RENDERED: MAY 30, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000782-MR

LORA N. PASCHAL — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 07-CI-00757

LANDMARK COMMUNITY NEWSPAPERS OF KENTUCKY, INC., d/b/a THE SENTINEL; and JAMES M. IRISH — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

COMBS, JUDGE: Lora Paschal appeals the order of the Shelby Circuit Court which granted summary judgment to Landmark Community Newspapers, Inc., d/b/a *The Sentinel*. After our review, we affirm.

Paschal was employed by *The Sentinel* as a sales representative beginning in 1999. The record indicates that there were two customer complaints and one admonishment regarding her attendance in 2000 and 2001. Otherwise, it appears that her employment was unremarkable until 2005 when she began receiving admonishments concerning training and attendance. In 2006, Paschal complained to *Sentinel* management about the conduct of Jim Irish, her supervisor.

On December 12, 2006, *The Sentinel* terminated Paschal's employment. She alleges that the termination occurred in retaliation for her reporting Irish's behavior. Therefore, on December 7, 2007, Paschal filed a complaint alleging several causes of actions against multiple defendants. The only claims pertinent to this appeal are that Irish sexually harassed her and that her termination was an act of retaliation for reporting the harassment.

In her complaint, Paschal alleged that Irish made sexually inappropriate remarks on a daily basis. He frequently commented on women's hormonal cycles and once bragged about being a member of "the penis club." Additionally, Irish allegedly recounted to Paschal and some of her co-workers a sexually explicit anecdote involving his wife and another woman. Paschal claimed that Irish accompanied the story with an explicit pantomime which created an image that lingered in her mind. The complaint also detailed an incident when Paschal overheard Irish make an inappropriate comment to a bartender at a *Sentinel* dinner event.

Additionally, Paschal related one instance when a customer grabbed her and propositioned her. *The Sentinel* then transferred that customer's account to a male employee. On another occasion, a male customer made Paschal feel uncomfortable by inviting her to have a beer with him at his home.

On October 5, 2011, *The Sentinel* filed a motion for summary judgment in which it alleged that Paschal had not met the requirements for *prima facie* cases of sexual harassment and retaliation. Discovery had been conducted, including Paschal's answers to interrogatories and her deposition.

In response to the motion, Paschal filed an affidavit providing additional facts. She stated that Irish had suggested that she wear revealing clothing when interacting with male customers. *The Sentinel* filed a motion to strike the affidavit, which the trial court granted. Therefore, it did not consider her affidavit in the order granting summary judgment on the claims which are the subject of this appeal. On April 30, 2013, the trial court entered an order denying Paschal's motion to vacate or amend the order. This appeal follows.

Paschal's threshold argument is that the court committed error when it struck the affidavit. The court did not consider it because it was filed long after Paschal's deposition and interrogatory testimony. It relied on *Lipsteur v. CSX Transportation, Inc*., 37 S.W.3d 732 (Ky. 2000), in which the court held that post-deposition affidavits ***are*** admissible for ***explaining*** deposition testimony. *Id*. at 735. However, parties are ***not*** permitted to provide an affidavit that presents ***contradictory*** information for the purpose of overcoming a motion for summary

judgment. *Id*. at 736. The rule specifically applies to depositions and to interrogatories. *Rogers v. Integrity Healthcare Services, Inc*., 358 S.W.3d 507, 511 (Ky. 2012).

Paschal argues that her affidavit should have been considered by the trial court because it supplemented her deposition testimony rather than contradicted it. In the affidavit, Paschal conceded that the allegations had been omitted from both her interrogatory answers and her deposition. She characterizes the information as supplemental. However, in a similar situation, this Court has held that such additional information is contradictory and inadmissible. *Gilliam v. Pikeville United Methodist Hospital of Kentucky, Inc*., 215 S.W.3d 56 (Ky. App. 2006). In that case, the plaintiff was asked to provide evidence of damages in his deposition; he did not list any. The trial court rejected his subsequent affidavit detailing damages after the motion for summary judgment had been filed. This Court affirmed. *Id*. at 64.

We are persuaded that *Gilliam* is the appropriate precedent in this case. *The Sentinel*'s interrogatory asked Paschal to recount each instance of conduct which she viewed as harassment. She did not include the suggestion by Irish that she should wear revealing clothing. Like the plaintiff in *Gilliam*, Paschal remembered the instance after the defendant's motion for summary judgment had been filed. Paschal has not provided us with legal authority for rejecting the precedent of *Gilliam*. Thus, we cannot conclude that it was error for the trial court to exclude the affidavit.

Paschal argues that even without the affidavit, it was improper for the trial court to grant the motion of summary judgment. Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). The movant must prove that no genuine issue of material fact exists and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*.

The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). In order to overcome a motion for summary judgment, the non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*. *See also* Kentucky Rule[s] of Civil Procedure (CR) 56.03. On appeal, our standard of review 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). Because summary judgments do not involve fact-finding, we review *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.2d 188, 189 (Ky. App. 2006).

Paschal argues that the trial court erred when it found that she had not presented a *prima facie* claim of sexual harassment based upon a hostile work environment. In order to establish a *prima facie* case, 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, [and] (4) the harassment created a hostile work environment[.]" *Clark v. United Parcel Service, Inc*., 400 F.3d 341, 347 (6th Cir. 2005).

In this case, the trial court found that Paschal's claim failed on the fourth prong; *i.e.,* she did not show that the harassment created a hostile work environment. Our Supreme Court has provided the definition of a hostile work environment:

> In 1986, the United States Supreme Court decided the watershed case of *Meritor Saving Bank v. Vinson* [477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed. 49 (1986)], which held that a sexual harassment claim can be brought based upon a hostile or abusive work environment. 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 [*sic*] sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." [*Williams v. General Motors Corp*., 187 F.3d 553, 560 (6th Cir. 1999)]. Moreover, the "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." As stated by the United States Supreme Court in *Harris v. Forklift Systems*, [510 U.S. 17, 114 S.Ct. 367, 126 L.Ed. 295 (1993)], the harassment must also be both objectively and subjectively offensive as determined by "looking at all the circumstances." [510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed. 295, 302]. These circumstances 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."

Ammerman v. Board of Education, of Nicholas County, 30 S.W.3d 793, 798 (Ky. 2000). (Emphasis added.)

As discussed above, the trial court relied on the incidents related by Paschal in her interrogatory answers and deposition testimony. They were: 1) comments by Irish regarding women's hormonal cycles; 2) a crude remark that Paschal overheard Irish make to a bartender; 3) an inappropriate story of a sexual nature that Irish told at work, including a pantomiming gesture; and 4) inappropriate remarks made to Paschal by customers. The court found that the incidents were episodic and that they did not create a hostile work environment.

In light of *Ammerman, supra,* we must agree. The comments by Irish – although admittedly inappropriate – did not create a continual course of behavior, and Paschal has failed to demonstrate how they interfered with her ability to work. Two of the incidents were perpetrated by customers, not by Irish, and *The Sentinel* transferred those customers to male sales representatives. One offensive remark was made to a bartender, and Paschal *happened* to overhear it. Remaining are the comments regarding women's hormones and the telling of the crude anecdote.

We reiterate that our Supreme Court has instructed us to examine the totality of the circumstances. Again, the comments made by Irish were offensive and highly inappropriate. However, Paschal did not suffer physical harm or humiliation; the comments were not severe; and Paschal has not shown that they

affected her work performance. We perceive the comments to have been "mere offensive utterances" as contemplated by the *Ammerman* court.

Paschal cites several cases in support of her contention that Irish's behavior constituted actionable sexual harassment, but they are distinguishable from the facts of this case. The Seventh Circuit has held that a single incident constituted actionable sexual harassment, but the incident was a rape by a co-worker. *Lapka v. Chertoff*, 517 F.3d 947 (7th Cir., 2008). Paschal also cites *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274 (Ky. App. 2009). That case involved egregious behavior which included offensive touching and assault. Paschal argues that this case should be guided by *Patane v. Clark*, 508 F.3d 106 (2nd Cir. 2007). However, we are unable to detect factual similarities between that case and this one. The plaintiff in *Patane* had been continually exposed to her supervisor's pornographic videotapes, including having to handle them for him. Finally, *Quantock v. Shared Marketing Services, Inc*., 312 F.3d 899 (7th Cir. 2002), is distinguishable because it actually involved multiple incidents.

Accordingly, because Paschal has not proven ongoing sexual harassment, we are persuaded that the trial court correctly granted summary judgment.

Paschal's final contention is that *The Sentinel* terminated her employment in retaliation for reporting Irish's behavior. The trial court found that Paschal failed to set forth sufficient evidence for a *prima facie* retaliation claim. In order to present a claim for retaliation, a plaintiff must show:

> that (1) [plaintiff] engaged in protected activity; (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.

Flock v. Brown-Forman Corp., 344 S.W.3d 111, 118 (Ky. App. 2010).

It is undisputed that reporting the sexual harassment was a protected activity. Obviously, *The Sentinel* was aware that she reported the behavior. *The Sentinel* does not dispute that dismissal is adverse employment action. The only issue is whether Paschal's reporting of sexual harassment was causally connected to her termination.

The termination letter that Paschal received cited several reasons for the dismissal. One reason was a complaint from Louise Riley, manager of one of *The Sentinel*'s major customers. Riley sent a letter alerting *Sentinel* management to what she believed was unprofessional conduct by Paschal. Paschal alleges that Irish had conspired with Riley, intending for the letter to precipitate termination of Paschal's employment. However, Paschal does not provide any proof beyond mere speculation.

The record actually indicates that Paschal had a troubled employment history beginning in 2005. There are letters from *Sentinel* management to Paschal regarding problems with her attendance and her ability to work with others. Paschal admitted in deposition testimony that she was aware of training issues in early 2006. In August 2006, a few months before her termination, Paschal

received a memo indicating that her job was in jeopardy if she did not demonstrate improvement in certain areas. Nonetheless, she did not comply with her training goals.

Furthermore, according to the record, the problems began before Paschal experienced difficulties with Irish. The letter from Riley was only one of several serious issues. Additionally, the record shows that Irish was not involved in Paschal's dismissal. Again, her accusations of his alleged involvement are wholly speculative. She has provided no other evidence of retaliation.

Accordingly, we agree with the Shelby Circuit Court that Paschal has not presented a *prima facie* case either for sexual harassment or for retaliation. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Philip C. Kimball
Louisville, Kentucky

BRIEF FOR APPELLEE:

Ashley C. Pack
Jeremy S. Rogers
Vanessa N. Rogers
Louisville, Kentucky