

RENDERED: FEBRUARY 22, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001343-MR

MARY TURNER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HON. ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 12-CI-000074

JEFFERSON COUNTY CLERK

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Mary Turner brings this appeal from a final judgment entered July 20, 2016, by the Jefferson Circuit Court, dismissing Turner's claims of hostile work environment and retaliatory discharge against the Jefferson County Clerk (Clerk) upon a jury verdict in the Clerk's favor. Turner subsequently filed a motion to alter, amend or vacate the judgment and a motion for new trial, which

the trial court denied by order entered September 12, 2016. For the reasons stated, we affirm.

BACKGROUND

This is the second trip for this case to the Court of Appeals.¹ The case was originally dismissed in its entirety by the circuit court shortly after filing in 2012. In our first opinion, rendered in April of 2014, we addressed the underlying facts and procedural posture of the case as follows:

Turner's complaint was filed on January 4, 2012. Immediately thereafter, without filing an answer or any discovery being conducted, appellees filed a motion to dismiss on January 7, 2012, pursuant to [Kentucky Rules of Civil Procedure (CR)] 12.02(f). The opinion and order dismissing was entered March 7, 2012. Other than the complaint, motion to dismiss, and response thereto, there is no substantive record below to review in this appeal. The complaint sets forth four causes of action, but for purposes of this appeal, only two claims were preserved for our review—claims for hostile work environment and retaliatory discharge. Turner did not address the wrongful discharge claim or intentional infliction of emotional distress claim in her brief or prehearing statement, which the circuit court disposed of on immunity grounds. Accordingly, the circuit court's dismissal of those two claims shall be affirmed.

Turner began working for the Jefferson County Clerk's Office in 2010, and was discharged approximately thirteen months later. During the year of her employment, Turner alleges she was sexually harassed by a fellow employee, John Clark, who was

¹ See *Turner v. Jefferson County Clerk's Office*, 2012-CA-000647-MR, 2014 WL 1407228 (Ky. App. Apr. 11, 2014).

under the control and supervision of Holsclaw. Further, Turner claims she received unfavorable evaluations and was ultimately fired as a result of reporting the incidents. Turner's complaint alleges that Clark smacked her on the buttocks, routinely touched his groin and made inappropriate gestures in her presence, commented about her dress being torn and being able to see her slip, and began sleeping on the floor of her office, purportedly in an attempt to have a sexual encounter. Turner claims that Clark's actions, and management's inaction, created a hostile work environment. Turner states in her complaint that she reported the harassment to management and to Holsclaw specifically, but nothing was done in response. After Turner complained, she alleged that Holsclaw began giving her unfavorable evaluations. Turner also alleged that improper gifts were received by the clerk's office during her tenure and asserts she was terminated as a result of her complaints regarding the sexual harassment and the improper gifts.

The circuit court concluded that Turner's complaint failed to state a claim on which relief could be granted as concerns the hostile work environment and retaliation discharge claims under CR 12.02(f). The circuit court reasoned that Turner failed to set forth sufficient facts to establish that the harassment was severe or pervasive and thus did not establish a claim for hostile work environment in violation of the Kentucky Civil Rights Act (the Act), Chapter 344 of the Kentucky Revised Statutes. The circuit court also concluded that Turner did not set forth sufficient facts to establish a causal link between her reports of harassment and her termination; thus, she did not set forth an actionable claim for retaliatory discharge under the Act.

Turner v. Jefferson County Clerk's Office, 2012-CA-000647-MR, 2014 WL

1407228, *1-2 (Ky. App. Apr. 11, 2014) (footnote omitted). This Court reversed

and remanded the circuit court's order dismissing for additional proceedings in the

circuit court as concerned Turner's hostile work environment and retaliatory discharge claims.

On remand, the trial court conducted a jury trial on both claims on July 5 through July 8, 2016. The jury returned a verdict in favor of the Clerk on the claims. The trial court rendered a judgment on the verdict on July 20, 2016, and denied Turner's motions to alter, amend, or vacate and for a new trial by order entered September 12, 2016. This appeal followed.

ANALYSIS

The sole issue raised by Turner on appeal looks to the unavailability of Sue Toole as a witness at trial. Toole was employed by the Clerk and held the positions of executive director and chief operating officer during Turner's term of employment. Toole had been listed by Turner as a possible witness to testify at trial but Toole was unable to attend due to a previously planned out-of-state vacation during the week of the trial. When Toole's absence was communicated to Turner's counsel, on or about June 20, 2016, the Clerk then noticed Toole's video deposition for June 29, 2016, which was attended by attorneys for both parties. At the deposition, counsel for Turner, who cross-examined Toole, purportedly served a subpoena on Toole to appear as a witness at trial. Turner had also filed a motion for a continuance on June 23, 2016, which was denied by the trial court on the first day of the trial. Turner did not introduce Toole's video deposition at trial. Turner

now argues on appeal that the Clerk procured the absence of Toole at trial in violation of CR 32.01 and Toole's absence as a live witness otherwise prejudiced Turner at trial. On this basis, Turner argues she is entitled to a new trial.

The trial court entered its scheduling order for trial in September of 2015. The scheduling order states that "[a]ny request for a continuance shall comply with CR 43.03." CR 43.03, which has not been amended since its adoption in 1953, provides as follows:

A motion to postpone a trial on account of the absence of evidence may be made *only upon affidavit showing the materiality of the evidence expected to be obtained*, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, *the affidavit must show what facts the affiant believes the witness will prove*, and not merely the effect of such facts in evidence, and that the affiant believes them to be true. If the adverse party will consent that, on the trial, the affidavit may be read as the deposition of the absent witness, the trial shall not be postponed on account of his absence.

(Emphasis added.)

As noted, on June 23, 2016, Turner filed a motion for a continuance, which generically stated in relevant part that "[s]everal of the key witnesses for the trial are unavailable due to the holiday and vacation." Toole was not identified in the motion. More importantly, Turner's counsel did not submit an affidavit with the motion as required by CR 43.03. Although Turner listed Toole as a possible witness in her pretrial disclosures, there was no affirmative statement therein that

Toole would be called to testify at trial nor was there a summary of her anticipated testimony as required by the court's pretrial order. Toole certainly was not identified as a "key" witness as argued by Turner on appeal. The court considered Turner's motion for continuance prior to commencing the trial and denied same. For the following reasons, we agree with the trial court's rulings that Toole was not a key witness whose absence warranted a continuance of the trial or a reversal of the judgment for a new trial.

First, Turner's motion for a continuance did not comply with CR 43.03 because Turner failed to attach the required affidavit in support of the motion. In Kentucky, an appellate court may not conclude that a trial court abused its discretion when denying a noncompliant motion. *See, e.g., Holthouser v. Cox*, 279 S.W.2d 744, 745 (Ky. 1955) ("The first ground which appellants urge for reversal is that the court abused its discretion in not granting them a continuance when it was discovered that M. E. Holthouser was absent in disobedience of a subpoena which had been served on him. The answer to this contention is that appellants failed to file an affidavit in support of the motion to postpone the trial as required by CR 43.03. . . . In the absence of a proper affidavit, the court was clearly correct in overruling this motion."); *Walker v. Farmer*, 428 S.W.2d 26, 28 (Ky. 1968) ("Compliance is necessary before a continuance may be granted. Since

appellant failed to comply with CR 43.03 there was no basis for the motion for a continuance and the trial court properly overruled it.”) (citations omitted).²

Second, Turner did not actually issue or serve a valid subpoena on Toole to compel her attendance at trial. CR 45.01(1) provides in relevant part that “[e]very subpoena shall command *each person to whom it is directed* to attend and give testimony . . . at the time and place therein specified.” (emphasis added). The subpoena Turner’s counsel served on Toole at the conclusion of her deposition, attached as Exhibit 14 to Toole’s deposition, inexplicably named Angela Davis, not Toole, to testify at Turner’s trial.³ A trial subpoena requires action only from the person named therein and who is directed to attend. Since Toole had not been properly issued or served a subpoena to appear at trial, the subpoena was of no force or affect in this case.

² Though Mary Turner’s brief repeatedly refers to Sue Toole as a “key” witness, the motion to continue did not refer to her as such. Indeed, the terse, fatally generic motion did not refer to anyone by name, nor did it explain what any unavailable witness’ expected testimony would be, the materiality thereof or the due diligence used to obtain the testimony. Kentucky Rules of Civil Procedure (CR) 43.03

³ Angela Davis was also listed as a witness in Turner’s pretrial disclosures. We note that Turner attached as Exhibit F to her brief, a subpoena addressed to Toole. However, as noted by the Clerk, that subpoena is not the same subpoena served and attached to Toole’s deposition, nor is it otherwise found in the record of this case. It is improper for counsel to attach a document to Turner’s brief which: a) is not in the record, and b) is materially different than what is in the record. CR 76.12 (4)(c)(vii). *See, e.g., Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012) (“Furthermore, an appellate court cannot consider items that were not first presented to the trial court.). Although permissible under CR 76.12(8), we have declined to strike appellant’s brief.

Third, for some unknown reason not addressed by Turner in her brief to this Court, Turner failed to introduce at trial any or all of Toole's deposition, which was legally permissible under CR 32.01(c) (since Toole was out of state and more than 100 miles from Louisville at the time of the trial). Additionally, without any recitation to the record on appeal, Turner argues that Toole's absence from the state on the days of trial was procured by the Clerk by merely approving her vacation. We can find no evidence in the record on appeal, including the trial recording, that the Clerk in any way influenced Toole's failure to appear at trial. Even more baffling to this Court is that Turner did not address the vacation issue with Toole at her video deposition the week before trial, yet now argues on appeal that Toole failed to appear because the Clerk approved Toole's vacation. If Toole was in fact a key witness, which is not supported by the record below, she could have been properly served a valid subpoena long before the trial date, rather than an invalid subpoena at her deposition, a week before trial. And, Toole should have been examined at her deposition by Turner on the Clerk's involvement in scheduling her vacation and establish how the Clerk procured her absence. There is simply no evidence below to support Turner's allegations.

In light of the above, Turner has not shown how she was prejudiced at trial by Toole's absence. Indeed, Toole testified at her deposition that Turner never told her that Turner had been sexually harassed, forced to endure a hostile

work environment or had been touched in an inappropriate manner at work.

Toole's Deposition at 47-48, 75-76.⁴ Thus, we again agree with the trial court that Turner's decision not to use Toole's deposition at trial in her absence does not form a basis for granting a new trial.

For the foregoing reasons, the Jefferson Circuit Court's final judgment upon the jury verdict dismissing Turner's claims is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kurt A. Scharfenberger
Louisville, Kentucky

BRIEF FOR APPELLEE

Janice M. Theriot
Laurence J. Zielke
Louisville, Kentucky

⁴ The Toole deposition was designated as part of the record on appeal by the Clerk.