RENDERED: MARCH 18, 2005; 10:00 A.M.

MODIFIED: APRIL 1, 2005; 10:00 a.m.

ORDERED NOT PUBLISHED BY KENTUCKY SUPREME COURT: SEPTEMBER 14, 2005 (2005-SC-0288-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000391-MR

ANN MICHELLE GREENWELL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN McDONALD, JUDGE
ACTION NO. 03-CI-001438

UNIFIED FOODSERVICE PURCHASING CO-OP, LLC; KENCO INSURANCE AGENCY, INC.; CAROL SINGLETON; AND H.W. "BUTCH" BIRCHFIELD — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: In directing a verdict in favor of the defendants, the Jefferson Circuit Court dismissed Ann Michelle Greenwell’s suit alleging retaliation and the intentional infliction of emotional distress against her employer for her

prior unfavorable testimony at an unemployment hearing. Greenwell has appealed from the judgment on directed verdict as well as from a pre-trial ruling on a motion in limine, in which the circuit court excluded testimony and documentation based upon the assertion of attorney-client privilege. We affirm the ruling on the motion in limine and the directed verdict on the intentional infliction of emotional distress claim, but reverse and remand on the retaliation claim.

Greenwell is an accountant who in 1990 began her employment as an accounting analyst for KFC National Purchasing Co-Op, the predecessor company to Unified Food Service Purchasing Co-Op, LLC (hereinafter "UFPC"). UFPC is a private corporation that provides a bulk food purchasing function for franchisees of Pizza Hut, KFC, and Taco Bell, among others. In 1999, Greenwell began work for Kenco Insurance Agency, Inc. (hereinafter "Kenco"), a subsidiary of UFPC that provides insurance for its franchisees. Although she continued to be employed by Kenco through the pendency of the action below and before this Court, UFPC dissolved Kenco and terminated all of Kenco's employees, including Greenwell, effective March 4, 2005.

Former Kenco president, Gail Wilson, who hired Greenwell as Agency/Accounting Manager, left the company in 2000, and Brian Taylor was hired as president in March 2001. At this point in time, the evidence is clear that a divide existed

in the office, which numbered approximately eleven people. In April, Greenwell discovered that co-employee Lisa Nash had changed house accounts so that she would receive commissions. Greenwell sought out Kay Saylor to find out how to access the transaction log to determine who had made the changes. Because she did not believe it was proper for Nash to be receiving these commissions, Greenwell determined who made the changes and when they were made and then reported this information to Taylor in an e-mail. Taylor agreed that the accounts should be recoded to house accounts. About one month later, Greenwell attended a meeting called by Nash to discuss undermining changes Taylor wanted to implement. Greenwell left the meeting, and later noticed that Nash engaged in a lengthy, long distance telephone call of a personal nature with Kenco's prior president. Greenwell reported the meeting and telephone call to Taylor, who told her to get the telephone records for Nash's extension. Greenwell did so and turned the information over to Taylor.

Taylor resigned from Kenco in June 2001, and filed for unemployment benefits under KRS Chapter 341. He also filed a reverse discrimination action under the Kentucky Civil Rights Act, KRS Chapter 344. Greenwell, along with other Kenco employees, testified at Taylor's unemployment hearing in October, and her testimony was favorable to him. Greenwell was also subpoenaed to testify at the December 2002 trial in

Taylor's discrimination action. Just prior to the date of Taylor's trial, the parties entered into an oral stipulation that all of the testimony taken in the unemployment hearing would be considered relevant for all purposes in the upcoming trial. However, Taylor's case settled and never went to trial.

Shortly after Taylor's case was dismissed in January, Carol Singleton (the vice-president of Human Resources for UFPC) and H.W. Birchfield (Kenco's current president) met with Greenwell to discuss a personnel issue. At that time, Singleton and Birchfield provided Greenwell with a memorandum dated January 23, 2003, which stated as follows:

> It has been brought to our attention that confidential information available to you based on your position within Kenco has been shared with others besides your direct team leaders. The purpose of this memo is to ensure understanding on your part of the severity of this type of breach of confidentiality. We also want to ensure there is an understanding on the inappropriateness of using your position to gain access to information that is not needed for purposes of completing your job.
>
> In certain positions, team members have access to confidential information of various types – salaries, bonuses, financial information and phone records. Your position has been one of those.
>
> We have learned that information relating to size of bonus and commission income on UFPC business were related to others. Also you requested copies of phone records for your team. Only team leaders should request copies of information on phone records of

> their direct reports. Needing overall information relating to costs is necessary for financial analysis but detailed information by team member is not needed for the successful completion of your job duties. If you feel there is an issue, as a manager you have a responsibility to take your concerns to your team leader but do not have the right to take matters in to [sic] your own hands. We value the privacy of our team members and make every effort to protect same. If there is a true business reason to access, the team leader makes that call.
>
> The behavior captured above is inappropriate and can carry consequences up to and including termination.

It is undisputed that the two incidents mentioned in the memorandum had occurred over eighteen months earlier in April and May 2001. Furthermore, a week later Birchfield took several managerial duties away from Greenwell, including authority over day-to-day operations, approval of his expense reports, and her ability to provide input regarding anything but accounting issues.

After receiving the January 23rd memorandum, Greenwell contacted attorney Stephen Frockt, who had represented Taylor in his reverse discrimination action. Greenwell filed a Verified Complaint on February 17, 2003, alleging retaliation under KRS Chapter 344 (the Kentucky Civil Rights Act) and as a violation of public policy against UFPC and Kenco, as well as the intentional infliction of emotional distress by Singleton and

Birchfield. The defendants filed an answer and were later permitted to file an amended answer. A trial was eventually scheduled for January 20, 2004. Shortly before trial, the defendants filed motions in limine based upon their assertion of the attorney-client privilege to exclude any testimony concerning attorney Julie Foster and related e-mail correspondence from the Taylor case. The circuit court granted these motions in limine, reasoning that the attorney-client privilege attached to the confidential communication between Greenwell, a representative of the company, and Foster, an attorney representing the company in the Taylor case.

The matter proceeded to trial on January 20, 2004, and concluded on January 22. Greenwell testified in her own behalf, and she also relied upon the testimony of fellow employees Donna Bauer (Kenco's controller), Saylor, Singleton and Birchfield, as well as Taylor. At the close of her case, the defendants moved for a directed verdict pursuant to CR 50.01. The defendants argued that Greenwell had not engaged in any protected conduct under KRS Chapter 344 as she had only testified under KRS Chapter 341, and that in any event she had not established that any retaliatory act was causally related to her support of Taylor or that she had been subjected to any adverse employment action. Furthermore, the defendants argued that Kentucky does not recognize a public policy violation as actionable absent a

discharge, which did not happen in this case. As to her intentional infliction of emotional distress claim, the defendants argued that Greenwell had not presented any evidence of any conduct that would amount to extraordinary or outrageous conduct. On the other hand, Greenwell responded that the jury should be permitted to determine whether an adverse employment action had taken place and whether Singleton's and Birchfield's respective conduct was outrageous.

After rhetorically asking "Where's the beef?", the circuit court decided that it would be an abuse of its discretion to send the case to the jury and granted a directed verdict on all issues. The circuit court then indicated that Greenwell was a "hypersensitive person" and expressed the thought that the case should never have gotten as far as it did. A judgment on directed verdict was then entered on February 11, 2004. This appeal from the judgment as well as from the order granting the defendants' motions in limine followed.

On appeal, Greenwell argues that the circuit court erred in granting the motions in limine and excluding the confidential communications between her and counsel for the employer in the Taylor case. Likewise, she argues that it was error for the circuit court to direct a verdict in favor of the appellees. On the other hand, the appellees assert that the circuit court properly granted their motions in limine due to

their assertion of the attorney-client privilege as well as their motion for a directed verdict because Greenwell failed to establish *prima facie* cases for either retaliation or the intentional infliction of emotional distress.

We shall first address the circuit court's rulings on the appellees' motions in limine. The appellees moved to exclude any testimony concerning conversations between attorney Julie Foster and Greenwell as well as e-mail communications. Attorney Foster had been preparing to defend the Taylor reverse discrimination action and was interviewing various employees of Kenco, including Greenwell, regarding their observations. The appellees also sought to exclude e-mail communications between Singleton and Greenwell concerning the scheduling of a meeting with attorney Foster. The circuit court excluded all of these communications, reasoning that the communications in question were between a representative (Greenwell) of the defendant company (Kenco) and the company's attorney, so that the company was entitled to invoke the privilege.

KRE 503(b) sets out the general rule concerning the attorney-client privilege as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

> (1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
>
> (2) Between the lawyer and a representative of the lawyer;
>
> (3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (4) Between representatives of the client or between the client and a representative of the client; or
>
> (5) Among lawyers and their representatives representing the same client.

KRE 503(a)(1) defines "client" as "a person, including a public officer, corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer." However, there are several exceptions enumerated under the rule in situations involving the furtherance of crime or fraud[1] or a breach of duty by the lawyer or the client.[2]

In Stidham v. Clark,[3] the Supreme Court of Kentucky addressed the invocation of privileges, in that case the communications of a psychotherapist. After noting that the

[1] KRE 503(d)(1).

[2] KRE 503(d)(3).

[3] 74 S.W.3d 719 (Ky. 2002).

party asserting the privilege has the burden to prove that it applies, the Stidham court stated that the opponent of the privilege would be required to establish, for one, that the communications were within a specified exception. Regarding the burden of proof, the court held:

> [A] claim of privilege can be defeated by proof by a preponderance of the evidence, including the communication or material claimed to be privileged, that the privilege has been waived or that the communication or material is either outside the scope of (or "not germane to") the privilege or falls within a specified exception to the privilege.[4]

In her brief, Greenwell focuses not upon the circuit court's determination that the privilege exists in this case, but rather on its failure to address the exceptions to the rule, which she asserts are applicable here. While we agree that the circuit court, unfortunately, failed to address the exceptions to KRE 503, we nevertheless hold that its decision was proper. Greenwell did not establish by a preponderance of evidence that either of the exceptions she advanced would apply to defeat the privilege. She did not introduce any evidence that crime or fraud was being furthered, or that there had been any breach of duty. Therefore, we hold that the circuit court did not abuse its discretion in granting the motions in limine.

[4] Id. at 727.

We shall next address the circuit court's entry of the directed verdict on all issues at the close of Greenwell's case. In Bierman v. Klapheke,[5] the Supreme Court of Kentucky set out the applicable standard of review as follows:

> On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party.[] Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.[]

In an earlier decision, the Supreme Court of Kentucky stated that, "[i]n reviewing this issue of evidential sufficiency the appellate court must respect the opinion of the trial judge who heard the evidence."[6] In general, a trial court is not permitted to enter a directed verdict "unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ."[7] It is up to

[5] 967 S.W.2d 16, 18 (Ky. 1998)(citations omitted). See also Banks v. Fritsch, 39 S.W.3d 474 (Ky.App. 2001).

[6] Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 821 (Ky. 1992).

[7] Bierman, 967 S.W.2d at 18-19.

the jury to resolve any conflicting evidence as well as any matters concerning witness credibility.[8]

The first issue we shall review is Greenwell's retaliation claim. Greenwell claims that she was subjected to retaliation in violation of KRS 344.280, which provides, in relevant part, as follows:

> It shall be unlawful practice for a person, or for two (2) or more persons to conspire:
>
> (1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter.

Because the Kentucky Civil Rights Act is virtually identical to the Federal Civil Rights Act of 1964, we look at how federal law has been interpreted.[9]

As Greenwell pointed out in her brief, Kentucky follows the burden shifting formula set out by the United States Supreme Court in McDonnell Douglas Corp. v. Green.[10] Once a plaintiff establishes a *prima facie* case, "[t]he burden then must shift to the employer to articulate some legitimate,

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[8] Id.

[9] Jefferson County v. Zaring, 91 S.W.3d 583 (Ky. 2002)(citing Harker v. Federal Land Bank of Louisville, 679 S.W.2d 226 (Ky. 1984)).

[10] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

nondiscriminatory reason for the employee's rejection."[11] If the employer meets 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."[12] In Brooks v. Lexington-Fayette Urban County Hous. Auth.,[13] the Supreme Court of Kentucky defined a *prima facie* case of retaliation as a demonstration:

> (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.

The appellees contend that Greenwell did not meet any of the four prongs. We shall examine each one in turn.

The first prong of the *prima facie* test is that Greenwell must establish that she was engaged in a protected activity. The appellees argue that Greenwell did not engage in a protected activity under KRS Chapter 344, but rather that she testified under KRS Chapter 341, dealing with unemployment. However, Greenwell argues that she meets the requirement under

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[11] Id. at 802.
[12] Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207, 215 (1981).

[13] 132 S.W.3d 790, 803 (Ky. 2004)(citing Christopher v. Stouder Memorial Hospital, 936 F.2d 870, 877 (6th Cir. 1991), cert. denied, 502 U.S. 1013, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991)).

the participation clause because she was subpoenaed to testify in Taylor's KRS Chapter 344 reverse discrimination action and her testimony from the unemployment hearing was included in that record by joint oral stipulation.

The federal courts have examined the participation clause and have consistently held that "the explicit language of [the] participation clause is expansive and seemingly contains no limitations."[14] Furthermore, the Sixth Circuit Court of Appeals recently held that "[t]he 'exceptionally broad protections' of the participation clause extends [sic] to persons who have 'participated in any manner' in Title VII proceedings."[15] In the present matter, it is clear that Greenwell did not actually testify in Taylor's KRS Chapter 344 proceeding, although she was under subpoena to testify, because that case settled prior to trial. But it is equally clear that the parties entered into an oral stipulation to include the transcript of the Taylor unemployment hearing, which included Greenwell's testimony, in the record of his reverse discrimination case. Therefore, construing her participation broadly as we must do, we hold that the inclusion of the unemployment hearing transcript in the record of the KRS Chapter 344 proceeding, coupled with Greenwell's being under subpoena to

[14] Deravin v. Kerik, 335 F.3d 195, 203 (2nd Cir. 2003).

[15] Johnson v. University of Cincinnati, 215 F.3d 561, 582 (6th Cir. 2000).

testify at trial, is sufficient under the participation clause to establish that Greenwell engaged in a protected activity under KRS Chapter 344. The circuit court was clearly erroneous in holding otherwise. Likewise, we must hold that the appellees knew about Greenwell's testimony at the unemployment hearing and about the inclusion of the hearing transcript in Taylor's reverse discrimination action.

We shall next examine the adverse-action element. In Brooks, the Supreme Court of Kentucky, relying upon the Sixth Circuit Court of Appeals' opinion in Hollins v. Atlantic Co., Inc.,[16] indicated that a plaintiff is required to identify "'a materially adverse change in the terms and conditions of his employment to state a claim for retaliation.'"[17] The Brooks court further cited the Hollins case to define a materially adverse change as "more disruptive than a mere inconvenience or an alteration of job responsibilities."[18] Furthermore, the court stated, "[a] material modification in duties and loss of prestige may rise to the level of adverse action."[19] In that case, Brooks was singled out from other employees and had to get permission from her supervisor to leave her desk for any reason.

[16] 188 F.3d 652, 662 (6th Cir. 1999).

[17] Brooks, 132 S.W.3d at 802.

[18] Id.

[19] Id. at 803.

The change in her duties "subjected her to greater supervisory scrutiny, carried an imputed diminished level of trust, and marked an objective decrease in prestige."[20]

Here, Greenwell argues that she was subjected to adverse employment actions when she received the January 23, 2003, memorandum regarding inappropriate behavior, when her managerial duties were withdrawn one week later by Birchfield in an e-mail announcement to the company, and when she did not receive a promotion. The appellees argue that Greenwell failed to show any evidence of a material adverse change to establish an adverse employment action. In a light most favorable to Greenwell, we hold that there is at least sufficient evidence to allow her to defeat a motion for directed verdict at the close of her case. Whether the evidence is sufficient to establish any adverse employment action is best left to the jury to decide.

The final prong of the *prima facie* case for retaliation is evidence of a causal connection between the protected activity and the adverse employment action. The Brooks court indicated that in the absence of direct evidence, "the causal connection of a *prima facie* case of retaliation must

[20] Id. at 804.

be established through circumstantial evidence."[21] More precisely,

> Circumstantial evidence of a causal connection is "evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action." . . . In most cases, this requires proof that (1) the decision maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action.[22]

In the present case, Greenwell relies upon the close temporal proximity of the dismissal of Taylor's reverse discrimination case to the January 23, 2003, memorandum and the e-mail concerning her managerial duties. This circumstantial evidence is sufficient, when regarded in a light most favorable to Greenwell, to establish this prong of the *prima facie* case of retaliation.

Because we have held that Greenwell established her *prima facie* case, the McDonnell Douglas burden shifting would then apply. At the outset, we note that the appellees were not required to present their case-in-chief because a directed verdict was granted at the end of Greenwell's case. However, the appellees were able to put forth some legitimate, non-discriminatory reasons for the actions that were taken regarding

[21] Id.
[22] Id. (Citations omitted.)

Greenwell. Assuming that the appellees' evidence would be sufficient to shift the burden back to require her to establish pretext, Greenwell argues that she presented evidence that the appellees' proffered reasons were merely pretext. In support, she points to trial testimony from several witnesses that establishes that the circumstances surrounding the incidents listed in the January 23, 2003, memorandum did not happen as reported in that document. In a light most favorable to her, we hold that Greenwell produced sufficient evidence to establish pretext on the appellees' part.

Because we have held that Greenwell engaged in a protected activity under KRS Chapter 344, we need not address her public policy argument.

Because we have held, in a light most favorable to her, that Greenwell established a *prima facie* case for retaliation as well as pretext, we hold that the circuit court was clearly erroneous in granting a directed verdict on the issue of retaliation, and accordingly reverse the judgment in this regard.

We shall next address Greenwell's intentional infliction of emotional distress claim against Singleton and Birchfield. In Humana of Kentucky v. Seitz,[23] the Supreme Court

[23] 796 S.W.2d 1, 2-3 (Ky. 1990).

of Kentucky set out the elements of a *prima facie* case of outrageous conduct as follows:

> 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
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> 4) the emotional distress must be severe.

In Seitz, the Supreme Court held that the hospital staff's callous treatment of a patient after the birth of her stillborn child did not reach the level of outrageous conduct sufficient to establish a *prima facie* case.

In her brief, Greenwell simply submits that it was outrageous for Singleton and Birchfield to retaliate against her for refusing to testify untruthfully. However, the appellees point out, and we agree, that Greenwell did not present any evidence that she was retaliated against because she refused to commit perjury. Because Greenwell failed to establish any evidence of outrageous and intolerable conduct, we agree that she failed to prove a *prima facie* case of intentional infliction of emotional distress. Therefore, the circuit court was not clearly erroneous in granting a directed verdict on this issue.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed in part and reversed in part, and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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