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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2024-CA-0640-MR

CHAD STEPHENS — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 22-CI-00035

HERB GEDDES FENCING — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, ECKERLE, AND KAREM, JUDGES.

ACREE, JUDGE: Chad Stephens appeals the Jessamine Circuit Court's summary judgment for his former employer, Herb Geddes Fencing (HGF), and dismissing his claims of retaliatory discharge for pursuing a workers' compensation claim and his hostile work environment claim based on sexual harassment. We affirm.

BACKGROUND

Stephens worked for HGF from 2008 to 2021. In 2016, he injured his back unrolling heavy chain link fencing. He did not file a workers' compensation claim but had back surgery at HGF's expense. HGF paid him for the eight weeks of recovery before he returned to work. When he did return to work, he was made foreman of crews of varying sizes and together they performed the necessary heavy lifting each job required.

In August 2017, Hubert "Jack" Badgett purchased HGF from the prior owner, Doug Geddes, and became Stephens' supervisor. According to Stephens' deposition testimony, Badgett had a "different style . . . of being a boss, of being an owner." When asked to elaborate Stephens explained, "The paperwork that we received [to perform a fencing job] would have a little less information," although that did not "cause a problem." Badgett had fewer "toolbox talks"—morning planning sessions for the day—than the previous owner. And Badgett reduced the crew sizes in reaction to workforce attrition. Stephens had no knowledge whether any retirement or resignation was because they "didn't like working for Jack Badgett[.]" The fact was, Badgett gave Stephens "a little bit more responsibility."

Two years later, in June 2019, during a company sponsored HGF employee outing at Kentucky Kingdom in Louisville, an incident occurred in the swimming pool area. Stephens testified that he was "pretty sure [Badgett] was

drinking that day, and he reached up and he grabbed my—my nipple piercings and said something that was little bit off." Stephens could not recall the words Badgett spoke, but he told Badgett, "Don't do that."

Stephens recalled only one prior incident of unwelcome touching—"a smack on the ass, to like—I don't know why. . . . And I had the thought, 'Well, that was weird.'" He told Badgett, "Don't do that." Stephens testified he and his co-workers talked about Badgett—"what we would say is, 'What's wrong with that guy? He's a little weird. Do you think he's a homo . . . ?'"

Stephens testified about and gave examples of Badgett's vulgarities in the workplace which typically involved discussing Badgett's own genitalia and physical contact with male workers. When Stephens was asked in deposition, "do you know, is Jack gay?" he responded, "I have no idea."

In 2019, after the HGF employee outing, Stephens re-injured his back at work and filed a workers' compensation claim. This time, post-surgery recovery lasted nearly a year. In October 2020, while still recuperating, Stephens discussed his limitations generally with Badgett, and about his return to work. Even though there was no light duty position in HGF's field work, Badgett allowed Stephens to return to work but urged him to rely on the people he supervised.

On February 8, 2021, the senior claims representative for HGF's workers' compensation carrier informed HGF for the first time that Stephens'

medical restrictions are permanent, that he could not perform repetitive bending or stooping and could not lift more than 50 pounds. HGF had no position that could be performed within those restrictions. HGF informed its workers' compensation carrier that HGF could not accommodate Stephens' permanent medical restrictions. On February 9, 2021, HGF terminated Stephens' employment.

On January 20, 2022, Stephens sued HGF. He alleged he was fired in retaliation for making a workers' compensation claim. He also alleged a hostile work environment claim, claiming Badgett subjected him to "lewd and sexual comments" and "unwanted touching."

HGF moved for summary judgment. With respect to Stephens' workers' compensation retaliation claim, the circuit court determined there was no genuine issue of material fact and that HGF terminated Stephens due to medical restrictions HGF could not accommodate. The circuit court observed that Stephens' workers' compensation claim was filed more than 16 months prior to his discharge, and that Stephens' discharge only occurred after HGF was notified by its insurance carrier of the permanency of Stephens' medical restrictions.

As to Stephens' sexual harassment/hostile work environment claim, the circuit court concluded Badgett's conduct was "inappropriate and in poor taste, but [did] not rise to the level of sexual harassment, especially considering that both parties are male," and that prior to his termination Stephens "never lodged a formal

complaint or indicated that the behavior altered the conditions of his employment or created an abusive working environment."

After the circuit court granted summary judgment for HGF and denied Stephens' post-judgment motion, he brought this timely appeal.

STANDARD OF REVIEW

"Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court's grant of summary judgment is reviewed *de novo*." *Brown v. Griffin*, 505 S.W.3d 777, 781 (Ky. App. 2016) (citation omitted).

ANALYSIS

The Retaliation Claim

The Workers' Compensation Act (the Act), KRS[1] Chapter 342, says, "No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter." KRS 342.197(1). Section (3) of KRS 342.197 authorizes a cause of action in circuit court for a violation of its section (1).

There is no direct evidence of retaliation. In such a case, "the burden of production and persuasion follows the familiar *McDonnell Douglas* [*v. Green*,

[1] Kentucky Revised Statutes.

411 U.S. 792 (1973)] framework." *Kentucky Dep't of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003). Under that framework,

> First, the complainant must establish a prima facie case of retaliation. To do so, the employee must demonstrate that (1) he engaged in a protected activity; (2) the defendant knew that the plaintiff had done so; (3) adverse employment action was taken; and (4) that there was a causal connection between the protected activity and the adverse employment action. The complainant need not prove that the sole or even the primary reason for the termination was related to the protected activity but only that its pursuit was a substantial and motivating factor in the decision to terminate.
>
> Once a prima facie case is shown, the burden then shifts to the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action. If the employer can provide a legitimate explanation, the burden then shifts back to the employee to demonstrate that this reason was merely a pretext for retaliation.

Benningfield v. Fields, 584 S.W.3d 731, 738–39 (Ky. 2019) (internal quotation marks and citations omitted).

Stephens' burden in opposing summary judgment was to "create a genuine dispute [of material fact] at each stage of the *McDonnell Douglas* inquiry." *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 661 (6th Cir. 2000) (applying *McDonnell Douglas* framework in Title VII case). *See McBrearty v. Kentucky Community and Tech. College System*, 262 S.W.3d 205, 214 (Ky. App. 2008) (citation omitted) (Kentucky courts are persuaded by federal interpretation in applying *McDonnell Douglas* framework to discrimination cases brought under

state law.). There is no dispute about Stephens' satisfaction of the first three elements of his *prima facie* case. Our focus is on the fourth and final element.

Stephens' Prima Facie *Claim of Retaliation*

As in the Sixth Circuit case of *Dixon v. Gonzales*, the only question is whether Stephens "has demonstrated a causal connection between the protected activity . . . and the adverse employment action . . . [by] proffer[ing] evidence sufficient to raise the inference that h[is] protected activity was the likely reason for the adverse action." 481 F.3d 324, 333 (6th Cir. 2007) (internal quotation marks and citations omitted). "The burden of proof at the *prima facie* stage is minimal; all the plaintiff must do is put forth some credible evidence that enables the court to deduce that there is a causal connection between the retaliatory action and the protected activity." *Id.*

Stephens argues that two facts support his *prima facie* claim of causation. First, he claims Badgett called him a "liability." Second, he cites the timing of the termination and argues the temporal proximity of his claim to the termination justifies an inference of discrimination or retaliation.

Stephens says Badgett called him a "liability" when terminating him. He characterizes that as a "retaliatory statement." Explaining his reasoning, Stephens says such a characterization is justified "based on his prior workers' compensation claims" that cost HGF money.

Stephens also argues that his filing of a workers' compensation claim (October 2019) and his termination (February 2021) were sufficiently close in time to justify the inference of causation. This Court said:

> "Close temporal proximity" does not mean that the employee must be terminated within days or even weeks of the filing of a workers' compensation claim. Such a requirement would shield the employer from liability by merely waiting months or even years to terminate the employee. The logical approach is for the court to view the time between the two events in the context of the entire circumstances.

Dollar General Partners v. Upchurch, 214 S.W.3d 910, 916 (Ky. App. 2006). In *Upchurch*, this Court found a five-month interval, in the context of the entire circumstances, "was a sufficiently close temporal proximity to establish an inference that there was causal connection between the protected activity and the termination." *Id. But see Turner v. City of Paris, Ky.*, 5:11-CV-351-KSF, 2012 WL 6706164, at *5 (E.D. Ky. Dec. 26, 2012), *aff'd sub nom. Turner v. City of Paris, Ky.*, 534 Fed. App'x 299 (6th Cir. 2013) (citing *Upchurch*, 214 S.W.3d at 916) (Forester, J.; "five months . . . is not 'very close in time' under Sixth Circuit precedent and does not support an inference of causation").

We are mindful that, at each stage of the *McDonnell Douglas* inquiry including the *prima facie* stage, "must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence

at trial warranting a judgment in his favor." *Charalambakis v. Asbury University*, 488 S.W.3d 568, 572 (Ky. 2016). Therefore, with no intention of creating a brightline rule, and privy only to what this record tells, we are unwilling to hold that Stephens failed to present enough evidence to shift the burden of going forward to HGF to articulate a legitimate, non-retaliatory reason for the adverse employment action. *Benningfield*, 584 S.W.3d at 739.

HGF has a strong argument that Stephens' claim fails even at the *prima facie* stage. For that reason, our ruling as to the *prima facie* claim should be read as presuming the minimal standard was met for the purpose of appellate review. As we see it, the sounder basis for affirming the circuit court is the absence of a genuine issue of material fact that HGF's legitimate, non-retaliatory basis for termination was not a pretext.

HGF's Legitimate, Non-retaliatory Basis for Stephens' Termination

HGF's legitimate, non-retaliatory reason for terminating Stephens, as stated in its brief, was that HGF "did not have light duty work available as demonstrated" previously in its brief. (Appellee's Brief at 20). When asked in deposition "why [Stephens] was terminated[,]" Badgett said: "He brought in a doctor's note that said he was permanently, I don't want to say disabled, but on light duty. And we don't have light duty." (Appellee's Br. at 4) (quoting Badgett Dep. at 33:19–23). HGF was not required to create a new position to

accommodate Stephens' work restrictions.[2] Those facts articulate a legitimate, non-retaliatory basis for Stephens' termination. Pursuant to *McDonnell Douglas*, that shifted the burden of going forward back to Stephens to present evidence that HGF's alleged legitimate, non-retaliatory basis for termination was mere pretext.

Stephens' Evidence of Pretext

Stephens never mentions pretext in either his main brief or his reply brief. He simply repeats the same two facts he alleged to establish his *prima facie* claim—(1) that Badgett called him a "liability" and (2) there is sufficiently close temporal proximity to justify the inference his termination was retaliatory.

Absent Stephens' presentation of any direct pretext argument, the Court attempts to read his *prima facie* claim argument as if in the context of the inquiry's pretext stage. First, Stephens claims Badgett called him a liability "based on his prior workers' compensation claims" asserting it is proof of retaliation. We disagree.

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[2] To the contrary, the Equal Employment Opportunity Commission, providing guidance to employers regarding the Americans with Disabilities Act, addressed this circumstance directly, stating:

> The ADA does not require an employer to create a new position . . . in order to reassign an employee who can no longer perform the essential functions of his/her original position, with or without a reasonable accommodation.

EEOC Enforcement Guidance: Workers' compensation and ADA, 1 Disability Discrimination in the Workplace § 16:14 (Feb. 2026 Update) (answer to inquiry 23).

We first note that although Stephens refers to his workers' compensation claims in the plural, he only filed one claim. Badgett's predecessor owner of HGF dissuaded Stephens from formally pursuing a claim for his 2016 workplace injury. That leaves only the claim he brought after a subsequent workplace accident exacerbated his original injury.

For our review, we accept as fact that Badgett said what Stephens claimed he said. But we must also accept the fact that, as an employee, Stephens was a liability, but not necessarily HGF's liability.

An employer is obligated to compensate an employee he hires and, without more to the equation, that makes any employee a net liability from the moment of hiring. But a successful employment relationship is mutually beneficial and, from the employer's perspective, makes the productive employee a net asset. Otherwise, there is no reason to retain him. Obviously, a nonproductive employee results in an employer's net liability. Play out that notion in the context of the Act.

If an employee's inability to be productive is the result of a workplace injury, he will remain a net liability until he achieves "[o]ne of the primary purposes" of the Act—"restoration . . . to gainful employment . . . [preferably] with the same employer or to the same or similar employment." KRS 342.710(1).

Stephens filed his claim, presumably hoping for such restoration. Badgett did not terminate Stephens when he filed his claim, apparently sharing the

same hope. HGF and Badgett allowed the claim process to take its course. The process and the Act itself ensure that Stephens' workplace accident and his resulting inability to be productive do not become HGF's liability. HGF's voluntary election to participate in the Act's alternative to tort litigation limited its exposure to liability, and its purchase of workers' compensation insurance shifted all remaining liability of retaining Stephens to the insurer. So, in fact, Badgett was not wrong when he called Stephens a liability. But, because of the Act, he was not a liability HGF bore directly—at least not until he returned to the payroll despite his work restrictions. The Act requires the insurer to bear the liability of Stephens' inability to perform heavy work until the goal of the Act—the employee's return to work he performed before his injury—is accomplished.

So long as Stephens' injury was not deemed permanent, the potential existed that he could return, one day, to the heavy duty work he performed prior to his workplace injury. Unfortunately, medical professionals found Stephens' work restrictions were permanent. By definition then, Stephens can never be restored to gainful employment at HGF. That impossibility is the cause for Stephens' termination. It is a legitimate, non-retaliatory ground for termination.

"[E]mployers simply are not required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future. Moreover, employers are not required to create new positions for disabled

employees in order to reasonably accommodate the disabled individual." *Milby v. Jefferson Cnty. Bd. of Educ.*, No. 2002-CA-000959-MR, 2003 WL 21474209, at *4 (Ky. App. Jun. 27, 2003) (quoting *Monette v. Elec. Data Systems Corp.*, 90 F.3d 1173, 1187 (6th Cir. 1996), *abrogated on other grounds by Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312 (6th Cir. 2012)).[3] When Stephens was terminated, he was being paid for work he could not perform. Even if insensitive, accurately calling Stephens a liability will not support an inference that terminating him for lack of work he could perform was a mere pretext.

We also find his view of the temporal proximity factor unpersuasive. When Stephens returned to work after nearly a year of convalescing, his status was still restriction to light duty with no heavy lifting. With no indication of the permanency of his restrictions, HGF returned Stephens to the payroll despite having no light duty work within his medical restrictions. As Badgett testified without objection, "Everything here [in fence installation] is heavy, for both leadmen [such as Stephens' had been before he exacerbated his original injury] and employees[.]" The reason is that standard fencing materials "come in two hundred thirty (230) pound rolls."

[3] This Court repeated the same legal concept in *Yadon v. Toyotetsu America, Inc.*, No. 2011-CA-001243-MR, 2012 WL 2472137, at *6 (Ky. App. Jun. 29, 2012) (An employer, "under Kentucky law, is not required to create a new position as a reasonable accommodation."). No published Kentucky opinion sets out this principle which is universally applied if federal civil rights cases in federal courts. Therefore, we cite *Milby* as persuasive.

This was Stephens' status for the next four months or so. Badgett had no reason to believe all hope was gone of Stephens' "restoration . . . to the same or similar employment" with HGF before his injury. KRS 342.710(1). In all, about sixteen months elapsed between Stephens' filing of a claim and his termination.

"The sooner adverse action is taken after the protected activity, the stronger the implication that the protected activity caused the adverse action, particularly if no legitimate reason for the adverse action is evident." *Upchurch*, 214 S.W.3d at 916 (quoting *McCullough*, 123 S.W.3d at 135). Stephens was not terminated until sixteen months after he filed his claim. And, while it is certainly true that Badgett wasted no time terminating Stephens once he learned Stephens' medical restrictions were permanent, the proximity between learning of that permanency and the termination is not a factor in the calculus of a claim of retaliation.

Ironically, the near immediacy of Stephens' termination after Badgett learned Stephens' restrictions are permanent justifies the inference that the "legitimate, non-retaliatory reason" for terminating Stephens was the lack of any employment position at HGF with duties he could perform.

We affirm the circuit court's summary judgment on the workers' compensation retaliation claim. There are no genuine issues of material fact

regarding the legitimate, non-retaliatory reason HGF terminated Stephens and HGF is entitled to judgment as a matter of law.

Stephens' Hostile Work Environment Claim

That takes us to Stephens' hostile work environment claim based on the Kentucky Civil Rights Act (KCRA), specifically KRS 344.040(1). Like his retaliation claim, this claim proceeds under the guidance of federal jurisprudence interpreting Title VII claims. Title VII is a section of the Civil Rights Act of 1964 that, like KRS 344.040(1), makes actionable an employer's discrimination based on, among other things, sex, including sexual harassment.

"For an atmosphere of sexual harassment or hostility to be actionable, . . . the offending behavior 'must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Pennsylvania State Police v. Suders*, 542 U.S. 129, 146–47 (2004) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). We measure severity and pervasiveness by whether "the workplace is permeated with discriminatory intimidation, ridicule, and insult . . . ." *Burton v. Kentucky State Police*, 341 S.W.3d 589, 593 (Ky. App. 2011).

The incidents a claimant identifies to illustrate severity and pervasiveness "must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *Ammerman v. Bd. of Educ. of*

Nicholas Cnty., 30 S.W.3d 793, 798 (Ky. 2000) (internal quotation marks and citation omitted). "[T]he harassment must also be both objectively and subjectively offensive as determined by 'looking at all the circumstances.'" *Id.* The court reviewing the claim considers "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 v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993) (as quoted in *Ammerman*, 30 S.W.3d at 798).

Stephens' primary, if not only argument on appeal is that the circuit court "used the wrong standard." This is demonstrated, he claims, by the court's noting "both parties are male," thereby contradicting the holding in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Indeed, *Oncale* is clear that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Id.* at 79.

We first note the obvious about this argument—our review is *de novo* and it does not matter what standard the circuit court used if the correct result is reached. However, our *de novo* review deviates little if at all from the circuit court's analysis which properly focused on the principles often repeated since the Supreme Court of the United States rendered *Oncale*. We start with that opinion.

Oncale goes directly to the point, explaining that Title VII "requires neither asexuality nor androgyny in the workplace; it forbids only behavior *so objectively offensive as to alter the 'conditions' of the victim's employment*." *Id.* at 81 (emphasis added). "We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—*such as male-on-male horseplay* or intersexual flirtation—for discriminatory 'conditions of employment.'" *Id.* (emphasis added).

In the case before us, the circuit court began its grant of summary judgment by expressly citing *Oncale* for the point that Stephens' and Badgett's being the same sex did not prohibit the claim from going forward. That beginning clearly rejected one of HGF's arguments, abandoned in this appeal, based on the fact Stephens is also male.

Instead, the court's finding that Stephens failed to present a viable claim focused on two material facts about which there is no genuine issue—(1) prior to his termination, Stephens made no effort to address the issue with more formality than saying, "Don't do that"; and (2) neither before nor after his termination did he ever "indicate[] that the behavior altered the conditions of his employment or created an abusive working environment." The circuit court's reference to both parties being male appears to be nothing more than an allusion to

the type of "male-on-male horseplay" *Oncale* says will not support a claim for hostile work environment based on sex discrimination.

Stephens argues he could not make a more formal complaint about Badgett's conduct before his termination because Badgett is HGF's owner and a formal complaint would be futile. We do not take the position that, under those circumstances, the failure to formally complain disqualifies a claim. We are saying, however, that putting one's objection in writing is a way of evidencing a subjective offensiveness to the conduct that can distinguish it from "male-on-male horseplay." Instead, Stephens reacted by talking with his male co-workers about Badgett being "weird." Other than that, there is no evidence contemporaneous with the alleged conduct, or even just pre-termination, that supports the claim that Stephens found Badgett's conduct more subjectively offensive than as a topic for water-cooler conversation.

More significantly, Stephens identifies nothing to support his claim that Badgett's conduct was "so objectively offensive as to alter the 'conditions' of [his] employment." *Oncale*, 523 U.S. at 81. Reading the record in a light most favorable to Stephens, we find a bald assertion in his complaint that HGF discriminated against him "in the terms and conditions of his employment due to his sex (male)" causing him to suffer "humiliation and economic loss which demands compensation." However, he fails to present evidence that the conditions

of his employment were altered in any way. We also looked at Stephens' response to the motion for summary judgment in search of such evidence. He argued only that he "is a member of a protected class" and "was subjected to sexual harassment." Stephens appears to conflate his justifiable termination with an alteration in the conditions of his employment, characterizing the termination itself as evidence in his hostile work environment claim. We cannot agree with the illogic that a lawful termination can be an unlawful alteration of employment conditions for purposes of a discrimination claim.

We share the circuit court's distaste, even disgust, for Badgett's crude behavior and both this Court and that expressed as much in writing, something Stephens never did before filing his complaint. And while we need not defer to the circuit court's reasoning, we also assess the evidence as does that court. The conduct Stephens says justifies a claim of hostile work environment based on sexual harassment was, as the circuit court put it, "'offhand' and isolated," or as *Ammerman* says, "episodic." 30 S.W.3d at 798. Again, quoting the circuit court, "Stephens apparently had no reservations about returning to work after being off almost a year[.]" That indicated to the circuit court "that he did not subjectively perceive the environment to be abusive." Similarly, "looking at all the circumstances" memorialized in the record, this Court sees nothing to suggest Stephens found Badgett's conduct so subjectively offensive that he did something

about it. And although objectively offensive to persons of ordinary sensibilities, Badgett's conduct was not so offensive that it altered the conditions of Stephens' employment.

For these reasons, we conclude there were no genuine issues of material fact regarding Stephens' claim of a hostile work environment and HGF was entitled to judgment as a matter of law.

CONCLUSION

The Jessamine Circuit Court's January 25, 2024, summary judgment is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Edward E. Dove
Lexington, Kentucky

Albert B. McQueen
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jennifer K. Nordstrom
Jacob A. Lentsch
Ft. Mitchell, Kentucky