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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001802-MR

ALONZO MORTON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 16-CI-02059

UNITED PARCEL SERVICE, INC.;
BRYAN SCHWEINEFUS; MATT GUTE;
AND STACEY COFFEY — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Alonzo Morton appeals from an order of the Fayette Circuit Court granting a motion by the United Parcel Service, Bryan Schweinefus, Matt Gute, and Stacey Coffey for summary judgment. For the reasons set forth below, we affirm in part, reverse in part, and remand.

Morton, who is African-American, began working for UPS in 2002 and was promoted to the position of human resource specialist in 2006. As a human resource specialist, he was responsible for recruiting employees for UPS and receiving complaints from other employees. As part of his job, Morton documented the complaints to pass along to his direct supervisors, Gute and Coffey, and an area human resource manager, Schweinefus. The parties agree that Morton's performance in this position was satisfactory and he won awards for his recruiting efforts. In 2010, Morton began receiving complaints about racial harassment and discord from several African-American UPS feeder drivers. Morton forwarded these complaints to his supervisors and, at one point, bypassed them to communicate his concerns about UPS's lack of response to ongoing racial discord at the Lexington facility to their supervisors, Pete Hood and Jim Lewis. These complaints continued through late 2011.

In August 2012, a "safety demonstration" "consisting of a replica of a UPS driver strung from the ceiling and partially connected to a ladder" was installed in the Lexington UPS facility. *United Parcel Service, Inc. v. Barber*, 557 S.W.3d 303, 307 (Ky. App. 2018). Sometime later the demonstration was altered to allow the effigy to "hang freely by the string around its neck" and "a sign placed nearby reading 'No hangings please.'" *Id*. "Many who saw it were disturbed or offended by the effigy's strong resemblance to an African-American and the

allusion to a lynching." *Id.* Morton was not present for this incident but was told of it by one of the feeder drivers and was shown a photograph after it occurred. Morton claims that, at this time, he encouraged the feeder drivers to file a complaint with the Equal Employment Opportunity Commission ("EEOC"). The record contains no evidence that UPS had knowledge of Morton's alleged encouragement. Regardless of Morton's involvement, the feeder drivers filed an EEOC complaint in late 2012 and a subsequent civil rights action in 2014.[1]

Morton alleges that a number of racially motivated incidents occurred after the EEOC claim was filed by the feeder drivers. First, he claims his supervisors began strictly supervising his work in a way that they had not done previously. For example, Coffey attended a recruitment event, something Morton claims he had never done previously. UPS argues that Coffey was acting within the duties of his position when he attended the event. Morton also alleges that, in 2013, his supervisors began monitoring his attendance much more closely, as evidenced by comments made on his timecards and write-ups he was required to complete for himself in October 2014, November 2014, and March 2015 to document his understanding of expectations for his attendance. Morton argues

[1] Several feeder drivers brought an action against UPS alleging racial discrimination, hostile work environment, and retaliation. The Fayette Circuit Court entered a judgment in favor of the employees. This Court affirmed the judgment in *United Parcel Service, Inc. v. Barber*, 557 S.W.3d 303 (Ky. App. 2018).

that, prior to the EEOC claim, he enjoyed a certain amount of flexibility in his hours and attendance, which was required for his position. UPS argues that the timecard comments and write-ups were not a response to the EEOC claim or racially motivated but were instead used to address ongoing issues with Morton's attendance. The record indicates Morton was repeatedly tardy, and the comments and write-ups related to the reasons for Morton's tardiness and his failure to inform supervisors when he was delayed.

Morton contends several other racially motivated incidents directly targeted him. In August 2015, during a conversation about a job candidate's hair, a white manager said to Morton, "Everyone has better hair than you." Morton did not complain to his supervisors about this incident when it occurred. Soon after, when Morton and another UPS employee were wearing similar shirts, another white supervisor allegedly told Morton, "I guess your black skin made it look wrong," in reference to the color of Morton's shirt. Morton reported this incident to his supervisors. He also informed his supervisors about the hair comment at this time. UPS investigated the incident and, although it unsubstantiated Morton's complaint, reviewed relevant company policies with the supervisor who allegedly made the comment. It is Morton's position that, although UPS ultimately investigated this incident, the investigation was insufficient. In November 2015, Morton arrived at his office to find his desk in disarray, which he claims was

racially motivated. UPS acknowledges the incident, but argues that there was no proof that it was racially motivated.

Morton also alleges several indirect incidents in which he claims UPS demonstrated racial bias. Morton reported at least one incident of finding graffiti which included racial epithets in a restroom at the UPS facility. UPS acknowledged these incidents and Morton agrees that UPS immediately removed the graffiti. Additionally, Morton alleges a supervisor once instructed him to stop recruiting at Kentucky State University ("KSU"), a historically African-American university. UPS claims that upon his report of this incident, Morton was instructed to continue recruiting from KSU if he thought it was a viable source for UPS employees. Morton does not allege a date for this incident, but indicated it occurred soon after he began recruiting employees for UPS in 2006.

Morton was deposed by the plaintiffs in the civil rights case in June 2015. He was prepared for his deposition by Schweinefus and an attorney for UPS. Schweinefus also attended Morton's deposition. Morton claims he was encouraged by Schweinefus to refer to the replica of a UPS driver that was hung from the ceiling of the Lexington UPS facility as a "safety demonstration." Morton felt intimidated by Schweinefus's participation in preparing him for the deposition and his attendance at the deposition.

Morton was subpoenaed to testify on April 6, 2016. Although he was not called to testify on that day, he visited a physician, who recommended he not return to work until the trial ended due to stress. Morton testified at trial on April 12, 2016. His testimony was unfavorable to UPS. On April 21, 2016, Morton resigned from his position with UPS, claiming he could no longer tolerate the work environment at the Lexington facility. UPS claims Morton's supervisors were surprised and disappointed by his resignation. Morton argues he was constructively discharged, while UPS contends his resignation was voluntary.

In June 2016, Morton filed an action alleging disparate treatment, hostile work environment, retaliation, conspiracy in retaliation, constructive discharge, and intentional infliction of emotional distress.[2] UPS then moved for summary judgment and, after hearing oral arguments, the circuit court granted the motion. This appeal followed. Oral arguments were held by this Court on June 10, 2019.

Our review of summary judgment is *de novo*. *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 81 (Ky. 2018) (citing *Owen v. University of Kentucky*, 486 S.W.3d 266, 269 (Ky. 2016)).

> Under our rules, summary judgment is appropriate when the pleadings, depositions, answers to interrogatories,

[2] Morton appeals only his claims for hostile work environment, retaliation, and constructive discharge here.

> stipulations, and any admissions on file demonstrate 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. CR[3] 56.03. All factual ambiguities are viewed in a light most favorable to the nonmoving party. *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010). Because summary judgment does not require findings of fact but only an examination of the record to determine whether material issues of fact exist, we generally review the grant of summary judgment without deference to either the trial court's assessment of the record or its legal conclusions. *Id.* (citing *Malone v. Kentucky Farm Bureau Mut. Ins. Co.*, 287 S.W.3d 656, 658 (Ky. 2009)).

Hayes v. D.C.I. Properties-D KY, LLC, 563 S.W.3d 619, 622 (Ky. 2018) (internal quotation marks omitted). "[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Service Center Inc.*, 807 S.W.2d 476, 482 (Ky. 1991) (citations omitted).

Morton argues the circuit court erroneously granted summary judgment on his claims for hostile work environment, retaliation, and constructive discharge. Because KRS[4] Chapter 344 and Title VII of the Civil Rights Act of 1964 are virtually identical, "Kentucky courts generally follow federal law in interpreting the Kentucky discrimination statute." *Stewart v. University of*

[3] Kentucky Rules of Civil Procedure.
[4] Kentucky Revised Statutes.

Louisville, 65 S.W.3d 536, 539 (Ky. App. 2001) (citing *Mills v. Gibson Greetings, Inc.*, 872 F. Supp. 366, 371 (E.D. Ky. 1994)).

First, Morton argues the circuit court erred in granting summary judgment on his claim for hostile work environment. Hostile work environment claims based upon race discrimination are reviewed under the same standard as claims based on sexual harassment. *Faragher v. Boca Raton*, 524 U.S. 775, 786-87, n.1, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). "[H]ostile 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." *Ammerman v. Board of Educ. of Nicholas County*, 30 S.W.3d 793, 798 (Ky. 2000) (internal quotation marks omitted) (quoting *Williams v. General Motors Corp.*, 187 F.3d 553, 560 (6th Cir. 1999)). The environment must be one "a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive." *Jackson v. Quanex Corp.*, 191 F.3d 647, 658-59 (6th Cir. 1991) (citation omitted).

To determine whether a work environment is both subjectively and objectively hostile, a court must consider the "totality of the circumstances." *Lewis-Smith v. Western Kentucky University*, 85 F. Supp.3d 885, 904 (W.D. Ky.

2015) (citation omitted). "[A] court should not examine each alleged incident of harassment in a vacuum[.]" *Jackson*, 191 F.3d at 661 (citation omitted).

> The issue is not whether each incident of harassment *standing alone* is sufficient to sustain the cause of action in a hostile environment case, but whether –taken together –the reported incidents make out such a case. The work environment as a whole must be considered rather than a focus on individual acts of alleged hostility.

Bowman v. Shawnee State University, 220 F.3d 456, 463 (6th Cir. 2000) (citations omitted).

In this matter, Morton alleges a number of incidents of racial discrimination occurred over the course of his employment with UPS. These incidents include at least one instance of finding graffiti containing racial epithets on UPS property, a derogatory comment about his skin color made by a white UPS manager, a comment made by another white supervisor about Morton's hair, and an instruction to discontinue recruitment from KSU, a historically African American university. Furthermore, Morton claims he was subjected to increased supervision and oversight by his supervisors after he attempted to assist the feeder drivers with their complaints of racial discord and their subsequent filing of a claim with the EEOC. This included actions by a supervisor which Morton perceived to be intimidating during a meeting to prepare him for a deposition and the subsequent deposition. Although it is possible to categorize each of these incidents

as "mere offensive utterances"[5] or otherwise insufficient to support a claim of hostile work environment independently, courts must not disaggregate a plaintiff's allegations into discrete incidents but must instead consider the work environment as a whole. *Bowman*, 220 F.3d at 463 (citations omitted).

In addition to incidents of harassment directly experienced by a plaintiff, the Sixth Circuit Court of Appeals has held a plaintiff may be "credited evidence of racial harassment directed at someone other than the plaintiff" when the plaintiff knew of the harassment. *Jackson*, 191 F.3d at 661 (citing *Moore v. KUKA Welding Systems & Robot Corp.*, 171 F.3d 1073, 1079 (6th Cir. 1999)). In *Jackson*, the Sixth Circuit held "[e]vidence of racist conduct affecting African-American employees certainly mattered as to whether the work environment . . . was objectively hostile to African-Americans[.]" *Id.* The plaintiff need not experience the harassment directly in order for such incidents to contribute to a work environment that is hostile to him. *Id.*

Morton alleges the atmosphere of racial discord within the UPS Lexington facility contributed to the hostility of his work environment. He repeatedly received complaints from other African American employees about racial harassment. He followed the company's procedure for dealing with those

[5] A hostile work environment claim cannot be premised upon a single incident of a "mere utterance . . . which engenders offensive feelings in an employee." *Faragher*, 524 U.S. at 787, 118 S. Ct. at 2283 (citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971)).

complaints. However, when nothing was done to address those concerns, he acted outside of his regular duties to attempt to contact other supervisors within the company about his concerns and alleges he instructed the feeder drivers to file an EEOC complaint when his attempts were unsuccessful in alleviating the racial harassment they experienced. Sometime during this period, the effigy was hung from the ceiling of the Lexington facility. This was a singularly egregious act of racial harassment and, although Morton learned of it from another employee, it, along with his knowledge of other incidents of harassment of African American employees, should still be considered as having contributed to his work environment. *Jackson*, 191 F.3d at 661.

"If the plaintiff can show that a hostile work environment existed, [he] must then prove that [his] employer tolerated or condoned the situation or that the employer knew or should have known of the alleged conduct and failed to take prompt remedial action." *Id*. at 659 (citation and internal quotation marks removed). UPS removed the racially derogatory graffiti when Morton reported it and spoke with the supervisor who allegedly made the comment about Morton's skin color. However, based upon the record, we cannot definitively determine that UPS sufficiently acted to remedy racial harassment within the Lexington facility in light of Morton's allegation that his repeated attempts to raise the issue went

unaddressed, and that the work environment worsened to the point that he felt compelled to instruct other employees to file an EEOC complaint against UPS.

Based upon the incidents Morton experienced personally and his knowledge of racial harassment experienced by other employees, as well as the inadequate response by UPS, we conclude a material issue of fact exists with regard to Morton's hostile work environment claim. Therefore, this claim must survive summary judgment.

Next, Morton argues the circuit court failed to consider evidence of retaliation against him in granting summary judgment on his claim for retaliation. "KRS 344.280(1) makes it unlawful for one or more persons [t]o retaliate or discriminate in any manner against a person . . . because he has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under the chapter." *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 801 (Ky. 2004) (emphasis in original) (internal quotation marks omitted).

> A *prima facie* case of retaliation requires a plaintiff to demonstrate (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

Id. at 803 (internal quotation marks omitted) (quoting *Christopher v. Stouder Memorial Hospital*, 936 F.2d 870, 877 (6th Cir. 1991), *cert. denied*, 502 U.S. 1013, 112 S. Ct. 658, 116 L. Ed. 2d 749 (1991)).

In order for an employee's activities to be considered protected, she must have "engage[d] in a discrete, identifiable, and purposive act of opposition to discrimination." *Thompson v. N. Am. Stainless, LP*, 567 F.3d 804, 816 (6th Cir. 2009). Especially relevant to this matter, "an employee does not receive special protection under Title VII simply because the employee handles discrimination complaints." *Lewis-Smith*, 85 F. Supp. 3d at 908 (internal quotation marks omitted) (quoting *Nelson v. Pima Community College*, 83 F.3d 1075, 1082 (9th Cir. 1996)). "In order for employees in human resource positions to claim retaliation they need to first clearly establish that they were engaged in protected activities other than the general work involved in their employment." *Id*. at 909. (citing *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486-87 (10th Cir. 1996)). Although Morton's job responsibilities of taking complaints from other UPS employees do not qualify as protected activities, his independent complaints to his supervisors regarding incident that involved him personally do qualify as protected activities. Morton made complaints directly to his supervisors regarding the graffiti, shirt, hair, and KSU incidents. He also acted outside of his regular duties

to communicate his concerns about ongoing racial harassment within the Lexington facility to other supervisors within the company.

Furthermore, as to the second element of the claim, Morton alleges UPS retaliated against him because he encouraged the feeder drivers to file the EEOC complaint but failed to show UPS had knowledge of this encouragement. Where an employer denies having knowledge of an alleged protected activity, the plaintiff must offer evidence to rebut their denials and must not rely upon conspiratorial theories, "flights of fancy, speculations, hunches, intuitions, or rumors[.]" *Mulhall v. Ashcroft*, 287 F.3d 543, 552 (6th Cir. 2002) (citation omitted). Morton offered only his own suspicion that his supervisors knew of his encouragement, which is insufficient to prove the second element of a claim for retaliation. However, UPS did have knowledge of complaints made by Morton directly to his supervisors, which is sufficient.

However, Morton's claim for retaliation fails because he is unable to show UPS took any adverse employment action against him. "Employment actions that are *de minimis* are not actionable under Title VII." *White v. Burlington Northern Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir. 2004) (citation omitted). For an action to be deemed adverse, it must have tangible effects on the plaintiff's employment. *Burlington Industries v. Ellerth*, 524 U.S. 742, 753, 118 S. Ct. 2257, 2265, 141 L. Ed. 2d 633 (1998). Such tangible effects must constitute a significant

change in employment status, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Most often, an adverse employment action "inflicts direct economic harm" on the plaintiff. *Id.* at 762.

Morton argues the changes to the manner in which his supervisors enforced the UPS attendance policy were adverse employment actions. He cites negative comments made on his timecards by his supervisors regarding his attendance beginning in 2013. Additionally, Morton was required to meet with his supervisors on more than one occasion to discuss his attendance. He also referencnes write-ups he was required to complete for himself after these meetings, which UPS contends were meant to document Morton's understanding of the attendance policy. "A written reprimand, without evidence that it led to a materially adverse consequence such as lowered pay, demotion, suspension, or the like, is not a materially adverse employment action." *Taylor v. Geithner*, 703 F.3d 328, 338 (6th Cir. 2013) (quoting *Creggett v. Jefferson County Bd. of Educ.*, 491 F. App'x 561, 566 (6th Cir. 2012)). Morton fails to show that the timecard comments, meetings, or write-ups resulted in any tangible effects on his employment.

Furthermore, Coffey attended a recruitment event with Morton, which Morton contends had never been done previously. UPS argues this was within

Coffey's job responsibilities. Like the timecard comments and write-ups, because Morton failed to show any tangible changes to the terms and conditions of his employment due to Coffey's attendance at the event, this does not constitute an adverse employment action. Without evidence of adverse employment actions on the part of UPS, Morton cannot prevail on his claim of retaliation.

Finally, Morton contends the circuit court erroneously granted summary judgment on his claim for constructive discharge. For claims of constructive discharge, "the commonly accepted standard is whether, based upon objective criteria, the conditions created by the employer's action are so intolerable that a reasonable person would feel compelled to resign." *Com., Tourism Cabinet v. Stosberg*, 948 S.W.2d 425, 427 (Ky. App. 1997) (citations omitted). "A finding of constructive discharge requires an inquiry into both the objective feelings of an employee and the intent of the employer." *Brooks*, 132 S.W.3d 790 808 (Ky. 2004) (citation omitted).

Here, Morton resigned without returning to work in April 2016. It appears to this Court that Morton was concerned his work environment might worsen once he returned to work after testifying unfavorably about UPS. However, employees who "leave their job[s] in apprehension that conditions may deteriorate later" are not considered to have been constructively discharged. *Groening v. Glen Lake Community Schools*, 884 F.3d 626, 630 (6th Cir. 2018)

(internal quotation marks omitted) (quoting *Agnew v. BASF Corp.*, 286 F.3d 307, 310 (6th Cir. 2002)). Morton's speculation about some future deterioration of working conditions is insufficient to prove constructive discharge.

Morton may subjectively have felt uncomfortable, or even intimidated, by Schweinefus's presence at the meeting in which he was prepared for his deposition and the subsequent deposition. He may have also subjectively felt uncomfortable returning to work after testifying negatively against his employer. However, Morton presented no evidence of intolerable actions on the part of UPS which would make a reasonable person feel compelled to resign.

Furthermore, with regard to the manner in which Morton's supervisors monitored his attendance and job performance, generally, the manner in which managers supervise or criticize an employee's job performance and assigned job duties are "insufficient to establish a constructive discharge as a matter of law." *Smith v. Henderson*, 376 F.3d 529, 534 (6th Cir. 2004) (citations omitted). Although Coffey attended a recruiting event and supervisors repeatedly addressed Morton's attendance issues, evidence shows Morton had their support until he resigned. Therefore, Morton failed to establish a *prima facie* claim for constructive discharge.

For the foregoing reasons, we reverse the order of the Fayette Circuit Court granting summary judgment on Morton's hostile work environment claim,

affirm the order granting summary judgment on his claims of retaliation and constructive discharge, and remand this matter for proceedings consistent with this opinion.

ALL CONCUR.

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BRIEF AND ORAL
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