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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001846-MR

CITY OF LOUISVILLE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 97-CI-007323

BRANDON LUMPKINS, MINOR, BY PARENT AND NEXT FRIEND, LATONIA LUMPKINS; KENNETH R. ANTHONY; AND JASON STARKS — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: The City of Louisville appeals a judgment entered by the Jefferson Circuit Court pursuant to a jury verdict in favor of the appellees on their claim of hostile work environment. Due to error in the jury instructions, we reverse and remand for a new trial.

In 1997, Brandon Lumpkins, Jason Starks, and Kenneth Ryan Anthony (Ryan), all teenagers at the time, obtained summer jobs as lifeguards with the City of Louisville, Metropolitan Parks and Recreation Department (hereinafter AMetro Parks Department@). Brandon, Jason, and Ryan (hereinafter, Athe

appellees@) were all assigned to the Watterson pool.[1] The appellees are African-American, and were the only African-American employees at the Watterson pool. Their supervisor at the Watterson pool was Billy Green, the pool manager. Green's supervisor was Marilyn Blaske-Hull, the aquatics director for the Metro Parks Department.

Testimony at trial established that if other of the city pools had a shortage of lifeguards, lifeguards could be reassigned from one pool to another. If a lifeguard would not accept the reassignment, he was sent home. Further, it was established that all lifeguards were required to do some cleaning work as part of their jobs.

The facts comprising the appellees' hostile work environment claim were hotly contested at trial between the appellees and the City. In summary, the plaintiffs/appellees testified at trial that over the course of the summer of 1997: 1) It was the appellees, rather than the Caucasian lifeguards, who were chosen to be reassigned to other, predominantly African-American populated pools.[2] The reason given to them by Green and Blaske-Hull as to why they were the ones being reassigned to these pools was that they would Afit in better@. Brandon and Jason accepted the reassignments, however, as Ryan had no

[1] Lifeguards were permitted to indicate a preference as to which pool they wished to be assigned to, and an effort was made to assign them as such. Jason, Ryan, and Brandon requested assignment to the Watterson pool.

[2] Trial testimony established that Watterson pool was predominantly patronized by African-Americans as well.

transportation, he had to go home.[3] 2) It was the appellees, rather than the Caucasian lifeguards, who were assigned by Green to do the dirtiest cleaning jobs, such as cleaning bathrooms and cleaning feces off of the deck. 3) Green once held an after hours party at the pool, inviting all of the (Caucasian) pool staff but excluding the appellees. The next morning, Green made the appellees clean up the mess from his party. 4) Green frequently referred to the appellees using the racial slur Aboy@.

The summer culminated in a particularly ugly incident which occurred at the Watterson pool on August 11, 1997. Although trial testimony differed between the appellees themselves, as well as between the appellees and Billy Green as to what exactly was said and how many times the racial epithet was used, it was undisputed that Billy Green, accusing the appellees of vandalizing his bicycle, called the appellees Aniggers@. Additionally, testimony was presented that Green then yelled for all of the Aniggers@ to get out of the pool, a fact contested by the City. It was, however, undisputed that after calling the appellees Aniggers@, that Billy Green sent them home. The appellees testified that Green fired them, a fact also hotly contested at trial by the City. Also contested was the remedial action taken by the City, in particular, when and whether Billy Green was fired.

On December 22, 1997, the appellees filed a complaint against the City of Louisville, Metro Parks Department alleging

[3] Ryan lived within walking distance of Watterson pool and walked to work.

that they were subjected to racial discrimination resulting in a hostile work environment in violation of the Kentucky Civil Rights Act, KRS 344.010, et. seq. A jury trial commenced on February 13, 2001. The jury returned a verdict in favor of the appellees, awarding damages for embarrassment and humiliation in the amount of $167,000 to each appellee, for a total of $501,000. The City of Louisville filed a Motion for Judgment Notwithstanding the Verdict, and, in the alternative, for a New Trial, which motion was denied by the trial court in an opinion and order entered on July 27, 2001. This appeal by the City followed.

We begin with a review of the law of hostile work environment. KRS 344.040 provides that it is an unlawful practice for an employer A[t]o discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race . . . .@ The Kentucky Civil Rights Act is interpreted consistently with federal case law construing Title VII. Ammerman v. Board of Education of Nicholas County, Ky., 30 S.W.3d 793, 797-798 (2000); Brewer v. Hillard, Ky. App., 15 S.W.3d 1, 10 (1999); Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814, 817 (1992); Hall v. Transit Authority, Ky. App., 883 S.W.2d 884, 886 (1994). Racial discrimination which creates a hostile or abusive work environment is actionable under Title VII. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

> [H]ostile environment discrimination exists Awhen 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.@ [Williams v. General Motors Corp., 187 F.3d 553, 560 (6th Cir. 1999) citing Harris v. Forklift Systems, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (citations and quotation marks omitted)]. Moreover, the Aincidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.@ [Carrero v. New York City Housing Authority, 890 F.2d 569, 577 (2d Cir. 1989).] As stated by the United States Supreme Court in Harris v. Forklift Systems, the harassment must also be both objectively and subjectively offensive as determined by Alooking at all the circumstances.@ [510 U.S. at 23, 114 S. Ct. at 371]. These circumstances may include Athe 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].

Ammerman, 30 S.W.3d at 798. Further, and of importance to the present case, is the requirement that A'offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the Aterms and conditions of employment@'@ so as to create a hostile working environment. Id. at 799, quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 2283, 141 L. Ed. 2d 662 (1998).

AAn 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.@ Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998); Faragher, 524 U.S. at 807, 118 S. Ct. at 2292-2293. A plaintiff

is not required to prove that he suffered a tangible employment action[4] in order to prevail on a hostile work environment claim. See Bowman v. Shawnee State University, 220 F.3d 456, 462 (6th Cir. 2000), citing Meritor, 477 U.S. 57, 106 S. Ct. 2399. However, in supervisor-created hostile environment cases, as in the present case, whether an employee suffered a tangible employment action is relevant as to whether an affirmative defense is available to the employer. Ellerth, 524 U.S. at 765, 118 S. Ct. at 2270; Faragher, 524 U.S. at 807-808, 118 S. Ct. at 2293. If a supervisor's harassment results in a tangible employment action, no affirmative defense is available to the employer. Ellerth, 524 U.S. at 765, 118 S. Ct. at 2270; Faragher, 524 U.S. at 808, 118 S. Ct. at 2293. However,

> [w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any [] 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.

Bank One, Kentucky, N.A. v. Murphy, Ky., 52 S.W.3d 540, 544 (2001), (quoting Ellerth, 524 U.S. at 765, and Faragher, 524 U.S. at 807).

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[4] AA 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.

On appeal, the City first contends that the trial court failed to properly instruct the jury, in that it failed to tender interrogatories tendered by the City, and that it failed to properly instruct on the law of hostile work environment. The City tendered instructions which included a set of interrogatories with regard to each plaintiff/appellee, requiring a finding by the jury that each particular incident of racial discrimination alleged by the appellees (i.e. being assigned the Adirty@ jobs, being called Aboy@, etc. . .) did or did not occur, and, if so, whether it occurred because of the plaintiff/appellee's race. The trial court refused the City's tendered interrogatories.

The City contends that the undisputed one time incident of August 11, 1997, was insufficient to create a hostile work environment, and that the interrogatories were necessary to determine which of the disputed incidents occurred and whether they were racially motivated. Additionally, the City argues that the trial court failed to properly instruct on the law of hostile work environment, specifically that the court failed to provide the limiting instruction that an isolated incident, unless extremely serious, is insufficient to create a hostile work environment. The City contends that, under the instructions given by the court, the jury could have based its verdict on a belief that only the August 11, 1997 incident occurred, and that such a finding would be contrary to law. The City contends that, without the interrogatories, it is impossible to determine if the

jury, in fact, based its finding of hostile work environment on only the August 11, 1997 incident.

The trial court instructed the jury, in pertinent part, as follows:

INSTRUCTION NO. 1

> You will find for the Plaintiffs, Brandon Lumpkins, Jason Starks and Kenneth Ryan Anthony, under this Instruction, if you are satisfied from the evidence that in the course of the Plaintiff's employment with the Defendant City of Louisville, the Plaintiffs were subjected to racial harassment by the Defendant City of Louisville, by and through its agents, severe or pervasive enough to create a work environment that a reasonable person would find hostile or abusive, and that the Plaintiffs subjectively regarded as hostile or abusive.
>
> In determining whether the work environment was hostile or abusive, you may consider any of the following factors:
>
> a. the frequency of the conduct or behavior;
> b. the severity of the conduct or behavior;
> c. whether the conduct or behavior was physically threatening or humiliating; OR
> d. whether the conduct or behavior unreasonably interfered with the Plaintiffs' work performance.
>
> If you find for the Plaintiffs, Brandon Lumpkins, Jason Starks and Kenneth Ryan Anthony, proceed to Instruction No. 2. If you find for the Defendant, the City of Louisville, record your Verdict on Verdict Form B.

INSTRUCTION NO. 2

> (1) A tangible job detriment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material

responsibilities, or other indices that might be unique to a particular situation.

You will find for the Plaintiffs, Brandon Lumpkins, Jason Starks and Kenneth Ryan Anthony, if you are satisfied from the evidence that the Defendant City of Louisville, by and through its agents, imposed a tangible job detriment against the Plaintiffs resulting from the hostile work environment described in Instruction No. 1. If you find that the Defendant City of Louisville imposed a tangible job detriment action against the Plaintiffs, proceed to Instruction No. 4.

Otherwise, proceed to Instruction No. 3.

INSTRUCTION NO. 3

You will find for the Defendant City of Louisville under this instruction (No. 4) [sic], if you are satisfied from the evidence that the Defendant City of Louisville exercised reasonable care to prevent and correct the harassing behavior and the Plaintiffs, Brandon Lumpkins, Jason Starks and Kenneth Ryan Anthony, unreasonably failed to take advantage of any preventative or corrective opportunities provided by the Defendant City of Louisville or to avoid harm otherwise. If you find for the Defendant City of Louisville, record your verdict on Verdict Form B.

Otherwise, you will find for the Plaintiffs, Brandon Lumpkins, Jason Starks, and Kenneth Ryan Anthony, under this Instruction and proceed to Instruction No. 4.

INSTRUCTION NO. 4

If you have found for the Plaintiffs, Brandon Lumpkins, Jason Starks and Kenneth Ryan Anthony, under Instruction No. 1,2 or 3, you will determine from the evidence a sum of money that will fairly compensate them for the following:

Embarrassment and humiliation
Brandon Lumpkins (not to exceed $500,000)
Jason Starks (not to exceed $500,000)
Kenneth Ryan Anthony (not to exceed $500,000)

We conclude that the court did not abuse its discretion in refusing to tender the City's interrogatories. A claim of hostile work environment must be analyzed under a Atotality of the circumstances@ test, rather than focusing on individual acts of harassment and hostility. Bowman, 220 F.3d at 463; Williams v. General Motors Corp., 187 F.3d 553, 562-563 (6th Cir. 1999). See also, Hall, 883 S.W.2d at 887. A[T]he 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 C taken together C the reported incidents make out such a case.@ Williams, 187 F.3d at 562.

> [T]he totality-of-circumstances test must be construed to mean that even where individual instances of [] harassment do not on their own create a hostile environment, the accumulated effect of such incidents may result in a Title VII violation. This totality-of-circumstances examination should be viewed as the most basic tenet of the hostile-work-environment cause of action. Hence, courts must be mindful of the need to review the work environment as a whole, rather than focusing single-mindedly on individual acts of alleged hostility.

Id. at 563. A[A] work environment viewed as a whole may satisfy the legal definition of an abusive work environment, for purposes of a hostile environment claim, even though no single episode crosses the Title VII threshold.@ Id. at 564. The interrogatories tendered by the City improperly focused on individual incidents, and are inconsistent with the totality of the circumstances approach required in analyzing a claim of hostile work environment. Id. at 562-563. Accordingly, the

trial court did not err in refusing to tender the City's interrogatories.

We opine that the instructions given by the trial court correctly followed the law, except that the court's instructions omitted the requirement that an isolated incident, unless extremely serious, is insufficient to create a hostile work environment. See Ammerman v. Board of Education of Nicholas County, Ky., 30 S.W.3d 793, 799 (2000). We conclude the trial court's omission of language to this effect to be reversible error.[5]

The appellees and the trial court are correct in that Kentucky does follow the Abare bones@ approach to jury instructions. See Meyers v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814, 824 (1992). A[J]ury instructions should be framed only to state what the jury must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof.@ Id. citing Webster v. Commonwealth, Ky., 508 S.W.2d 33 (1974). However, A[i]nstructions must be based upon the evidence and must properly and intelligibly state the law@. Howard v. Commonwealth, Ky., 618 S.W.2d 177, 178 (1981), citing Simpson v. Commonwealth, 313 Ky. 599, 233 S.W.2d 118, 120 (1950).

[5] We note that in Hall v. Transit Authority, Ky. App., 883 S.W.2d 884, 886 (1994), this Court approved as comporting with the requirements of Harris, 510 U.S. 17, a hostile work environment instruction which did not include language that an isolated incident, unless extremely serious, is insufficient to create a hostile work environment. However, the presence or absence of such language was not raised as an issue in the case, and was not considered by the Court.

In Ammerman, our Supreme Court recognized that the law of hostile work environment includes the requirement that an isolated incident (unless extremely serious) is insufficient to constitute a hostile work environment.[6] The hostile work environment instruction given by the trial court in the present case (Instruction No. 1), however, omitted this requirement, and thus permitted the jury to find a hostile work environment even if it believed that only one incident occurred.[7] Ammerman indicates that such a finding would be contrary to law, and accordingly, we must conclude the trial court's failure to include the aforementioned Aisolated incident@ requirement in the instructions to be reversible error.

Additionally, in order to prevent error upon retrial, we believe it necessary to comment on the City's entitlement to assert the affirmative defense, and its effect on the issue of tangible job detriment, in the event the evidence at retrial is the same or similar. It was established at trial that the appellees never received an employee handbook from the City, and neither received nor were made aware of any City policies or procedures regarding harassment. In light of the City's failure to disseminate a harassment policy and complaint procedure to the

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[6] AThe 'incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.'@ Ammerman, 30 S.W.2d at 798 (citation omitted.) A'[I]solated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.'@ Id. at 799, quoting Faragher, 524 U.S. at 788.

[7] In the present case, under the instructions as given, it is impossible to determine if the jury believed that more than one incident occurred.

appellees, we believe that the decision of the United States Supreme Court in Faragher v. City of Boca Raton forecloses the City's ability to assert the affirmative defense.[8] Similar to the present case, Faragher involved the sexual harassment of a female lifeguard by her immediate supervisors during the course of her employment at a beach operated by the City of Boca Raton, Florida. The Supreme Court held that because the City of Boca Raton had not disseminated its sexual harrassment policy to its beach employees, it could not satisfy the affirmative defense and thus escape liability for the conduct of its supervisors. The Court stated:

> While the City would have an opportunity to raise an affirmative defense if there were any serious prospect of its presenting one, it appears from the record that any such avenue is closed. The District Court found that the City had entirely failed to disseminate its policy against sexual harassment among the beach employees and that its officials made no attempt to keep track of the conduct of supervisors like Terry and Silverman. The record also makes clear that the City's policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints. []. Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct.

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[8] As previously noted, AWhen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any [] 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.@ Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807. ANo affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action@. Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 808.

> Unlike the employer of a small workforce, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment.

Faragher, 524 U.S. at 808-809, 118 S. Ct. at 2293. In the present case, as in Faragher, the evidence presented indicated a complete failure on the part of the City of Louisville to disseminate a harassment policy and complaint procedure to the employees of the Watterson pool in the summer of 1997. Per the United States Supreme Court's holding in Faragher, it was, therefore, impossible for the City to establish the first prong of the affirmative defense, that it exercised reasonable care to prevent Green's harassing conduct. Having concluded that the affirmative defense was not available to the City, the issue of whether the appellees suffered a tangible job detriment (which the City contends they did not) is moot.

We next address the City's argument that the trial court erred by not allowing the jury to hear the complete testimony of Jennifer Manke, a patron of the pool on August 11, 1997. Manke's intended testimony was offered by way of avowal. Manke testified that on August 11, 1997, she was at the pool with her two young children, and heard obscene language from a group of lifeguards, comprised of two African-American males and one white female. Manke testified that it was Jason whom she specifically heard out of the group, and that she heard him say the words Am-f-er@, Afuck@, Apussy@, and Atitties@. Manke testified

that she complained to the pool manager, after which Jason threatened her, which resulted in her calling the police to come to the pool.

The trial court permitted Manke to testify before the jury as to the aforementioned events, but did not allow Manke to testify as to the specific obscene words spoken by Jason. The court found that the specific words had no probative value as related to a claim of racial discrimination.

On appeal, the City contends that the trial court's ruling deprived the City of a fair trial, and that the error was reflected in the amount of damages awarded to the appellees, in particular, Jason Starks. The City contends that Manke's testimony as to the specific obscene words used by Jason would have shown the jury that Jason was not as sensitive to offensive words as he would have the jury believe, and thus affected the damage award for embarrassment and humiliation, at least for Jason.

Rulings on the admissibility of evidence should not be reversed on appeal absent an abuse of discretion. Simpson v. Commonwealth, Ky., 889 S.W.2d 781, 783 (1994). In the present case, in lieu of the actual words, Manke was permitted to testify that she heard Jason use Aobscene@ language, as well as that he made obscene gestures at her, and threatened her. In our opinion, testimony as to the actual words would not have been more damaging, therefore, we conclude the trial court's ruling did not constitute an abuse of discretion.

As we are reversing and remanding this case for a new trial, the City's arguments regarding damages are rendered moot.

For the aforementioned reasons, the judgment of the Jefferson Circuit Court is reversed and the case remanded for a new trial.

TACKETT, JUDGE, CONCURS.

EMBERTON, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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ORAL ARGUMENT FOR APPELLANT:

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