

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001430-MR

JENNIFER GIBSON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 16-CI-00486

H&J RESTAURANTS, LLC

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

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

MAZE, JUDGE: Jennifer Gibson appeals from an order of the McCracken Circuit Court dismissing her complaint against H&J Restaurants, LLC (H&J) for failure to state a claim upon which relief can be granted. While we agree with the trial court that Gibson's amended complaint has significant deficiencies, we must conclude that she has alleged the essential elements for her claims of workplace sexual

harassment, hostile work environment, and retaliatory discharge. We also conclude that the failure by Gibson's counsel to attend two motion hearings did not separately justify dismissal of her complaint. Hence, we reverse and remand for additional proceedings.

On June 27, 2016, Gibson filed a complaint against H&J. Gibson alleged that she was a former employee of H&J, and that while working for H&J, she was subjected to harassment of a sexual nature which created a hostile work environment. Gibson further alleged that she complained about the harassment to H&J, but was subject to retaliation and termination in violation of KRS¹ 344.280.

In response, H&J filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. CR² 12.02(f). H&J noted that Gibson's complaint did not identify her dates of employment, the perpetrator or dates of the harassment, to whom the complaints of sexual harassment were made, or the date of her alleged termination. H&J requested that the complaint be dismissed, or that the court order Gibson to provide a more definite statement. CR 12.05.

In response, Gibson filed an amended complaint, alleging that the head chef had routinely sexually harassed her with explicit comments. Gibson also stated that she had complained to "H&J authorities, specifically Mr. Lee,..." but no

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

action was taken and she was terminated after making a subsequent complaint. The amended complaint did not correct any of the other deficiencies noted in H&J's motion. However, the trial court concluded that the amended complaint alleged facts which could entitle Gibson to relief, and thus denied the motion to dismiss.

Thereafter, H&J filed a renewed motion to dismiss, again pointing out the lack of specificity in the amended complaint. H&J also argued that Gibson's attachment of comments from a website about the restaurant was improper. On September 6, 2016, the trial court dismissed the amended complaint based on the grounds asserted in H&J's motion. The trial court also noted that Gibson's counsel failed to appear twice at scheduled motion hearings. Gibson now appeals from this order.

Under CR 12.02(f), a court may dismiss a complaint for failure to state a claim upon which relief could be granted. In such a case, "[t]he court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). For purposes of the motion, the facts as pleaded in the complaint are admitted; only the right to relief remains to be challenged. *Huie v. Jones*, 362 S.W.2d 287, 288 (Ky. 1962). Because the resolution of this case concerns an issue of law, rather than an issue of

fact, our review is *de novo*. *Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

We first note that when a complaint has been amended, a pending motion to dismiss for failure to state a claim upon which relief can be granted must be renewed to remain alive, because the amendment results in a new complaint.

Hawes v. Cumberland Contracting Co., 422 S.W.2d 713, 715 (Ky. 1967).

Consequently, the trial court properly denied H&J's motion to dismiss after Gibson filed her amended complaint. The controlling issue is whether the allegations in Gibson's amended complaint were stated with sufficient specificity to survive a motion to dismiss.

“The true objective of a pleading stating a claim is to give the opposing party fair notice of its essential nature.” *Cincinnati, Newport & Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky. 1962).

Consequently, CR 8.01(a) requires only a concise statement of facts which gives fair notice of the cause of action and the relief sought. *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968). Thus, we must look to the essential elements of the claims asserted.

Actions for sexual harassment in the workplace may be brought under the Kentucky Civil Rights Act, KRS 344.010 *et seq.* A hostile-work-environment claim 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.”

Ammerman v. Board of Education of Nicholas County, 30 S.W.3d 793, 798 (Ky. 2000), quoting *Williams v. General Motors Corporation*, 187 F.3d 553, 560 (6th Cir. 1999). The alleged “incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.” *Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2d Cir. 1989). A claim for unlawful retaliation falls under KRS 344.280(1). To make a *prima facie* case for retaliation, a plaintiff must establish (1) she was engaged in a protected activity; (2) she was disadvantaged by an act of her employer; and (3) there was a causal connection between the activity engaged in and the employer’s treatment of her. *Banker v. University of Louisville Athletic Association, Inc.*, 466 S.W.3d 456, 460 (Ky. 2015).

The trial court found that Gibson failed to sufficiently plead a *prima facie* case for either workplace harassment, a hostile work environment, or retaliatory discharge. The court pointed out that Gibson’s complaint does not identify: (1) the dates the alleged harassment occurred; (2) the date of her alleged termination; (3) the dates of her employment; or (4) the dates that she made her complaints of sexual harassment to Mr. Lee. While we agree with the trial court that these deficiencies are significant, we disagree with the trial court that the allegations were so deficient as to require dismissal of the complaint.

“A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled.” CR 8.01(1). Although Gibson’s complaint is devoid of significant detail which may affect her ability to prevail on her claims, the complaint clearly identifies the conduct of which she complains, and the nature of the causes of action and relief sought. In her amended complaint, Gibson alleged that she was sexually harassed on repeated occasions by a co-worker, that H&J allowed the situation to continue after she advised a supervisor of it, and that H&J retaliated against her for reporting the misconduct.

In particular, Gibson states that she was employed by H&J, and that during her employment, the head chef, Alex, made lewd comments of a sexual nature to her “at least fifteen times.” She also alleged that “on other occasions,” Alex touched her buttocks. Gibson further alleged that Mr. Lee terminated her employment after a subsequent complaint.

We agree with H&J that the exhibit attached to the complaint, a printout of customer comments from an internet message board, was improper. But even without the exhibit, the allegations in Gibson’s amended complaint set out the essential elements for a claim of workplace sexual harassment/hostile work environment and retaliation under the Kentucky Civil Rights Act. The additional

details cited by the trial court will be necessary to survive a motion for summary judgment, and we express no opinion on the merits of Gibson's claims. However, we conclude that the absence of these details did not require dismissal of the complaint. Consequently, the trial court erred by dismissing the amended complaint on that basis.

As an additional basis for dismissal, the trial court stated that “[p]laintiff’s counsel has failed to appear twice.” We agree that a trial court has the discretion to dismiss for lack of prosecution under CR 41.02, provided that adequate findings are made. *See Jaroszewski v. Flege*, 297 S.W.3d 24, 34 (Ky. 2009). But in the absence of findings, we are unable to say that counsel’s failure to appear at two scheduled motion hearings justified dismissal of the complaint. On both occasions, counsel filed pleadings opposing H&J’s motions to dismiss, and there is no indication in the record that Gibson’s counsel missed any substantive proceedings. While we do not condone counsel’s lapses, we must conclude that the trial court abused its discretion by granting the motion to dismiss on this basis.

Accordingly, we reverse the order of McCracken Circuit Court dismissing Gibson’s complaint, and we remand for additional proceedings consistent with this opinion.

ALL CONCUR.

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