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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001190-MR

TIONNE PERRY APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 17-CI-000958

REYNOLDS CONSUMER PRODUCTS, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

COMBS, JUDGE: Appellant, Tionne Perry (Perry), appeals from an opinion and order of the Jefferson Circuit Court granting summary judgment in favor of Appellee, Reynolds Consumer Products (Reynolds), and dismissing with prejudice her claims for sexual harassment/hostile work environment, retaliation, and race discrimination. After our review, we affirm.

Perry was hired by Reynolds in February 2011 as a production line tender. Her employment was terminated on November 4, 2016. On February 23, 2017, she filed a complaint against Reynolds in the Jefferson Circuit Court alleging sexual harassment/hostile work environment, unlawful retaliation under KRS[1] 344.280, and race discrimination.

As Reynolds notes, Perry does not allege any error with respect to the trial court's dismissal of her claims for retaliation and race discrimination in her appellate brief. We limit our review and discussion of the record accordingly. *Milby v. Mears*, 580 S.W.2d 724 (Ky. App. 1979) (reviewing court generally confines itself to errors pointed out in briefs; failure to discuss particular errors in brief same as if no brief filed on those issues).

Reynolds deposed Perry on November 3, 2017. When asked about her answers to written discovery (that an Albert Neff had given her a vibrator for Valentine's Day), Perry explained that Neff was "just another employee there." He did not exercise any authority over Perry. Neff worked a different shift and Perry knew him through work, but they had no social relationship. On Valentine's Day 2016, Neff told Perry he had a gift for her. When she was leaving work and going out the door, Neff handed Perry a box wrapped in aluminum foil. Perry opened it when she got in the car. It was a vibrator. Perry threw it out the

[1] Kentucky Revised Statutes.

window. Prior to that time, there had been no indication that Neff would act in that fashion. His action was "out of the blue." When asked if she made any complaints "as far as the company" after receiving the vibrator, Perry responded, "No." She did not allege any other incident involving Neff.

Perry was also asked about other allegations that came out in discovery. In her answers to interrogatories, Perry mentioned comments made to her by Virgil Fitzpatrick, a third-shift supervisor. Perry worked second shift. Perry explained that supervisors come out onto the line to make sure that everything is functioning properly. Perry was working third shift at the time because she had to work four hours over her regular shift. According to Perry, Fitzpatrick was walking behind her and said, "I can tell that's good by the way you walk." Perry responded, "We're not going to go there Virgil. We're not going to go there." According to Perry, Fitzgerald just walked off. Perry was asked what she did after that exchange -- if she filed a complaint or took any formal actions. Perry responded, "No, I just let him know that I didn't agree with the things that he was saying to me." Perry explained that she told Fitzpatrick that "I'm not going to go there with him. We're not going to go there." Perry testified that she did not tell anyone else at Reynolds about what happened:

Q. You didn't report it to HR?
A. No.
Q. Or any other supervisor?
A. No.

Q. Nobody whatsoever?
A. No.
Q. And you went through, I guess, employee training at Reynolds?
A. Yes.
Q. So you would have been aware that there are ways to report instances of sexual harassment, correct?
A. Yes.
Q. They even have a 1-800 number?
A. Yes.
Q. You're aware of that?
A. Yes.
Q. But you didn't report it to anyone else? You just told Mr. Fitzpatrick, "I'm not going to go there," correct?
A. Right.

(Deposition at p. 31.)

Perry also testified Fitzpatrick made suggestive comments to her on numerous occasions. She testified that these other instances occurred frequently whenever she would work his shift. She could not provide specific dates other than that it first happened in June or July of 2016. By that time, Perry was already on step four of Reynolds's five-step disciplinary process. Perry received a Step 1 warning dated October 22, 2015; a Step 2 warning dated November 3, 2015; a Step 3 warning dated November 8, 2015; a Step 4 final written warning with a 5-day suspension dated November 19, 2015; and a Step 5 warning, suspension pending investigation for the purpose of termination, dated June 27, 2016. All the warnings were based upon poor job performance (for submitting paperwork with the wrong date or for failure to clock in or out of her shifts), and all were signed by Perry's regular supervisor, Steve Woods.

On February 23, 2018, Reynolds filed a motion for summary judgment on the grounds that none of Perry's allegations supported a violation of the Kentucky Civil Rights Act (KCRA) (KRS Chapter 344), and that her employment had been terminated solely due to poor work performance. Reynolds explained that after Perry had reached step 5 in the disciplinary process, it gave Perry another chance. She entered into a "Last Chance Agreement." On November 4, 2016, Perry violated the Last Chance Agreement by putting the wrong date on paperwork; her employment was terminated.

On March 30, 2018, Perry filed a response to Reynolds's motion accompanied by an affidavit dated March 29, 2018. The affidavit is set forth in Perry's appellate brief at pages 1-3 and is included as Appendix 1. In her affidavit, Perry averred that she had:

> complained of the harassment directly to Fitzpatrick. Reynolds management was fully aware of Fitzpatrick and his continuing harassment of female employees but did nothing to stop it. In fact after I complained about Fitzpatrick, he changed my hours and increased the difficulty of my work assignments.

Perry alleged that after Fitzpatrick started to sexually harass her, Neff began to harass her by giving a vibrator as a Valentine's Day gift. Perry also stated in her affidavit that she was being sexually harassed on an "almost daily basis."

On July 19, 2018, the trial court entered an opinion and order granting summary judgment for Reynolds, reciting as follows:

> Reynolds hired Perry in February 2011, as a "line tender" in production until Reynolds terminated her on November 4, 2016 for breaching a "Last Chance Agreement" due to poor work performance. She executed this agreement on July 8, 2016, when, again, due to poor work performance she reached the fifth step in Reynolds['] five-step disciplinary process that would have otherwise mandated termination. The Last Chance Agreement originally provided that Perry would be immediately terminated if at any time before July 8, 2017, she received discipline for poor work performance or for a safety violation. Reynolds later modified the agreement by reducing the probationary period from July 8, 2017, to November 19, 2016, a reduction of 8 months.
>
> Perry indisputably violated the modified agreement on November 4, 2016, when she placed the wrong date on quality control forms.…

(Opinion of the Court, p. 2.)

> Perry's claims of a sexually hostile work environment are based on two separate allegations. The first is an isolated incident that occurred . . . on Valentine's Day of 2016. A fellow union employee named Alfred Neff, with whom she had no romantic relationship, . . . handed her a box wrapped in aluminum foil. She unwrapped the box when she got in her car and found a vibrator, which she promptly tossed out the window. The second allegation involves her part-time supervisor named Virgil Fitzpatrick. Perry claims Fitzpatrick was "always saying something" to her of a sexual nature, which she said in her deposition happened "numerous times" beginning in June or July 2016. . . . Despite being notified of and trained in the particulars of Reynolds['] anti-harassment policy and complaint procedure – and apparently knowing how to complain to supervisors about harassment since she did so after both of the racial incidents she described – Perry did not

> complain about either of these incidents to anyone at Reynolds; except, that is, to Fitzpatrick himself every time he made a suggestive comment. In an affidavit submitted with her response to the summary judgment motion, again for the first time she claims that,
>
> > [B]ecause Fitzpatrick had control over my schedule I was concerned about the harassment impacting my job . . . Reynolds was fully aware of Fitzpatrick and his continued sexual harassment of female employees but did nothing to stop it. In fact, after I complained about Fitzpatrick [directly to Fitzpatrick], he changed my hours and increased the difficulty of my work assignments.
>
> Perry also claims in her affidavit, for the first time, that "Fitzpatrick routinely propositioned me for sex at work . . . on an almost daily basis." The Court will not consider the affidavit to the extent Perry now claims Reynolds was "fully aware" of Fitzpatrick's sexual harassment; this allegation is contradictory to her deposition testimony that she never told anyone about it, since one would reasonably expect that when asked if she told anyone in management about Fitzpatrick's actions, her response would be she did not have to tell management because it already knew. Neither will the Court consider the allegation that Fitzpatrick changed her hours after she rebuffed his advances, finding it conclusory and self-serving with no stated factual basis. Finally, the Court will not consider the new allegation that Fitzpatrick propositioned Perry for sex on an almost daily basis, finding it to be inconsistent with that portion of her deposition testimony where she alleged he propositioned her "numerous times."

(Opinion of the court, pp. 4-5) (footnotes omitted).

The court explained that Perry's hostile work-environment harassment claim was based upon the alleged comments and actions of one co-worker and of one supervisor. Citing *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir. 1992) (holding that there are two types of such harassment, those where the alleged harasser is a co-worker and those where the alleged harasser is a superior), the trial court further explained that in order for Perry to survive summary judgment on this claim, she had to make a *prima facie* case by showing that:

> (1) she is a member of a protected class; (2) she was subjected to unwelcome sexual harassment that is severe *or* pervasive; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with her work performance and creating an intimidating, hostile, or offensive working environment; and 5) employer liability. *Kauffman v. Allied Signal, Inc., supra*, 970 F.2d at 178.

(Opinion of the court, p. 6.)

The court determined that Perry "cannot establish that the conduct of her co-worker was sufficiently severe or pervasive to give rise to a claim of hostile environment/sexual harassment, nor can she establish employer liability for the conduct of either her co-worker or her part-time supervisor."

The court dismissed all of Perry's claims based on the vibrator incident. The court explained that in *Harris v. Forklift Systems, Inc*., 510 U.S. 17,

114 S.Ct. 367, 126 L.Ed.2d 295 (1993), the U.S. Supreme Court established the following factors in determining whether or not conduct is sufficiently severe or pervasive to constitute actionable sexual harassment:

> (1) the frequency of the discriminatory conduct;
> (2) its severity;
> (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and
> (4) whether it unreasonably interferes with an employee's work performance.

(Opinion of the court, p.7.)

Viewing the facts in a light most favorable to Perry, the court determined that Neff's giving her a vibrator although "offensive, is not sufficiently pervasive to create a hostile work environment." The court explained this was the only act of Neff about which Perry complained; that it was not accompanied by any offensive words or physically threatening words or deeds; and that it "did not rise beyond 'the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers' that is insufficient to create a hostile work environment[,]" citing *Stacy v. Shoney's, Inc.*, 955 F. Supp. 751 (E.D. Ky. 1997). The court continued its reasoning as follows: "it is undisputed Perry never told anyone in management about the vibrator incident[,]" noting that sexual harassment by a co-worker does not violate Title VII unless the employer knew or should have known about it and failed to act. *Kirkwood v. Courier-Journal*, 858 S.W.2d 194 (Ky. App. 1993).

With respect to Fitzpatrick, the court explained that his sexual comments presented different issues:

> Perry's allegation that they occurred "numerous times" is sufficient to create a genuine issue of material fact concerning whether the comments were pervasive enough to create a hostile work environment. However, the question still remains whether Reynolds is liable for Perry's comments. The court finds that Reynolds is not so liable.
>
> With one important exception, "an employer is vicariously liable for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee." *Jackson v. Quanex Corp.*, 191 F.3d 647, 663 (6th Cir. 1999). The exception involves an affirmative defense which Reynolds terms the *Ellerth/Faragher* defense. To avail itself of this defense, "the employer must show by a preponderance of the evidence that (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or" the employer responded adequately and effectively to correct the situation upon receiving the employee's complaints. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); and *Pierce v. Commonwealth Life Insurance Co.*, 40 F.3d 796, 803 (6th Cir. 1994). Here, Reynolds indisputably had a reasonable anti-discrimination policy in force that Perry knew about and failed to use to fend off Fitzpatrick's advances. If Fitzpatrick had been a co-worker, the inquiry would end there. The affirmative defense, though, contains an exception. The employer is vicariously liable for the harassment of the supervisor when the same supervisor takes "tangible employment action" against the plaintiff for supposedly refusing his overtures. *Cobb v. Cmty. Action Counsel for Lexington-*

> *Fayette*, 2008 WL 1087122, at *4 (Ky. App. 2008), citing *Burlington Industries, Inc v Ellerth*, 524 U.S. 742, 765 (1998) and its companion case *Faragher, supra*. . . .

(Opinion of the court, p. 9.)

> In the instant case, Fitzpatrick was not Perry's full-time supervisor. Rather, he only had supervisory control over her when she worked past her regular shift. Fitzpatrick therefore played no role in levying any of the disciplinary actions that led to Perry's eventual termination. Rather, Perry testified in her deposition that when she rebuffed Fitzpatrick's advances, "he would put me on jobs he wouldn't usually put me on. He would put me on a little harder job or something that would be more vigorous," as opposed to "an easy job." The Court finds that assignment of a task that is a "little harder" as opposed to "easy" does not rise to a tangible employment action, especially when the task is within the employee's job description and the employee suffers no adverse economic consequences. The Court therefore finds that the *Ellerth/Faragher* defense entitles Reynolds to summary judgment as a matter of law on Perry's sexual harassment /hostile environment claims.

(Opinion of the court, p. 11) (footnote omitted).

The court also dismissed Perry's race-based claims and dismissed Perry's complaint with prejudice. The opinion and order recites that it is a "final and appealable order, there being no just reason for delay."

On August 7, 2018, Perry filed a Notice of Appeal to this Court. "The standard of review on appeal of a summary judgment is 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). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Perry's first argument is that the trial court erred in dismissing her sexual harassment/hostile work environment claim. She contends that whether the harassment was "severe and pervasive" was a question of fact that should have been submitted to the jury and that the trial court erred by ignoring the standard in *Steelvest*, 807 S.W.2d 476. We cannot agree.

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Harris, 510 U.S. at 23, 114 S. Ct. at 371; *Gray v. Kenton Cty*., 467 S.W.3d 801, 805 (Ky. App. 2014)

("Whether the harassment is severe and pervasive is determined by a totality of the circumstances test . . . .").

There was no disputed issue of fact regarding the vibrator incident. The trial court properly considered the totality of the circumstances as set forth above in concluding that it was not "sufficiently severe or pervasive to create a hostile work environment." One lone incident was at issue. We find no error in the court's analysis that one occurrence failed to constitute a hostile work environment.

Next, Perry argues that because Fitzpatrick was her supervisor, Reynolds is vicariously liable and that Reynolds has no affirmative defense because Perry ultimately "suffered the loss of her job ('tangible employment action') . . . ."

> To establish a prima facie case of a hostile work environment based on sex, a plaintiff must show that:
>
> (1) she is a member of a protected class,
>
> (2) she was subjected to unwelcome sexual harassment,
>
> (3) the harassment was based on her sex,
>
> (4) the harassment created a hostile work environment, and that
>
> (5) the employer is vicariously liable.

Gray, 467 S.W.3d at 805 (quoting *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 347 (6th Cir. 2005))

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) (both cases decided the same day), the Supreme Court adopted the following holding:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary 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. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. See *Burlington*, 524 U.S., at 762-763, 118 S.Ct., at 2269.

Faragher, 524 U.S. at 807-08, 118 S.Ct. at 2292-93. "A tangible employment action constitutes 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." *Ellerth*, 524 U.S. at 761, 118 S. Ct. at 2268. KRS 344.040 is interpreted "in consonance with federal anti-discrimination law. Thus, the *Ellerth/Faragher* affirmative defense is available to

employers facing vicarious liability for sexual harassment under KRS 344.040." *Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540, 544 (Ky. 2001) (footnotes omitted).

In the case before us, the trial court concluded that Perry could not establish an essential element of her claim -- employer liability for the conduct of her part-time supervisor, Virgil Fitzpatrick, "because he played no role in levying any of the disciplinary actions that led to Perry's eventual termination." Additionally, Reynolds notes that Fitzpatrick's alleged harassment could not have been the cause of Perry's termination because she admittedly did not report it to anyone. Perry testified by deposition that Fitzgerald would put her on a harder job when she rebuffed his advances. However, the court found that "assignment of a task that is a 'little harder' as opposed to 'easy' does not rise to a tangible employment action, especially when the task is within the employee's job description and the employee suffers no adverse economic consequences."

We are compelled to agree with the trial court's analysis. Fitzpatrick's conduct simply did not culminate in a tangible employment action. We also agree that Reynolds "indisputably had a reasonable anti-discrimination policy in force that Perry knew about and failed to use to fend off Fitzpatrick's advances" and that the *Ellerth/Faragher* affirmative defense to liability entitled Reynolds to summary

judgment as a matter of law on Perry's sexual harassment/hostile environment claims.

Perry's final argument is that the trial court should have considered her affidavit. Perry filed her affidavit with her response to Reynolds's motion for summary judgment months after her deposition was taken. As noted above, the trial court refused to consider the affidavit "to the extent Perry now claims Reynolds was 'fully aware' of Fitzpatrick's sexual harassment; this allegation is contradictory to her deposition testimony that she never told anyone about it ….' The trial court declined to "consider the allegation that Fitzpatrick changed her hours after she rebuffed his advances, finding it conclusory and self-serving with no stated factual basis." The court would not "consider the new allegation that Fitzpatrick propositioned Perry for sex on an almost daily basis, finding it to be inconsistent with that portion of her deposition testimony where she alleged he propositioned her numerous times."

We find no error. *See Gilliam v. Pikeville United Methodist Hosp. of Kentucky, Inc.*, 215 S.W.3d 56 (Ky. App. 2006) (post-deposition affidavit may be admitted to explain testimony, but affidavit contradicting earlier testimony cannot be submitted for purpose of creating genuine issue of material fact to avoid summary judgment); *Groves v. Woods*, No. 2016-CA-001546-MR, 2018 WL

560417, at *3 (Ky. App. Jan. 26, 2018("Nor can a litigant provide self-serving statements to defeat a motion for summary judgment.").

We AFFIRM the Opinion and Order of the Jefferson Circuit Court granting summary judgment in this matter.

ALL CONCUR.

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