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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001856-MR

DIANE W. SIMPSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 98-CI-03495

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT AND WALTER F. SKIBA

APPELLEES

OPINION

AFFIRMING

** ** *

BEFORE: BUCKINGHAM, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. In this discrimination action, Diane W. Simpson (hereinafter "Simpson") has appealed from the Fayette Circuit Court's April 10, 2002, summary judgment in favor of Lexington-Fayette Urban County Government (hereinafter "LFUCG") and Walter F. Skiba (hereinafter "Skiba") and from the August 20, 2002, order denying her motion to alter, vacate or amend.

Having reviewed the parties' briefs and oral arguments, the record, and the applicable case law, we affirm.

Simpson is an African-American female with a date of birth of March 27, 1952. She began working for LFUCG in 1988 as a Human Resources Specialist and at the time of her lawsuit was a Human Resources Analyst. On August 27, 1997, Simpson filed a charge of discrimination with the Kentucky Commission on Human Rights, alleging racial and sexual discrimination due to actions taken by Skiba, the Director of Human Resources. She received a right to sue letter in 1998, and on September 28, 1998, Simpson filed a multiple-count verified complaint in Fayette Circuit Court against LFUCG and Skiba. In her complaint, Simpson made allegations of (1) race, gender and/or age discrimination in violation of KRS Chapter 344 against LFUCG and Skiba; (2) retaliation against LFUCG and Skiba; (3) fraud, deceit and misrepresentation against Skiba; (4) defamation of character against Skiba; (5) intentional infliction of emotional and physical distress and outrageous conduct against Skiba; and (6) violations of the Equal Pay Act against LFUCG and Skiba. She requested a jury trial and judgments against both LFUCG and Skiba for actual, general, compensatory, and punitive damages. Both LFUCG and Skiba filed answers to Simpson's complaint, and requested that the suit be dismissed for various reasons.

LFUCG and Skiba moved for summary judgment on January 30, 2000, arguing that many of Simpson's claims were barred by the doctrine of sovereign immunity, that she failed to establish a *prima facie* case to support several of her claims, and that she failed to prove any adverse job action. Prior to the hearing on the motions, the suit was placed into abeyance to allow the Supreme Court to decide several cases regarding sovereign immunity. Once those cases were decided, Simpson filed her response to LFUCG's motion. The circuit court held a hearing on the motions for summary judgment on August 17, 2001, after which Simpson filed her response to Skiba's motion. Upon the filing of LFUCG's reply and copies of the depositions the parties intended to rely upon, the matter was submitted for a decision.

On April 10, 2002, the circuit court entered an order granting LFUCG's and Skiba's motions for summary judgment as follows:

This case came before the Court on the Defendant[]s['] Motion[s] for Summary Judgment. Plaintiff filed claims for race, gender and/or age discrimination; retaliation; fraud, deceit, and misrepresentation; defamation of character; intentional infliction of emotional and physical distress; and claims under the Equal Pay Act. Having heard from all parties, the Court rules as follows:

1. Kentucky law bars Plaintiff's common law tort claims under the doctrine of

sovereign immunity. Thus, Defendant Lexington-Fayette Urban County Government's Motion for Summary Judgment is granted as to Plaintiff's claims of fraud, deceit, misrepresentation, defamation of character and intentional infliction of emotion and physical distress/outrageous conduct.

2. Plaintiff, based on the evidence presented to the Court, has not established a *prima facie* case of wage discrimination. Plaintiff has not shown that Defendant paid Plaintiff a lower salary than wages paid to another for work requiring the same skill and performed under similar conditions. Thus defendant LFUCG's Motion for Summary Judgment as to Plaintiff's Equal Pay Act claim is granted.
3. Plaintiff has not established a *prima facie* case of race, age and gender discrimination because Plaintiff has not presented evidence that Plaintiff was subjected to an adverse employment decision on the basis of her race, age or gender. Thus the Motion for Summary Judgment should be granted.
4. The Court holds that Defendant LFUCG's and Defendant Skiba's Motion for Summary Judgment as to the retaliation claim must be granted because the Court finds there is insufficient evidence to establish a *prima facie* retaliation claim. Specifically the Court holds that Plaintiff did not produce any evidence that Defendants participated in actionable retaliatory conduct against Plaintiff.
5. As to Plaintiff's claim of intentional infliction of emotional distress/outrageous conduct the Court grants Defendant Skiba's Motion for Summary Judgment because Plaintiff has

not shown such outrageous conduct that would offend generally accepted standards of decency.

6. Defendant Skiba's Motion for Summary Judgment is granted as to Plaintiff's claim of defamation because the communications in question are absolutely privileged from suit.
7. For the foregoing reasons, the Defendants' Motions for Summary Judgment are SUSTAINED.

Simpson then filed a motion to alter, vacate or amend the circuit court's summary judgment. In her motion, Simpson relied upon deposition testimony to argue the existence of a hostile work environment and upon case law holding that discriminatory workplace harassment claims are rarely summarily dismissed. LFUCG and Skiba filed a joint response, arguing that even if Simpson had pled a hostile work environment, which they argued she did not, the allegations she relied upon failed to support her claim. Furthermore, they argued that the circuit court properly granted summary judgment on the remaining claims.

On August 20, 2002, the circuit court entered an order denying Simpson's motion to alter, vacate or amend as follows:

This matter came before the Court on Plaintiff's Motion to Alter, Vacate or Amend. Plaintiff argues that the Court issued its previous opinion without regards to the law or a thorough review of the record. The Court, having further reviewed the record and having extensively considered the law now rules as follows on Plaintiff's Motion to Alter, Vacate or Amend.

Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476[, 483] (1991) states that "summary judgment is to be cautiously applied. . . . [and] used [']to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.[']" CR 56.03 states: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." The Court, in making its decision, has kept the appropriate standard in mind and thus has ruled accordingly.

The Court holds that the doctrine of sovereign immunity bars Plaintiff's common law tort claim pursuant to the Kentucky Constitution, unless the legislature has expressly waived such immunity. The Court also notes that Withers v. University of Kentucky, Ky., 939 S.W.2d 340, 345 (1997) affirmed the right of the Commonwealth to immunity from suit absent an explicit waiver of such by the General Assembly. The Court again holds that [Defendant's] Motion for Summary Judgment as to the claims of fraud, deceit, misrepresentation, defamation and intentional infliction of emotional and physical distress is SUSTAINED.

With the above analysis, the Court also holds that sovereign immunity bars Plaintiff's claim under the Equal Pay Act. The Court further points out that Plaintiff has not met her burden of establishing a *prima facie* claim under the Equal Pay Act. Kentucky law prohibits an employer from pay discrimination by making it unlawful for the employer to pay any employee of the opposite

sex at a lower rate for comparable work requiring the same skill and effort. The law does allow for pay differentials pursuant to an established seniority system or merit system. Employers can defend against charges of wage discrimination where the differentials are based on a bona fide use of 'other factors than sex.' Washington County v. Gunther, 452 U.S. 161, 170; 101 S.Ct. 2242, 2248; 68 L.Ed.2d 751 (1981).

In the present case, the Court is pressed to find where Plaintiff has proved a pay differential based on the sex of an employee. Regardless, the Court does hold that the Defendants have been successful in establishing that the wage system in place is nondiscriminatory. The Defendants have extensively detailed the process by which Lexington Fayette Urban County Government employees are paid and the factors considered in determining wage pay. The Court is satisfied that the Defendants have a complex method of determining the appropriate employee wage compensation and it is not believed that the said method considers the sex of the employee. The Court thus SUSTAINS the Defendants' Motion for Summary Judgment as to the Plaintiff's claim of wage discrimination.

The Plaintiff has alleged that the Defendants have discriminated against her on the basis of race, gender and/or age. Plaintiff, to meet her *prima facie* case of discrimination as set forth in her complaint, must prove that: (1) she was a member of a protected class; (2) she applied for and was qualified for the position; (3) she was subjected to an adverse employment decision; and (4) that a similarly situated employee outside the protected classification was not subject to the adverse employment action. St. Mary's Honer Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). If the Plaintiff meets her burden, then the

Defendant is required to refute the burden by articulating a legitimate, nondiscriminatory reason for the employee's rejection. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

The Court again holds that the Plaintiff has not met her burden of proof. The Court feels that while Plaintiff is a member of a protected class, she has not proved that she was subjected to an adverse employment decision due to her race, age or gender. Plaintiff's own testimony indicated she had no evidence she was not promoted because of her race. In any event, the Court further holds that the evidence in the record proves that the Defendants indeed have legitimate, nondiscriminatory reasons for not choosing Plaintiff to fill particular positions. Such reasons include the fact that Plaintiff was not as qualified or experienced as other applicants. For these reasons, the Court SUSTAINS the Defendants' Motion for Summary Judgment as to the Plaintiff's claims of discrimination based on race, gender or age.

The Court also SUSTAINS Defendant Skiba's Motion for Summary Judgment as to Plaintiff's claims of fraud, deceit and misrepresentation. The Court does not find sufficient evidence in the record to support this claim to continue forward. The same is true for Plaintiff's claims for outrageous conduct and intentional infliction of emotional distress. Taken in the light most favorable to Plaintiff, the Court does not believe the conduct complained of rises to the level of outrageousness required by Kentucky law. Thus, the Court SUSTAINS the Defendant's Motion for Summary Judgment as to Plaintiff's claim for outrageous conduct and intentional inflection of emotional distress.

The Plaintiff has also made a claim for defamation. The Court holds that Kentucky law deems communications about an employee's job performance absolutely privileged from suit. The Court rules that Plaintiff's defamation claim is barred by absolute privilege based on Plaintiff's claim and thus SUSTAINS Defendant's Motion for Summary Judgment.

The Plaintiff's complaint sets for[th] a claim for retaliation against the Defendants based on Plaintiff filing an employment discrimination claim. To prove such a claim, the Plaintiff must prove that: (1) she was engaged in a protected activity, (2) she was disadvantaged by an act of her employer, and (3) there was a causal connection between the activity engaged in and the employer's act. Barnett v. Dept. of Veteran's Affairs, 153 F.3d 338, 343 (6th Cir. 1998). If the Plaintiff meets this burden by proving each of these three elements, the employer may then articulate a legitimate, non retaliatory reason for the action. Id.

The Court, after thoroughly looking through the record, is pressed to find any evidence to indicate that the Plaintiff was retaliated against. The Plaintiff was never demoted nor given a decrease in pay. The Plaintiff's own testimony reveals that she was never disciplined or suspended. The stated instances involving office furniture, office relocation and the souvenir doll given to another employee do not rise to the level of retaliation in this Court's opinion. Even considering all the instances together, in the light most favorable to the Plaintiff, the Court does not feel the Plaintiff has been retaliated against by LFUCG. With the Summary Judgment standard in mind, the Court does not find that there is any evidence of retaliation by Defendant LFUCG and SUSTAINS the Motion for Summary Judgment.

The Court also SUSTAINS Defendant Skiba's Motion for Summary Judgment as to Plaintiff's claim for retaliation. The Court notes that Defendant Skiba and the Plaintiff obviously have not had the ideal working relationship, but the Court does not believe the Plaintiff has proved a claim for retaliation. The Court does not see where Plaintiff has suffered job detriment. Plaintiff's own deposition states she had not ever been suspended or formally disciplined. The Court is of the opinion that a retaliation claim needs something more concrete than what Plaintiff has presented. While the Court sympathizes with Plaintiff's situation, as a matter of law, it is of the opinion that Plaintiff has not produced enough evidence indicating job detriment as a result of engaging in protected activity. This is a final and appealable Order.

This appeal followed.

On appeal, Simpson argues that the circuit court improperly granted summary judgment because several genuine issues of material fact still exist. In particular, she argues that she in fact presented evidence sufficient to establish a *prima facie* case on her claims, that LFUCG has no immunity from the Equal Pay Act, that the deposition testimony of Darrylyn Combs constituted binding judicial admissions, and that the circuit court erred in dismissing her common law claims for intentional infliction of emotional distress and defamation.¹

¹ Simpson has not raised as an issue the circuit court's entry of summary judgment on her claim of fraud, deception and misrepresentation. Therefore, that ruling shall stand without the necessity for further review.

Both LFUCG and Skiba filed briefs opposing Simpson's arguments, to which Simpson filed reply briefs.

STANDARD OF REVIEW

In Lewis v. B&R Corporation, Ky.App., 56 S.W.3d 432 (2001), this Court detailed the standard of review applicable in appeals from summary judgments:

The standard of review on appeal when a trial court grants a motion for 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." The trial court 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. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in Steelvest used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. (citations in footnotes omitted).

Id. at 436. With this standard in mind, we shall review in turn each of the preserved issues Simpson raised in her complaint.²

I. KRS CHAPTER 344 ALLEGATIONS OF RACE, GENDER AND/OR AGE DISCRIMINATION

Simpson argues that the circuit court erred in granting a summary judgment on the issue of discrimination as genuine issues of material fact existed, which should have been submitted to a fact-finding jury. The circuit court held that although Simpson was a member of a protected class, she failed to establish that she had been subjected to an adverse employment decision. Here, she argues that she presented sufficient evidence of both direct and indirect discrimination to establish a *prima face* case, and argues that this evidence should have allowed her to defeat LFUCG's motion for summary judgment. She also argues that KRS Chapter 344 allows for individual liability for supervisors, so that her claims against Skiba should be allowed to continue. On the other hand, LFUCG argues that, as a matter of law, Simpson has failed to establish a *prima facie* case of race, gender or age discrimination, either through direct or circumstantial evidence. Although Simpson was a member of a protected class, she could not establish that she

² Simpson did not allege any common law claims against LFUCG in her complaint; her claims against LFUCG were limited to discrimination, retaliation, and violations of the Equal Pay Act. She only alleged common law claims against Skiba. Therefore, we shall ignore those portions of the circuit court's orders granting summary judgment to LFUCG on Simpson's common law claims as she did not allege any such claims against LFUCG.

had been subjected to an adverse employment decision or that she was rejected for different positions on the basis of her race, gender or age.

In KRS 344.040(1) of the Kentucky Civil Rights Act, which mirrors its federal counterpart, the General Assembly made it an unlawful practice for an employer:

To fail or refuse to hire, or to discharge any individual or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges or employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or non-smoker, as long as the person complies with any workplace policy concerning smoking.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), the United States Supreme Court set out the requirements to establish a *prima facie* case of discrimination:

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. In a footnote, the Supreme Court noted that the facts would vary from case to case, and that the proof necessary

to establish a *prima facie* case would not be applicable in every case. Once a *prima facie* case is established, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. Finally, "should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L.Ed.2d 207, 215, 101 S.Ct. 1089, 1093 (1981). See also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993).

LFUCG concedes, and we agree, that Simpson has met the first prong of the *prima facie* case as she is an African-American female over the age of forty. However, she failed to establish that she had been subjected to an adverse employment action due to her race, gender or age because she had never been demoted, suspended or even formally disciplined. Furthermore, LFUCG did an excellent job in its brief detailing the reasons why Simpson's failure to receive the three positions for which she applied were not the result of any type of discrimination, but rather were the result of lack of experience on her part or better qualifications of other candidates.

Although we are inclined to agree with LFUCG's argument that Simpson failed to assert a claim of discrimination based upon a hostile work environment, we shall nevertheless review this issue.

In order to establish a racially hostile work environment under Title VII, the plaintiff must show that the conduct in question was severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and that the victim subjectively regarded it as abusive. . . . The plaintiff must also prove that his employer 'tolerated or condoned the situation,' or knew or should have known of the alleged conduct and did nothing to correct the situation.

Smith v. Leggett Wire Co., 220 F.3d 752, 760 (6th Cir. 2000).

Although we are aware of our decision in Kirkwood v. Courier-Journal and Louisville Times Co., Ky.App., 858 S.W.2d 194, 198, that "[c]laims of discriminatory workplace harassment are rarely summarily dismissed where there is any colorable evidence of such harassment[,]" we agree with LFUCG that Simpson has not presented sufficient objective or subjective evidence of a hostile work environment to defeat a motion for summary judgment. A mere belief that Skiba was a racist and taking offense at Skiba's gift of a souvenir "mammy" doll to another employee, along with Simpson's other allegations, do not even collectively create evidence of a hostile work environment.

Based upon the evidence she presented, we cannot hold that the circuit court erred in granting a summary judgment on her discrimination claim because Simpson failed to establish a *prima facie* case and there are no genuine issues of material fact to be decided.

II. RETALIATION

In Count II of her complaint, Simpson detailed her retaliation claims against both LFUCG and Skiba, alleging a violation of KRS 344.280 in that they retaliated against her after she had opposed "certain of Defendants' unlawful practices." Simpson had completed and filed a charge of discrimination form with the Kentucky Commission on Human Rights on August 22, 1997, alleging race and sex discrimination in that Skiba told her that minorities were responsible for the majority of workplace violence, that he refused to speak to her and told others not to talk to her, and that he thwarted her attempts to transfer out of the department. The circuit court granted summary judgments on this issue to both LFUCG and Skiba, holding that Simpson failed to establish a *prima facie* case of retaliation pursuant to Barnett v. Dept. of Veteran's Affairs, 153 F.3d 338, 343 (6th Cir. 1998). On appeal, Simpson argues that the deposition testimony she presented was sufficient to allow her claim for retaliation to go to a jury and that the trial court ignored evidence favorable to her in making its

decision. On the other hand, LFUCG maintains that the circuit court properly granted a summary judgment in its favor because the claims of retaliation Simpson asserted did not establish a tangible employment action relating to her compensation or the terms of her employment. Skiba, in turn, argues that KRS Chapter 344 does not create a private cause of action against supervisors in their individual capacities. Although it appears that Chapter 344 does allow for retaliation suits against supervisors in their individual capacities unless protected by qualified immunity,³ we need not address Skiba's argument because we agree with the circuit court that Simpson has not established a *prima facie* case of retaliation.

In Kentucky Center for the Arts v. Handley, Ky., 827 S.W.2d 697 (1991), this Court addressed the necessary elements to establishing a *prima facie* case of retaliation: "The plaintiff, in making out a prima facie case, must show that 1) she engaged in a protected activity, 2) she was disadvantaged by an act of her employer, and 3) there was a causal connection between the activity engaged in and the employer's act." Id. at 701. In Morris v. Oldham County Fiscal Court, 201 F.3d 784 (6th Cir. 2000), the 6th Circuit Court of Appeals held that a Title VII plaintiff must also prove that the defendant took an adverse employment action against her, which would include hiring,

³ See Morris v. Oldham County Fiscal Court, 201 F3d 784 (6th Cir. 2000).

firing, failing to promote, reassignment, or a significant change in benefits. See also Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 663 (1998). Furthermore, personal dislike has been held not to equal a discriminatory animus. Barnett v. Dept. of Veterans Affairs, 153 F.3d 338 (6th Cir. 1998).

In the present case, we hold that the actions Simpson has set forth as evidence of retaliation do not meet the standard required under the law and that she has failed to establish that she experienced any adverse job action. Simpson was never fired or demoted, nor were her benefits or job responsibilities changed. Her relocation to a smaller office to make room for a copy room, Skiba's late approval of new office furniture for her, the change of the office to non-smoking status, the gift of a souvenir doll to another employee, and the review of her work by Skiba do not rise, either separately or as a whole, to an actionable level of retaliation. The situation between Simpson and Skiba appears to more one of personal dislike, which is simply insufficient to establish discriminatory animus.

The circuit court properly granted a summary judgment on Simpson's retaliation claim.

III. DEFAMATION

In her complaint, Simpson alleged a defamation claim against Skiba, stating that he had “engaged in conduct designed to defame Plaintiff’s character in an attempt to downplay his discriminatory actions taken against Plaintiff.” In their answer, LFUCG and Skiba argued that any communications about Simpson were not published outside the legitimate business affairs of LFUCG and were privileged. The circuit court held that the communications⁴ in question were absolutely privileged from suit because they were about an employee’s job performance. Simpson now argues that Skiba’s actions were not protected by sovereign immunity and that the circuit court’s dismissal of this claim was in error. We disagree.

In Columbia Sussex Corp., Inc. v. Hay, Ky.App., 627 S.W.2d 270 (1981), this Court addressed the tort of defamation. In order to establish an action for defamation, a plaintiff must show: 1) defamatory language; 2) about the plaintiff; 3) that is published; and 4) that causes injury to the reputation. Id. at 273. However, the defendant is entitled to affirmatively plead the defense of privilege, as was done in the present matter. The circuit court must determine the question of

⁴ In his brief, Skiba notes that these allegations were that Skiba told Simpson and others that she had “screwed up” a job packet, which had to be redone, and that Skiba had written a letter to other department heads to assist her in a position transfer. Simpson never saw the letter or knew what it said.

privilege as a matter of law. Caslin v. General Electric Co., Ky.App., 608 S.W.2d 69 (1980). In Caslin, this Court held that job performance appraisal reports were privileged as they were communications within the company that were necessary to its functioning. See also Rich v. Kentucky Country Day, Inc., Ky.App., 793 S.W.2d 832 (1990).

We agree with the trial court that the communications in question were privileged as they concerned Simpson's job performance. Therefore, the circuit court properly entered a summary judgment in Skiba's favor because, as a matter of law, the communications were privileged.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS/OUTRAGEOUS CONDUCT

Simpson alleged in her complaint that Skiba inflicted upon her severe emotional and physical distress due to his acts, omissions, conduct and discrimination. The circuit court held that the conduct about which Simpson complained did not rise to the level of outrageousness required in the Commonwealth in that it would not offend generally accepted standards of decency. On appeal, Simpson argues that her demonstration of a long-standing pattern of discrimination and retaliation entitles her to present her evidence to a jury, and that therefore the circuit court improperly entered a summary judgment against her. Skiba, on the other hand, argues that even in a light most favorable to

her, the allegations Simpson made do not rise to the level of outrageousness necessary for her to defeat a motion for summary judgment.

In Kraft v. Rice, Ky., 671 S.W.2d 247 (1984), the Supreme Court of Kentucky adopted the *Restatement (Second) of Torts* § 46, which defines the tort of outrageous conduct as follows: "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." In Kraft, the Court held that the alleged harassment -- including keeping Kraft under surveillance, threatening to put her husband in jail, and forcing her vehicle off the road -- that took place over a period of months was enough to satisfy the threshold requirements for the tort of outrageous conduct. In Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W.2d 1 (1990), the Supreme Court went further and set out the four element necessary to sustain a cause of action for outrageous conduct:

- 1) the wrongdoer's conduct must be intentional or reckless;
- 2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
- 3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and

4) the emotional distress must be severe.

Id. at 2-3. In Seitz, the Court determined that the conduct relied upon regarding the circumstances of the birth of Seitz's stillborn child was not sufficient to establish the tort. Seitz had offered proof that she believed the intercom in her room had been disconnected, that there was a 12 to 15 minute lapse in time between the start of her delivery and the nurses' arrival in her room, that a nurse told her to shut up, and that a nurse told her that the baby would be disposed of in the hospital.

In The Kroger Company v. Willgruber, Ky., 920 S.W.2d 61 (1996), however, the Supreme Court of Kentucky found that Willgruber had presented sufficient evidence to entitle him to defeat a motion for directed verdict on his claim for intentional infliction of emotional distress. The Court recognized that, "[c]itizens in our society are expected to withstand petty insults, unkind words and minor indignities. Such irritations are a part of normal, every day life and constitute no legal cause of action." Id. at 65. In his case, Willgruber presented evidence of Kroger's calculated attempt to force him to sign a release that would exonerate Kroger's wrongful discharge of him. Finally, in Wilson v. Lowe's Home Center, Ky., 75 S.W.3d 229 (2001), the Supreme Court of Kentucky again held that there was sufficient evidence of intentional

infliction of emotional distress to defeat a motion for summary judgment. Wilson, an African-American, had been subject to racist remarks by three store managers virtually every day throughout his seven years of employment, and that superiors had taken no action to stop the store managers from continuing this conduct. In determining that the issue should not have been decided on summary judgment, the Court looked to Comment h of § 46 of the *Restatement (Second) of Torts*, which provides:

It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

In Wilson, the Supreme Court determined that based upon the conduct alleged to have occurred, a jury could have found such conduct to be intentional, outrageous and intolerable.

In applying the law to the facts of this case, we agree with Skiba that Simpson's allegations, even if true, do not rise to the level of outrageousness necessary to defeat a motion for summary judgment. Simpson claimed that Skiba did not talk to her, that he told other employees not to talk to her, that he scrutinized her work, that he gave a souvenir "mammy" doll to another employee, that he told her minorities were

responsible for the majority of workplace violence, and that he asked her if her niece's death was expected. She also claimed that she had to move from a larger to a smaller office so that her larger office could be a copy room and that there was a delay in her receiving approval for new officer furniture. Even if Simpson's allegations are true, we cannot conclude that such conduct rises to the level of outrageousness necessary to establish a claim for intentional infliction of emotional distress. Reasonable minds would not differ in finding such conduct not sufficiently extreme or intolerable so as to permit recovery.

Therefore, the circuit court did not err in granting Skiba's motion for summary judgment on this claim.

V. EQUAL PAY ACT

In her complaint, Simpson alleged Equal Pay Act⁵ violations against both LFUCG and Skiba, claiming that LFUCG specifically discriminated against her by paying her at a lower rate of wages than similarly situated male employees and that Skiba caused or attempted to cause LFUCG to discriminate against her. On the other hand, LFUCG argued that the doctrine of sovereign immunity operates to protect it from this claim. In any event, both LFUCG and Skiba argue that Simpson failed to

⁵ KRS 337.420 et seq.

establish a *prima facie* case to support her allegations of Equal Pay Act violations.

We shall first address LFUCG's sovereign immunity argument. In its order ruling on the motion to alter, vacate or amend, the circuit court held that sovereign immunity acted to bar Simpson's claim. Simpson now argues that KRS Chapter 337 extends, in its entirety, to state employees and that a plain reading of the statute reveals a waiver of sovereign immunity by the General Assembly. She directs our attention to KRS 337.010(2)(a)(9), which provides a definition of the term "employee" to include state government workers.⁶ Simpson also directs our attention to OAG 86-73, in which she claims the Attorney General stated that LFUCG is not exempt from the provisions of KRS Chapter 337.⁷ We disagree with Simpson's assertions.

In Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997), the Supreme Court of Kentucky confirmed that the Commonwealth is entitled to sovereign immunity unless waived by the General Assembly. Citing Edelman v. Jordan, 415 U.S. 651,

⁶ The definitions contained in KRS 337.010(2) are specifically limited to KRS 337.275 to 337.325, 337.345 and 337.385 to 337.405. The Equal Pay Act is not included in any of the sections listed, and has its own definitional section, including a definition of "employee".

⁷ OAG 86-73 deals with the Lexington Fayette Urban County Airport Board, not the Lexington Fayette Urban County Government, and the opinion held that because the Airport Board was not a city, county, or urban county government, it was not exempted from the prevailing wage law of KRS 337.010(3)(e). The opinion did not state that LFUCG was exempt from KRS Chapter 337 or even address the doctrine of sovereign immunity.

673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662, 678 (1974), the Withers Court adopted the following rule: "We will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 464-65, 53 L.Ed. 742 (1909)." Withers, 939 S.W.2d at 346.

In the present matter, we disagree with Simpson's argument that the General Assembly waived its immunity for suits involving the Equal Pay Act. KRS 337.420, the definitional section for the Equal Pay Act, defines an employer in section 2 as "a person who has two (2) or more employees within the state" KRS 337.420(7) then defines a person as "one (1) or more individuals, partnerships, corporations, legal representatives, trustees, trustees in bankruptcy, or voluntary associations." The General Assembly clearly did not include the state or any of its political subdivisions or agencies in the definition of person, as was done in the definitional section of Kentucky's Civil Rights Act, KRS Chapter 344. Because we have determined that the General Assembly did not in any way waive the Commonwealth's immunity from suit, we hold that the doctrine of sovereign immunity acts to bar Simpson's claim under the Equal Pay Act against LFUCG.

Likewise, we agree with Skiba's argument that KRS Chapter 337 does not create a private cause of action against supervisors in their individual capacities, so that any claim against Skiba individually must fail.

Even if Simpson could properly have raised an Equal Pay Act claim, her claim would have failed because she failed to establish a *prima facie* case of wage discrimination. "In order to make out a case under the Act, the [plaintiff] must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" Corning Glass Works v. Brennan, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974). Once the plaintiff establishes a *prima facie* case, the burden shifts to the employer to prove that the wage differential falls under one of the four exceptions.

In the present case, Simpson failed to establish a *prima facie* case because James Muschette, the only employee she compared herself to for purposes of her wage discrimination claim, earned less money than she did at all relevant times. Therefore, the circuit court properly granted a summary judgment to LFUCG and Skiba on Simpson's wage discrimination claim under the Equal Pay Act.

CONCLUSION

For the foregoing reasons, the Fayette Circuit Court's summary judgment and order denying the motion to alter, amend or vacate are affirmed.

ALL CONCUR.

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