

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000647-MR

MARY TURNER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 12-CI-000074

JEFFERSON COUNTY CLERK'S OFFICE;
AND HON. BOBBIE HOLSCLAW

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Mary Turner appeals a Jefferson Circuit Court Opinion and Order entered March 7, 2012, dismissing her complaint against Bobbie Holsclaw¹ and the Jefferson County Clerk's Office pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f), for failure to state a claim upon which relief could be

¹ Bobbie Holsclaw is the duly elected Jefferson County Clerk.

granted. Turner's complaint alleges she was sexually harassed by an individual under Holsclaw's direct supervision; the harassment created a hostile work environment; and, as a result of reporting the incidents, her employment was terminated. Turner also asserted claims for wrongful discharge and intentional infliction of emotional distress. For the reasons stated, we conclude the complaint sufficiently sets forth a claim for hostile work environment and retaliatory discharge and, thus, we affirm in part, reverse in part, and remand.

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 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 under the control and supervision of Holsclaw.² 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

² The complaint alleges that John Clark was Mary Turner's supervisor, but appellees assert that Turner supervised Clark. Bobbie Holsclaw, as Jefferson County Clerk, supervised all employees in the Clerk's Office in Jefferson County.

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 argues that she has alleged sufficient facts pursuant to CR 8.01. Under CR 8.01(1), a complaint must set forth “a short and plain statement of the claim showing that the pleader is entitled to relief” and must demand “judgment for the relief to which he deems himself entitled.” A circuit court’s grant of a motion to dismiss made pursuant to CR 12.02(f), “is governed by a rigorous and sweeping standard which dictates that it should be granted only where ‘it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of [the] claim.’” *Mitchell v. Coldstream Labs., Inc.*, 337 S.W.3d 642, 644 (Ky. App. 2010) (quoting *Pari-Mutuel Clerks’ Union v. Ky. Jockey Club*, 551 S.W.2d 801 (Ky. 1977)). The allegations contained in the pleading “are to be treated as true and must be construed in a light most favorable to the pleading party.” *Mitchell*, 337 S.W.3d at 644 (citation omitted). “The test is whether the pleading sets forth **any** set of facts which – if proven – would entitle the party to relief. If so, the pleading is sufficient to state a claim.” *Id.* at 645. Because the trial court is not required to make factual findings, “the determination is purely a matter of law.” *Id.* at 645. As a result, the decision below is reviewed *de novo* by this Court. *Id.* With this standard in mind, we turn to the sufficiency of the allegations in the complaint.

First, we consider Turner's allegation that sexual harassment in the work place created a hostile work environment. In *Ammerman v. Board of Education of Nicholas County*, 30 S.W.3d 793, 798 (Ky. 2000) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986)), the Supreme Court of Kentucky held that a sexual harassment claim may be brought based on a hostile or abusive work environment. The Court noted:

For sexual harassment to be actionable under the *Meritor* standard, it must be sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment. 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, 30 S.W.3d at 798 (internal citations omitted) (quotations omitted) (footnotes omitted). The determination as to whether or not evidence is sufficient to prove that harassment is "severe or pervasive," is a question of fact for the jury. *Meyers v. Chapman Printing Co. Inc.*, 840 S.W.2d 814, 822 (Ky. 1992).

In her complaint, Turner alleged she was "smacked . . . on the buttock" by Clark and he routinely touched his groin and made inappropriate sexual gestures to her. Turner also alleges that Clark slept on the floor of her office in what she believed was an attempt to have a sexual encounter with her.

Although the complaint does not allege how often this behavior occurred, it does allege that the behavior continued after she complained to management. While these allegations could be more thoroughly stated, they are at a bare minimum sufficient to state a claim. The allegations may ultimately be proven or established not to be severe or persuasive, but nonetheless are sufficient to assert a claim to withstand dismissal at this early stage of the proceeding under CR 8.01.

As concerns the retaliation claim:

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.’

Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 803 (Ky. 2004) (quoting *Christopher v. Stouder Mem’l Hosp.*, 963 F.2d 870, 877 (6th Cir. 1991)). “In cases where there is no direct evidence of a causal connection, the causal connection of a *prima facie* case of retaliation must be established through circumstantial evidence.” *Brooks*, 132 S.W.3d at 804. Simply establishing that the protected activity was likely the reason for the adverse action is sufficient. *Id.*

Turner’s complaint alleges that she reported her allegations of sexual harassment to management, and specifically to Holsclaw, but no action was taken. Turner further alleges that she had an excellent employment record and work history during her term of employment, including her unrefuted statement that she

was never suspended, demoted, disciplined, discharged or threatened with discharge prior to reporting Clark's improper behavior. After complaining to Holsclaw, Turner alleges she began receiving unfavorable reviews and was eventually terminated by Holsclaw. The circuit court reasoned that Turner failed to allege a sufficient causal relationship between her complaints to management and her subsequent termination. The court also found that there was not a close temporal relationship between the alleged harassment, her complaints, and her termination. However, if we accept Turner's allegations as true, as required in our CR 12 analysis, a causal relationship could be established if her termination was based on the complaints of sexual harassment given her prior work history and the relatively short duration of her employment, during which the incidents allegedly occurred. Again, for purposes of stating a claim under CR 8.01, Turner has met the bare minimum standard, sufficient to state a cause of action.

For the foregoing reasons, we affirm in part as concerns the dismissal of the wrongful discharge claim and the intentional infliction of emotional distress claim and reverse and remand for further proceedings on the remaining claims as addressed by this opinion.

COMBS, JUDGE, CONCURS,

MOORE, JUDGE, CONCURS IN PART, DISSENTS IN PART,
AND FILES SEPARATE OPINION.

MOORE, JUDGE, CONCURRING IN PART AND DISSENTING IN
PART: I concur with the majority's decision to affirm the circuit court regarding

Turner's claims of wrongful discharge and intentional infliction of emotional distress claim. However, I respectfully dissent from the majority's decision to reverse the circuit court on Turner's claims of hostile work environment and retaliatory discharge. Certainly, dismissal pursuant to CR 12.02(f), for failure to state a claim upon which relief can be granted, is a high standard for dismissal. However, I agree fully with the circuit court's reasoning and decision that even taking all of Turner's allegations regarding the offensive conduct as true, as the Court is obligated to do on a motion to dismiss, the conduct of which Turner complains is insufficient as a matter of law to state a claim for hostile work environment and fails to allege the close temporal relationship necessary between protected activity and the adverse action to state a claim for retaliatory discharge. Agreeing wholly with the circuit court's decision, I would affirm.

BRIEF FOR APPELLANT:

Kurt A. Scharfenberger
Louisville, KY

BRIEF FOR APPELLEES:

Janice M. Theriot
Laurence J. Zielke
Louisville, KY