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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000694-MR

KEVIN BOOKER — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 13-CI-01467

KENTUCKY DEPARTMENT OF WORKERS' CLAIMS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

NICKELL, JUDGE: Kevin Booker appeals from the Franklin Circuit Court's entry of summary judgment in favor of the Kentucky Department of Workers' Claims (DWC) in his action alleging *quid pro quo* sexual harassment, hostile work environment, and retaliation. Following a careful review, we affirm.

Booker began working for DWC in 2006. Billie Buckley began working there around the same time. In August 2008, Booker and Buckley began

a consensual sexual relationship while Booker also engaged in sexual relationships with other women. In July 2011, DWC promoted Buckley and she became Booker's direct supervisor. Booker and Buckley discussed the promotion and decided their consensual sexual relationship would not influence their professional relationship despite the change in roles. Booker thought Buckley "would be good for the job," and initially their relationship continued without a problem.

In late 2011 or early 2012, Booker ended his sexual relationship with Buckley. On two occasions afterward, Buckley implied she wanted to resume their relationship. First, Buckley implied she wanted to exchange sexual favors for a set of interview test questions for Booker to give to his friend who had applied for a DWC position. Although Booker accepted the questions, his friend declined to use them and DWC hired him. When Buckley followed up with a request to reinitiate their consensual sexual relationship, Booker declined, and Buckley told him she understood. Soon after, Buckley's attitude changed, and she began criticizing Booker's newly-hired friend, who was ultimately fired by DWC during his probationary period for failure to follow guidelines. The second implied request occurred when Buckley accused Booker of having sexual relationships with two of his coworkers and then began antagonizing them. Both coworkers left DWC employment after Buckley's behavior toward them changed.

Once Booker's allies and paramours were gone, Buckley focused her criticism on Booker. Buckley complained about the inferior quality of his work and began returning his reports for various defects, despite Booker's reports rarely

having been returned in the past. Booker always received "outstanding" evaluations and was praised consistently for the high quality of his work since he began working at DWC. Yet under Buckley's supervision, Booker received a low "outstanding" score, which Buckley insisted was not lower because of his historically exceptional work. Booker complained to Buckley about her unfair scrutiny and stated his discomfort with their professional relationship since the end of their sexual relationship. Buckley responded to Booker's complaints with threats to report him to "Personnel" and to provide false complaints against Tom Powell, Booker's prior direct supervisor. Booker then complained directly to Powell about Buckley's treatment of him, without disclosing their prior consensual sexual relationship.

In March 2013, Booker called the Kentucky Employee Assistance Program's (KEAP) hotline and reported his prior consensual sexual relationship with Buckley. He complained about the deterioration of their professional relationship because of the end of their sexual one. The hotline operator recommended Booker contact the Kentucky Personnel Cabinet to report his complaint. Booker never did so. He did not report his consensual sexual relationship with Buckley to anyone else until after DWC fired him for unrelated policy violations.

During his career with DWC, Booker also held other part-time employment, mostly providing security for various businesses. Booker was aware of DWC's policy requiring employees to report all other employment to prevent

the appearance of impropriety or a conflict of interest. Throughout his career with DWC, Booker had properly reported his additional employment. However, he failed to report working for Brown-Forman Corporation, beginning in September 2011. During shifts worked at Brown-Forman, he often brought his DWC work and completed it while there. Buckley reported Booker to Powell after another employee alerted her to Booker's outside employment at Brown-Forman. Powell investigated Booker's hours at both jobs. Powell's investigation found Booker reported a total of seventy-one hours at Brown-Forman which occurred during his reported hours at DWC. In June 2013, Booker received his discharge letter for violating KRS[1] 18A.145(4) which prohibits making false statements about hours worked for the Commonwealth and was notified of his pre-termination hearing rights. DWC placed Booker on administrative leave. Ultimately, Booker admitted reporting overlapping time to DWC and chose early retirement.[2]

In June 2013, DWC held Booker's pre-termination hearing before several DWC managers. Neither Buckley nor Powell attended. During the hearing, Booker revealed his consensual sexual relationship with Buckley to DWC. After Booker's revelation, DWC investigated his relationship with Buckley. Two months later, DWC demoted Buckley.[3] In December 2013, Booker filed this

[1] Kentucky Revised Statutes.

[2] Additionally, DWC forwarded information about Booker's time-reporting violations to the Executive Branch Ethics Commission, which reached a settlement with Booker for alleged violations of KRS 11A.020(1)(b), (c), and (d), and KRS 11A.020(2), resulting in a public reprimand and $3,000 fine.

[3] DWC demoted Buckley in July 2013 because she provided the interview questions in violation of KRS 18A.010(1). She was later fined $1,000 by the Executive Branch Ethics Commission for

lawsuit[4] claiming *quid pro quo* and hostile work environment sexual harassment under KRS 344.040(1) and retaliation under KRS 344.280.

In August 2016, after the parties conducted depositions, DWC moved for summary judgment. The trial court entered its opinion and order granting DWC's motion for summary judgment in March 2017. This appeal followed.

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." CR[5] 56.03. It is well-established a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co.*, 281 S.W.2d 914, 916 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citation omitted). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of

violating KRS 11A.020(1)(a), (b), (d), and KRS 11.020(2)-(3).

[4] His original action included claims for whistleblower protection and negligent hiring, which he has since abandoned.

[5] Kentucky Rules of Civil Procedure.

the evidence is not the sort of affirmative proof required to avoid summary judgment."). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotation marks omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant and consider "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); CR 56.03. "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) (footnote omitted). "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears it would be impossible for the respondent to produce evidence at trial warranting judgment in his favor." *Steelvest*, 807 S.W.2d at 480.

Here, because the trial court granted summary judgment to DWC, we review the facts in a light most favorable to Booker and resolve all doubts in his favor. Applying the *Steelvest* standard, there was no genuine issue of material fact, and Booker could not, and did not, carry his burden. Therefore, we conclude summary judgment was properly granted to DWC.

Booker alleges Buckley's behavior violated the KCRA[6] modeled after Title VII of the 1964 federal Civil Rights Act.[7] KRS 344.040 prohibits discrimination "against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's . . . sex[.]" The Supreme Court of Kentucky held KRS 344.040 "should be interpreted consonant with federal interpretation" in *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 821 (Ky. 1992).

In claims alleging *quid pro quo* sexual harassment, an employee must prove all five of the following elements to prevail on a *quid pro quo* sexual harassment claim:

> 1) that the employee was a member of a protected class; 2) that the employee was subjected to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors; 3) that the harassment complained of was on the basis of sex; 4) that the employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment; and 5) the existence of *respondeat superior* liability.

Gray v. Kenton County, 467 S.W.3d 801, 806 (Ky. App. 2014) (quoting *Howington v. Quality Restaurant Concepts, LLC*, 298 Fed. App'x 436, 441 (6th Cir. 2008)) (emphasis added). After construing the facts in favor of Booker, his

[6] Kentucky Civil Rights Act, KRS 344.010, *et. seq*.

[7] 42 U.S.C. § 2000e-2(a)(1).

quid pro quo sexual harassment claim does not present a genuine issue of material fact.

The parties agree the first and third elements have been met, leaving only the second, fourth, and fifth elements in contention: unwanted sexual harassment, job benefits or tangible detriments conditioned on consent, and DWC's liability.

Evidence does not support Booker's allegation of unwanted sexual advances and unwelcomed sexual harassment. Booker's relationship with Buckley was entirely consensual and began before Buckley was promoted to supervisor. Booker's testimony describes some requests for a continuation of their consensual sexual relationship after he decided to end it. However, Booker admitted Buckley's advances ceased when Booker rejected the requests. Booker's allegations do not rise to the level of sexual harassment leaving the second element of his *quid pro quo* claim unmet.

Booker's argument under *Thompson v. North American Stainless Steel, LP*, 562 U.S. 170, 177-78, 131 S.Ct. 863, 870, 178 L.Ed.2d 694 (2011), is misplaced. *Thompson* allows the victim of an employer's unlawful or adverse act, who had a close personal connection to a claimant, to bring an action for retaliation under Title VII although the victim is not the claimant—the one who complained of discriminatory conduct. *Id*. First, *Thompson* was decided in the context of a retaliation claim and does not directly apply to the element of unwanted sexual harassment under a *quid pro quo* claim. Second, *Thompson* is limited to allowing

a third party to harassment to bring a claim when, due to his relationship to the claimant, he is the one who suffers from the retaliatory act; like the man who was fired after his fiancée complained about being harassed at work in *Thompson*. *Id*. Here, Booker argues *Thompson* allows him to use his alleged evidence of the negative effect Buckley's supervision had on his colleagues to support his *quid pro quo* claim. *Thompson* does not allow a claimant to use actions committed against third parties to support his own allegations of sexual harassment.

Booker also fails to meet the fourth element of *quid pro quo* harassment. He did not prove his denial of Buckley's sexual advances resulted in a loss of job benefits or a tangible job detriment. After Booker ended his sexual relationship with Buckley, he continued receiving "outstanding" employee evaluations, despite Buckley's increased scrutiny of all her employees' performances. The job detriment Booker complains of is his inability to continue working at unapproved employment, falsifying timesheets, and fraudulently reporting time worked for DWC while working for another employer. Avoiding valid employment policies is not a tangible job detriment. As the trial court found, "[t]he KCRA was not enacted to protect such unethical and dishonest conduct."

Finally, the fifth element, *respondeat superior* liability, also fails. DWC was unaware of Booker's sexual relationship with Buckley until after it had terminated Booker's employment based on unrelated policy and statutory violations. Reporting his discomfort with Buckley's management directly to Buckley was insufficient to give notice or extend liability to DWC. Booker

reported his allegations to KEAP's hotline; however, this was not the correct reporting mechanism. He was advised by the hotline operator how to correctly report his claims according to DWC policies, on which he also acknowledged receiving training. Despite opportunities to inform DWC of the problem and allow it to investigate, Booker waited to report his claims until after DWC terminated his employment. Even taking the facts in the light most favorable to Booker, there is no triable issue on DWC's liability under the fifth element of his *quid pro quo* claims.

Next, a hostile work environment claim encompasses "harassment that is severe or pervasive." *Burlington Industry, Inc. v. Ellerth*, 524 U.S. 742, 752, 118 S.Ct. 2257, 2264, 141 L.Ed.2d 633 (1998). Elements required to prevail on a hostile environment claim are:

> (1) [the employee] is a member of a protected class,
>
> (2) [he] was subjected to unwelcome sexual harassment,
>
> (3) the harassment was based on [his] sex,
>
> (4) the harassment created a hostile work environment, and that
>
> (5) the employer is vicariously liable.

Gray, 467 S.W.3d at 805. "Whether the harassment is severe and pervasive is determined by a totality of the circumstances test—circumstances including frequency and severity of the conduct, whether the conduct is physically

threatening or humiliating, and whether it unreasonably interferes with the employee's work performance." *Id*. (citation omitted).

> 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.

Ammerman v. Board of Educ. of Nicholas County, 30 S.W.3d 793, 798 (Ky. 2000) (internal quotation marks and citations omitted).

The first and third elements of the hostile work environment test are effectively the same as the *quid pro quo* test. Accordingly, Booker meets those two elements, as noted above. However, on review of the record and construing the facts in a light most favorable to Booker, he has ultimately failed to present genuine issues of material fact establishing his hostile work environment claim. In granting summary judgment in favor of DWC, the trial court concluded Booker failed to satisfy the second, fourth, and fifth elements of his hostile work environment claim based on sexual harassment.

Similar to the analysis for Booker's *quid pro quo* claim, the second element of the hostile work environment claim requires proof he was subjected to unwelcome sexual harassment. As reasoned above, Booker is unable to prove this element due to the consensual nature of his sexual relationship with Buckley and because when he ended the relationship, she responded with understanding and did

not continue pressuring him. Moreover, Booker is unable to use his coworker's experiences with Buckley to bolster his hostile work environment claim. *Thompson*, 562 U.S. at 177-78, 131 S.Ct. at 870.

The fourth element of a hostile work environment claim requires severe and pervasive harassment. Evidence provided by Booker is tantamount to evidence of a supervisor's occasional and mild discriminatory actions which "does not satisfy the severe and pervasive standard and cannot reasonably be thought to constitute sexual harassment[.]" *Ammerman*, 30 S.W.3d at 799 (internal quotation marks and citation omitted). The few requests to continue their consensual sexual relationship recounted by Booker occurred sporadically and did not rise to the level of being severe or pervasive. When he denied Buckley's requests, she acknowledged his position and only expressed her interest in reinitiating sexual relations once thereafter.

Finally, Booker failed to prove the last element of a hostile work environment claim, employer vicarious liability. This element imposes strict liability on an employer when an agency relationship exists, and a tangible employment action has been taken against the employee. *Ellerth*, 524 U.S. at 762, 118 S.Ct. at 2269. A supervisor's actions toward an employee fall under the agency relationship with the employer. *Id*. Tangible employment actions typically consist of a significant change in employment status and inflict direct economic harm on the employee. *Id.*, 524 U.S. at 761-62, 118 S.Ct. at 2268-69. DWC was unaware of Booker's claims against Buckley until after it terminated his

employment based on unrelated violations. Booker did not complain of any other tangible employment actions taken by Buckley, such as demotion, unfavorable job reassignment, or reduced pay. Thus, even when viewing the facts in a light most favorable to him, Booker failed to prove he suffered a tangible employment action.

An employee may still proceed with a hostile work environment claim although there was no tangible employment action taken. *Id.*, 524 U.S. at 765, 118 S.Ct. at 2270. In this circumstance, the employer is afforded an affirmative defense to liability. *Id*. The affirmative defense shifts the burden to the employer to prove two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id*.

The first element of DWC's affirmative defense has been met. DWC was unaware of Booker's complaints until after the decision was made to terminate his employment for unrelated time-reporting violations. Additionally, once Booker informed DWC of his allegations during his pre-termination hearing, DWC promptly conducted a thorough investigation.

DWC also satisfied the second element of its affirmative defense to Booker's allegation of vicarious liability. DWC provided proof of a valid sexual harassment reporting procedure as part of its overall policy against sexual harassment and discrimination. Booker did not follow this policy, despite admitting he was aware of the policy.

> And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Id. Therefore, Booker unreasonably failed to take advantage of DWC's preventive and corrective opportunities to otherwise avoid harm. Because no disputed issue of fact on DWC's liability remains, and Booker is unable to prove all required elements, his hostile work environment claim fails as a matter of law.

Next, a retaliation claim does not require a finding of discriminatory or harassing conduct in violation of the KCRA. *Asbury Univ. v. Powell*, 486 S.W.3d 246, 252 (Ky. 2016). Instead, an employee must show only a "reasonable good faith belief" the adverse employment practices opposed by the employee were KCRA violations. *Id.* (citations omitted). There are four elements of a retaliation claim: "a plaintiff must produce evidence that (1) [he] engaged in protected activity (2) that was known to the defendant (3) who thereafter took an employment action adverse to the plaintiff, (4) which was causally connected to the plaintiffs [sic] protected activity." *Id*.

Taking the facts as he has presented them, Booker is unable to prove his retaliation claim. Reporting sexual harassment is a protected activity under the KCRA. Booker believed he had engaged in an activity protected by the KCRA when he reported his consensual sexual relationship with his supervisor during his pre-termination hearing. However, this is insufficient when Booker admitted he

complained of harassment only after DWC discharged him for independent, legitimate, non-discriminatory reasons. Because DWC was unaware of Booker's claims until after it terminated his employment, neither the second element of knowledge of the protected activity nor the third element, adverse employment action taken after the protected activity occurred, can be proved. Finally, without an adverse employment action there can be no causal connection to a KCRA protected activity. Thus, Booker cannot meet the last element. Therefore, even taking all facts in the light most favorable to him, Booker is unable to prove the elements of his retaliation claim.

As in his *quid pro quo* argument, Booker's citation to *Thompson* is unavailing here. Taking the unsupported facts as Booker presented them, he cannot successfully assert Buckley took adverse actions against third parties to prove his claims.

Finally, even assuming Booker was able to succeed on any one of his claims of *quid pro quo* sexual harassment, hostile work environment, or retaliation, there is no genuine issue of material fact regarding the legitimate reason for his termination. In cases of "mixed-motive firings," a valid and non-discriminatory reason for termination is an adequate basis for the employment action. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286, 97 S.Ct. 568, 575, 50 L.Ed.2d 471 (1977); *see also McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360-61, 115 S.Ct. 879, 885, 130 L.Ed.2d 852 (1995). DWC terminated Booker's employment for time violations when he claimed he was

working for DWC while on-duty for another employer. Therefore, even if there was a "mixed-motive" for Booker's termination, he would not prevail.

Having thoroughly reviewed the record and arguments on appeal, we affirm the trial court's entry of summary judgment against Booker. Viewing all disputed facts in Booker's favor, he cannot prevail on claims of sexual harassment, discrimination, or retaliation. Summary judgment was properly granted.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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