to offer evidence of the fourth element: that there was a causal connection between the protected activity (filing the EEOC complaint) and the termination.

When, as in this case, there is no direct evidence of a causal connection,

the causal connection of a *prima facie* case of retaliation must be established through circumstantial evidence. *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.* at 566. In most cases, this requires proof

that (1) the decision maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action. *See, e.g., Clark County School District v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 1511, 149 L.Ed.2d 509, 515 (2001).

*Brooks*, 132 S.W.3d at 804.

In this case, Bluegrass received notice in August 2013 that Tucker had filed the EEOC Charge. Its proceedings against Tucker concerning the allegedly inappropriate filing of the 202A petition commenced in April 2014, eight months later. Without any additional evidence of retaliatory conduct, there is an insufficient temporal relationship to meet the standard for showing causation.

“[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Steelvest, Inc.*, 807 S.W.2d at 482.

“[T]he hope that something will come to light in additional discovery is not enough to create a genuine issue of material fact.” *Benningfield v. Pettit Envtl., Inc.*, 183 S.W.3d 567, 573 (Ky. App. 2005).

Tucker filed her complaint against Bluegrass in August 2014. Summary judgment was not granted to Bluegrass until almost one year later. Although Tucker’s attorney withdrew representation in May 2015, she was provided additional time by the court to procure new counsel and to provide some evidentiary support to defeat the summary judgment motion. We recognize that “[p]ro se pleadings are not required to meet the standard of those applied to legal

counsel[,]” *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Ky. 1983), but “[a] party’s subjective beliefs 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).

The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since “hope springs eternal in the human breast.” The hope or bare belief, like Mr. Micawber's, that something will “turn up,” cannot be made basis for showing that a genuine issue as to a material fact exists.

*Neal v. Welker*, 426 S.W.2d 476, 479–80 (Ky. 1968) (internal citation omitted).

The Fayette Circuit Court order granting summary judgment to Bluegrass is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Angela Tucker, *pro se*  
Versailles, Kentucky

BRIEF FOR APPELLEE:

Leslie Patterson Vose  
Erin C. Sammons  
Gregory A. Jackson  
Lexington, Kentucky