

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000418-MR

TRACY BACK

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 01-CI-00449

GARY CORNETT, IN HIS CAPACITY
AS LETCHER COUNTY JAILER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Tracy Back appeals the summary dismissal of her claim for damages for sexual harassment alleged to have been incurred through appellee's negligence in allowing a hostile work environment to exist at the Letcher County Jail. Having carefully reviewed the record in the light most favorable to appellant, we find no basis for disturbing the decision of

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the trial judge and accordingly affirm the judgment in this case.

Appellant Tracy Back instituted this action for damages based upon the allegation that she was sexually harassed by co-workers in the course of her employment as a deputy jailer at the Letcher County Jail. Back alleged in her complaint that appellee, the Letcher County Jailer, had been placed on notice that the work environment at the jail was "patently offensive and hostile" toward her and that appellee had allowed the hostile treatment to continue to the point that she was forced to resign her employment in violation of KRS 344.040. In her brief to this Court, Back identified the incidents underpinning her claim as follows: 1) just prior to Thanksgiving 2000, fellow deputy John Wyatt walked up her behind her while she was booking an inmate, grabbed her by the hair and said, "You stupid bitch"; 2) on another occasion Wyatt locked her in the female cell for approximately three hours because she refused to relieve him in the control booth; 3) in May 2001, Wyatt and another deputy jailer, while talking to a former inmate on a speakerphone, began imitating a female voice, pretending to be appellant, and insinuating that she was a lesbian; and 4) on a separate occasion, Back was informed of a conversation in which Wyatt and another deputy told a former female inmate that appellant was gay.

In his motion for summary judgment, appellee Cornett argued that Back had failed to sustain her burden of setting out a prima facie case of hostile work environment sexual harassment; that Back never formally complained to Cornett prior to filing this lawsuit that she found the work environment at the jail abusive; and that Back herself was disciplined several times for conduct which may have contributed to the creation of an unprofessional work environment at the jail. The summary dismissal of Back's complaint precipitated this appeal.

The standard by which this Court reviews appeals from the grant of summary judgment is clearly set out in Lewis v. B&R Corporation:²

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 Lewis court points out that the party seeking summary disposition bears the initial burden of establishing that no genuine issue of material fact exists and the burden then shifts to the party opposing the motion to present "at least some

² 56 S.W.3d 432, 436 (Ky.App. 2001).

affirmative evidence showing that there is a genuine issue of fact for trial.”³ In order to prevail against a properly supported motion for summary judgment in a discrimination case, it is incumbent upon the plaintiff to identify “cold hard facts” from which an inference of racial or sexual discrimination can be drawn.⁴ Finally in this regard, because KRS 344.040, the pertinent provision of the Kentucky anti-discrimination statutes, closely mirrors similar language in Title VII of the Federal Civil Rights Act, we reiterate the often-cited directive of the Supreme Court of Kentucky in Meyers v. Chapman Printing Co., Inc.,⁵ that federal anti-discrimination caselaw should serve as guidelines in interpreting Kentucky anti-discrimination legislation. With these standards in mind, we will undertake an examination of the propriety of the trial judge’s decision to summarily dismiss appellant’s complaint.

We first note the absence of any genuine issue as to the facts alleged to have created a hostile work environment at the Letcher County Jail. Taking as true the incidents recited by appellant in support of her complaint, we are convinced that Back failed to set out a prima facie case of sexual harassment. To successfully establish a cause of action predicated upon

³ Id.

⁴ Kentucky Center for the Arts v. Handley, 827 S.W.2d 697, 700-01 (Ky.App. 1991).

⁵ 840 S.W.2d 814 (Ky. 1992).

hostile work environment, a plaintiff must demonstrate: 1) that the conduct in question was unwelcome; 2) that the harassment was based upon gender; 3) that the harassment was sufficiently pervasive or severe so as to "alter the conditions" of the plaintiff's employment; and 4) that a reasonable basis exists for imputing the conduct of a fellow employee to the employer.⁶ It must be emphasized that not only must the conduct be extreme and based upon the plaintiff's gender, it must also pass the test of objectivity. A determination as to the existence of an objectively hostile or abusive work environment:

can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a merely offensive utterance; and whether it unreasonably interferes with an employee's work performance.⁷

A review of Back's own testimony negates the existence of several of these essential elements.

We commence our discussion of appellant's failure to set out a prima facie case of sexual discrimination by examining each incident of alleged misconduct individually. The first allegedly-offensive conduct occurred just prior to Thanksgiving 2000 when fellow deputy jailer John Wyatt came up behind

⁶ Meyers, 840 S.W.2d at 821; Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992).

⁷ Harris v. Forklift Systems, Inc., 520 U.S. 17, 23 (1993).

appellant while she was booking an inmate, pulled her hair and stated, "You stupid bitch." Appellant's deposition testimony indicated that appellant had no idea why Wyatt would have said such a thing and that she simply ignored the incident. Her testimony implies that at the time, she ascribed no gender-based content to the incident. It is also noteworthy that the hair-pulling incident is the only conduct involving physical contact.

The second episode of allegedly harassing conduct occurred when Deputy Wyatt locked appellant in the female cell for approximately three hours. Appellant described that incident as follows:

Q. Okay, what happened at Thanksgiving?

A. He had locked me in the female cell for approximately three-

Q. Deputy Wyatt did?

A. Yes, for approximately three hours.

Q. Okay, now, what were you doing in the female cell?

A. Well, I had went in there to check, check on the females, and they wanted me to set down and play a game of cards with them, so I did.

Q. All right.

A. And-

Q. Let me interrupt you. While you are in there, and I'm assuming that that's fine, that you could go in there-

A. Mm-hmm.

Q. -and play cards with them, would the cell door had to have been locked?

A. No. You have to push it shut.

Q. Okay.

A. Or slam it shut. So we just had it, you know, at the-it was just-you could still go in and out of it.

Q. Okay. No, but I guess what I'm asking is it okay for a deputy to be inside a jail cell with inmates and not have the door locked?

A. Yeah.

Q. Okay. And so then how did it come to be locked? Did he come by and-

A. He come by and shut it, shut the door, and I-I couldn't get out. And he come over the intercom, they have got intercoms inside the cells, and he was saying, cussing at me and just saying stuff, and I said, "Let me out." I said, "Open the door." I said, "I've got stuff I've got to do." And, no, he wouldn't do it.

Q. And so from the time that he locked the door until you got out was three hours?

A. Approximately.

Q. Okay.

A. He had wanted me to come out, he'd holler over the intercom and wanted me, before he shut the door, wanted me to come out and set in the control booth while he went upstairs and played poker in the sheriff's office, and I wouldn't do it. So that would be the only reason

I could think that he would have locked me in there.

Thus, by appellant's own interpretation of this incident, she was not locked in the cell due to gender-based harassment, but because she would not comply with Wyatt's request that she relieve him in the control booth.

The incidents which come closest to constituting harassment gender-based discrimination are the two telephone calls made by other employees to former inmates insinuating that appellant was a lesbian and that she was attracted to the inmates. Appellant stated that she heard the first conversation in which Wyatt and another deputy had Rebecca Akers on the speaker phone. Appellant believed from Akers' slurred speech that she was intoxicated on something. From appellant's description of the conversation, Wyatt was pretending to impersonate appellant and was engaging Akers in vulgar conversation. Appellant stated that she informed the deputies that she did not believe that appellee Cornett would approve of their conduct and then left the room. A second incident involving a similar telephone call was reported to appellant by another deputy and thus she was not actually present at the time the allegedly harassing conduct occurred.

Appellant admits in her deposition that although she reported these incidents to her immediate supervisors according

to jail policy, she did not follow up to determine if the supervisors had actually informed appellee. Appellant also acknowledged the fact that she never approached Cornett or other county official with her complaints of a hostile work environment at the time these incidents were occurring or at any time during her employment.

Viewing these incidents in the light most favorable to appellant, we can construe only the telephone conversation with Rebecca Akers as objectively constituting gender-based harassing conduct. The hair-pulling episode and the incident in which appellant was locked in the female cell were not, by appellant's own assessment, gender-based conduct. Because appellant did not actually hear the second telephone call, it has limited weight in establishing the severity of the harassing conduct. It must also be emphasized that not all offensive or unprofessional conduct rises to the level of gender-based harassment. In fact, it is our opinion that no reasonable person could find the admitted conduct at the jail, including conduct of appellant herself, anything other than offensive, crude, and utterly unprofessional. Nevertheless, what is lacking in this record is evidence of a pattern of gender-based conduct so pervasive and severe as to have interfered with the conditions of appellant's employment. It was not until after appellant left her employment, based upon her perception that she had been demoted

and was not receiving the same number of work hours that she previously enjoyed, that she brought her claim of a hostile work environment to the attention of the person in the best position to remedy the situation, appellee Gary Cornett. Noticeably lacking from her deposition testimony is any indication that appellant left her employment because of the hostile environment.

We view the Akers' telephone call as the sole episode in this case from which a reasonable person could draw an inference that gender-based animus was leveled at appellant. And as a single incident, it utterly fails the test for the existence of a hostile environment set out in Faragher v. City of Boca Raton:⁸ that "'simple teasing', offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" In explaining the application of this test to a particular case, the United States Supreme Court reiterated its conclusion that to be actionable "a sexually oriented environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so."⁹ This requires that trial courts examine the totality of the

⁸ 524 U.S. 775, 788 (1998).

⁹ Id. at 787-88.

circumstances, the frequency of the conduct, whether it is physically threatening or humiliating, and whether it in fact interferes with an employee's work performance:

These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes and occasional teasing." . . . We have made it clear that the conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view. [Citations omitted.]¹⁰

Viewing the totality of the work environment at the Letcher County Jail from the perspective of appellant's own testimony, we find that she cannot meet the Faragher criteria for an actionable claim based upon hostile work environment. Accordingly, we affirm the summary dismissal of her complaint.

All Concur.

BRIEF FOR APPELLANT:

Jonah Stevens
Pikeville, Kentucky

BRIEF FOR APPELLEE:

C. Thomas Hectus
Randall S. Strause
Louisville, Kentucky

¹⁰Id. at 788.