

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001730-MR

SHEILA K. SMITH

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 15-CI-00227

LEBANON MACHINE SHOP, INC.;
LAWRENCE E. SMITH; DANIEL L. SMITH;
AND PATRICK A. SMITH

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, NICKELL, AND THOMPSON, JUDGES.

DIXON, JUDGE: Sheila K. Smith appeals from a Marion Circuit Court order granting summary judgment in favor of her former employer, Lebanon Machine Shop (LMS), and its principal owners, Lawrence E. Smith, Daniel L. Smith, and Patrick A. Smith. After reviewing the record on appeal, we affirm.

Sheila married Lawrence Smith in 1983. In 1987, she began working as a bookkeeper at LMS, which Lawrence co-owned with his two brothers. In June 2010, Sheila initiated divorce proceedings against Lawrence after she learned her niece had accused him of inappropriate touching. Sheila continued working as the bookkeeper for LMS until she was terminated on August 12, 2010. The stated reason for termination was a conflict of interest between Sheila and LMS due to the pending divorce proceedings.

On August 10, 2015, Sheila filed a complaint against Appellees in Marion Circuit Court alleging gender discrimination, civil conspiracy under KRS 344.280(2), wrongful termination in violation of public policy, and alter ego liability. Sheila specifically alleged, while she was responsible for maintaining the finances of LMS, she observed that Lawrence frequently failed to deposit large amounts of money that belonged to LMS. She further contended she was terminated because she was a woman going through a divorce. Sheila asserted two other employees of LMS, Eddie Joe Garrett and Jake Hourigan, also went through divorce proceedings, and LMS did not terminate their employment. Appellees LMS, Patrick, and Daniel filed an answer and counter-claim against Sheila for breach of fiduciary duty and fraud. Lawrence filed an answer denying the allegations asserted by Sheila. After a period of discovery, Appellees moved for

summary judgment on Sheila's claims. The trial court issued an opinion and order granting summary judgment in favor of Appellees on October 10, 2016.

First, Sheila contends the court erred by denying her motion to dismiss Appellees' (LMS, Patrick, and Daniel) counter-claim because it failed to satisfy the minimum requirements of CR 8.01.

A counter-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). It is well-settled that "[t]he 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). Here, the counter-claim plainly asserted claims for breach of fiduciary duty and fraud related to Sheila's position as bookkeeper and her alleged direct knowledge her then-husband, Lawrence, frequently withheld bank deposits that belonged to LMS. "The purpose of CR 8.01 is to give notice and formulate issues without the requirement of detail." *Rose v. Ackerson*, 374 S.W.3d 339, 343 (Ky. App. 2012). The record reflects the counter-claim was sufficient to inform Sheila of its essential nature; accordingly, the court properly denied Sheila's motion to dismiss.

Sheila next contends the court erred by granting summary judgment in favor of Appellees. She argues genuine issues of material fact existed regarding her gender discrimination and civil conspiracy claims.¹

To prevail on a motion for summary judgment, the movant must “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). “Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). “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 Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Sheila contends her termination constituted impermissible gender discrimination. LMS contends, however, that summary judgment was proper because Sheila was unable to establish a *prima facie* case of discrimination.

Under the Kentucky Civil Rights Act, it is unlawful for an employer “to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment,

¹ Sheila’s appellate brief does not address her claims of wrongful termination in violation of public policy and alter ego liability; consequently, we will not address those issues on appeal.

because of the individual's race, color, religion, national origin, sex, [or] age forty (40) and over[.]” KRS 344.040(1)(a).

To establish a *prima facie* case of gender discrimination, the movant must show: “that she is a member of the protected class, that she was subject to an adverse employment action, that she was qualified for the position, and that a similarly situated male was treated more favorably.” *Commonwealth v. Solly*, 253 S.W.3d 537, 541 (Ky. 2008). As to the fourth element, to be considered similarly-situated, the female employee must establish:

that all of the relevant aspects of [her] employment situation are nearly identical to those of the [male] 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.

...

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.

Id. at 542 (internal citations and quotes omitted).

In the case at bar, Sheila opines she was terminated for being a woman who initiated divorce proceedings against her husband, while two male employees, Garrett and Hourigan, who were also both divorced, were not terminated by LMS.

In its order granting summary judgment, the trial court stated, in relevant part:

Welders and bookkeepers perform materially different functions in a business such as LMS and the potential impact of the divorce of a welder versus the divorce of a bookkeeper from a principal are likewise materially different. ... Unlike Garrett and Hourigan, when Sheila filed for divorce against Larry her interest immediately became adversarial to those of the business, ultimately resulting in LMS, Dan and Pat, and their respective wives being joined as parties in the divorce action. Clearly, Sheila's proof fails to establish that Garrett and Hourigan's conduct in divorcing their respective spouses was similar to her own behavior in either scope or effect.

The record reflects Sheila admitted in her deposition she did not perform the same job duties, such as welding, as Garrett and Hourigan. She further acknowledged her job duties, unlike those of Garrett and Hourigan, required her to handle the company's finances, payroll, and bookkeeping. Additionally, the record reveals there was clearly a material difference in the circumstances of Sheila's divorce compared to Garrett's or Hourigan's – Sheila's husband was one of three co-owners of the small family business where she was the bookkeeper. As previously noted, to be considered similarly situated, the employees must 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.” *Id.* at 542. We agree with the trial court that Sheila was unable to show she was similarly situated to Garrett or Hourigan. After careful review, we

conclude summary judgment was appropriate because Sheila failed to establish a *prima facie* case of gender discrimination.

Next, Sheila contends summary judgment was improper as to her conspiracy claim, alleging Lawrence, Patrick, and Daniel conspired with LMS to terminate her employment in violation of the KCRA. KRS 344.280 provides that is unlawful for two or more persons to conspire “to aid, abet, incite, compel, or coerce a person to engage in any of the acts or practices declared unlawful by this chapter[.]” KRS 344.280(2).

We have already determined Sheila’s gender discrimination claim failed as a matter of law. As Sheila’s termination was not a violation of KRS 344.040(1)(a), we conclude she likewise failed to establish Lawrence, Patrick, and Daniel conspired to aid or abet LMS in unlawful discrimination prohibited by the KCRA. The trial court correctly granted summary judgment on this issue.

For the reasons stated herein, the order of Marion Circuit Court is affirmed.

NICKELL, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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