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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2016-CA-000947-MR

MICHAEL P. TEXAS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 14-CI-004209

ENOVAPREMIER, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Michael Texas bring this appeal from an order of the Jefferson Circuit Court which granted summary judgment in favor of EnovaPremier, LLC and dismissed his claims of sexual harassment and retaliation. We find no error and affirm.

Mr. Texas was employed by EnovaPremier as an information services specialist. His department monitored, updated, and cleaned the company's computer network. Part of Mr. Texas' job was to routinely check the company server to locate and remove hidden, improper, or excessively large data files. In May of 2014, Mr. Texas was performing such a server check when he discovered topless pictures of EnovaPremier's Human Resources Manager. The HR Manager had placed the pictures on the server herself. These pictures violated the company's computer policy; therefore, Mr. Texas reported his findings to management. Management told him to keep the matter confidential due to the nature of the pictures.[1]

After reporting the pictures to management, Mr. Texas claims that the HR Manager began harassing him by calling him impolite names. Mr. Texas complained about this harassment to management multiple times. On July 29, 2014, Mr. Texas was terminated from his employment. EnovaPremier claimed it fired Mr. Texas because it believed he was going to "go to the media" about the underlying events. During his deposition in this case, Mr. Texas testified that this was the reason he was given for his termination.

On August 11, 2014, Mr. Texas filed the underlying action alleging a hostile work environment due to sexual harassment. The sexual harassment claim was based solely on the finding of the pictures. Mr. Texas later, through pleadings, expanded on the sexual harassment claim to include the instances of name calling

[1] EnovaPremier claims Mr. Texas did not keep the matter confidential, while Mr. Texas claims he did.

from the HR Manager. Mr. Texas' complaint also alleged retaliation related to his termination that followed his report of the topless pictures.

EnovaPremier filed a motion for summary judgment, which the trial court ultimately granted. The court found that Mr. Texas' "one-time viewing of explicit photographs, found in the course of [his] job duty to remove inappropriate material from the company's server," did not constitute sexual harassment. The court also found that the harassment Mr. Texas underwent from the HR Manager, while unpleasant, did not amount to sexual harassment. As for the retaliation claim, the trial court found that Mr. Texas was not engaged in protected activity when he reported the computer policy violation. The court also found that EnovaPremier terminated Mr. Texas because it believed he was going to "go to the media", not as retaliation for the complaints he made. This appeal followed.

> 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. Kentucky Rules of Civil Procedure (CR) 56.03. . . . "The 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 Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App.

1992)[.]

*Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

The Kentucky Civil Rights Act is found in Kentucky Revised Statute (KRS) Chapter 344. "The Kentucky Act is similar to Title VII of the 1964 federal Civil Rights Act and should be interpreted consistently with federal law." *Ammerman v. Bd. of Educ., of Nicholas Cty.*, 30 S.W.3d 793, 797-98 (Ky. 2000) (citations omitted).

KRS 344.040(1)(a) makes it unlawful to, among other things, discriminate against someone based on sex.

> To establish a [*prima facie*] case of a hostile work environment based on sex, a plaintiff must show that:
> (1) [he or] she is a member of a protected class,
> (2) [he or] she was subjected to unwelcome sexual harassment,
> (3) the harassment was based on [his or] her sex,
> (4) the harassment created a hostile work environment, and that
> (5) the employer is vicariously liable.

*Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 347 (6th Cir. 2005) (citation omitted).

> For sexual harassment to be actionable . . . , it must be sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an

> abusive working environment. In other words, hostile environment discrimination exists "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Moreover, the "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." As stated by the United States Supreme Court in *Harris v. Forklift Systems*, [510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993),] the harassment must also be both objectively and subjectively offensive as determined by "looking at all the circumstances." These circumstances may include "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 work performance."

*Ammerman* at 798. "'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 2283, 141 L.Ed.2d 662 (1998) (citation omitted).

We agree with the trial court that Mr. Texas was not subjected to a hostile work environment due to his sex. Even accepting the facts as presented by Mr. Texas as true, Mr. Texas was not subjected to a hostile work environment due to sexual harassment as a matter of law. His discovery of the pictures was an isolated incident. Also, the pictures were not sent to him directly, but found during the course of him fulfilling the duties of his employment. In addition, the impolite comments and actions of the HR Manager were not related to Mr. Texas' sex and had no sexual connotation. The HR Manager may have been harassing Mr. Texas;

however, the Kentucky Civil Rights Act, found in KRS Chapter 344, is not a "general civility code." *See id.*

We now move to Mr. Texas' retaliation claim. KRS 344.280 states in relevant part:

> It shall be an unlawful practice for a person . . . :
> (1) To 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[.]

To prove a *prima facie* case of retaliation, an employee must show that:

> (1) he was engaged in opposition to practices made unlawful by [the Civil Rights Act] or was a participant in a [Civil Rights Act] proceeding
> (2) his activity was protected
> (3) he was subjected to adverse treatment by the employer or labor union, and
> (4) there was a causal connection between his opposition or participation and the retaliation.

*Mountain Clay, Inc. v. Com., Comm'n on Human Rights*, 830 S.W.2d 395, 396 (Ky. App. 1992).

Mr. Texas claims that he was terminated for reporting to management the existence of pictures containing nudity and for his complaints about the HR Manager's harassing behavior toward him. The trial court granted summary judgment as to this issue in part because Mr. Texas was not engaged in protected activity. We agree.

Mr. Texas' report to management regarding the pictures did not involve a claim or complaint of sexual harassment. The report was made in keeping with his employment duties and was used to inform his superiors of a violation of company policy. Furthermore, the harassment endured by Mr. Texas from the HR Manager after reporting the picture did not amount to sexual harassment because it was not based on Mr. Texas' sex or contain sexual connotations. Assuming the facts set forth by Mr. Texas are true, he is still unable to sustain a cause of action for retaliation as a matter of law. Mr. Texas' picture report and additional complaints were not protected activity nor do they amount to opposing "practices made unlawful" by the Kentucky Civil Rights Act.

Based on the foregoing, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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