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NOVEMBER 16, 2005 (2005-SC-0538-D)

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2004-CA-000720-MR

LISA ADKINS

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 00-CI-00952

JUSTICE CABINET,  
DEPARTMENT OF CORRECTIONS;  
and KENTUCKY PERSONNEL BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

VANMETER, JUDGE: This is an appeal from an order entered by the Franklin Circuit Court affirming an order of the Kentucky Personnel Board (Board) dismissing appellant Lisa Adkins from employment with the Department of Corrections (Corrections).

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Adkins contends that the circuit court and the Board erred (1) by applying an incorrect legal analysis, (2) by failing to find that Corrections violated its duty to undertake reasonable steps to remove her from a hostile work environment, (3) by failing to find that Corrections condoned a hostile work environment by discharging her based in part on "administrative burden," and (4) by finding that substantial evidence supported her dismissal. For the reasons stated hereafter, we affirm.

Adkins began working as a correctional officer at Northpoint Training Center, an all-male facility, on November 18, 1998. Some nine days after Adkins completed her month-long initial training process, certain events began to occur which led to her dismissal. The record shows that there were numerous instances of inmates behaving in sexual or other inappropriate ways toward Adkins, frequent allegations of inappropriate contact between Adkins and various inmates, and several allegations that Adkins made inappropriate or unprofessional remarks to other employees regarding inmates or her personal life. Further, there was evidence that Adkins violated policy by failing to report multiple instances of inmate or fellow officer misconduct. The evidence showed that Adkins' supervisors counseled with her concerning the need to maintain a proper authoritative relationship with inmates. Nevertheless, in a memorandum dated June 8, 1999, the deputy warden advised

the warden that Adkins had "not progressed and performed in a satisfactory manner during her probationary period" and that she

has been the focal point of considerable inmate and staff attention, allegations and rumors. Officer Adkins has not adjusted well to the correctional environment. Repeated supervisory and administrative efforts to assist Officer Adkins have not been successful, largely due to her demeanor, and lack of a command presence to control inmates.

There have also been several incidents of staff problems in which Officer Adkins has been involved. While many of the rumors have not been substantiated, this officer has required excessive management, to include many man-hours of supervisory intervention, investigations, etc. Security supervisors and administrators have recently assigned Officer Adkins to a tower and other outside posts because we feel strongly that Officer Adkins may get hurt, and/or the safety and security of the facility may be threatened.

Adkins was discharged on July 13, which was several days prior to the expiration of the eight-month probationary period during which she could be dismissed without cause.

Adkins appealed as provided by KRS 18A.095, alleging that she had been discriminated against on the basis of gender and that the institution had condoned sexual harassment by her supervisor, fellow employees and inmates. The Board adopted the hearing officer's forty-seven page report and dismissed the appeal, finding in part:

3. During [Adkins'] initial probationary period, the testimony at the hearing showed numerous instances of the exercise of poor judgment by [Adkins] in performing her job duties. Specifically, [Adkins] frequently did not promptly report incidents with inmates to her supervisors; did not show sufficient command presence with inmates necessary to control the inmates; and became too friendly with inmates who, as a result, perceived her as weak.

. . .

11. On February 17, 1999, Deputy Warden Brad Mitchell and Sr. Captain McElroy Burdette counseled with [Adkins] concerning professionalism, the games inmates play, how to file reports promptly and initiate corrective action of inmate misbehavior. [Adkins] was told in this meeting by Deputy Warden Mitchell that she needed to take immediate action each and every time an inmate approached her inappropriately. Mitchell also told [Adkins] to report these matters to supervisors and properly document these occurrences. [Adkins] was also cautioned during the counseling session against discussing her personal life or personal business at work with staff or inmates.

. . .

17. On March 31, 1999, Deputy Warden Mitchell and Lt. Case who had conducted the investigation met with [Adkins] to inform her of the status of the investigation. At that time Deputy Warden Mitchell voiced concerns about the allegations of misconduct and advised [Adkins] not to be alone with an inmate as it would encourage further allegations. He also advised [Adkins] to be professional and to be consistent, firm and fair when dealing with inmates. The Deputy Warden also informed [Adkins] that he had doubts if corrections should be a career

choice for her. The Deputy Warden also noted that although Inmate Thomopolous had been clearly pursuing a relationship with [Adkins], Appellant Adkins had not reported this fact.

. . .

22. On April 23, 1999, Officer Burdette Wells submitted a report that [Adkins] had told Wells that Correctional Officer Daniel Berg had touched her inappropriately by leaning up against her and pressing his pelvic area against her. An investigation of this incident was conducted. Internal Affairs found evidence that physical contact did occur between Officer Berg and [Adkins], but that [Adkins] had failed to report the incident.

23. On May 6, 1999, [Adkins] was again evaluated by Lt. Richardson for the months of March and April 1999. On each of these evaluations, Richardson gave [Adkins] "Fails to Meet" in the "Judgment" and "Adaptability" categories. Richardson's evaluations noted that [Adkins] had problems around inmates and that she "lets the inmates dictate her actions thus affecting her job quality." Richardson also noted on the April 1999 evaluation, "her weak point is working too closely with inmates thus creating a dangerous working environment." Richardson testified that he had been told by Capt. McCullough to "do your job" in performing these evaluations of [Adkins].

24. In May of 1999 [Adkins] was reassigned to work in Tower 3. A report was received from Officer Daniel Ray that [Adkins] had engaged in conversation with inmates on the yard for approximately forty-five minutes on May 23, 1999. This incident was also confirmed by Officers Hood and Noel.

25. Deputy Warden Brad Mitchell stated that the reasons for recommending to the Warden that [Adkins] not complete her probationary

period related to the fact that she had had repeated problems with reporting incidents on time and dealing with inmates. Mitchell stated that inmates routinely play games, test and try out new correctional officers. Despite repeated counseling sessions, [Adkins] had been unable to conduct herself in a manner so as to minimize the rumors. Mitchell also stated that [Adkins] was the first instance where he had ever had to meet with a probationary employee as many times as he had met with [Adkins]. Mitchell pointed out that he had had twenty or twenty-five female probationary correctional officer employees during his tenure.

26. The evidence at the hearing did not demonstrate a pattern of sexual harassment by staff at Northpoint Training Center. The only incident of possible sexual harassment by Officer Daniel Berg was not reported by [Adkins] to her supervisors. After an investigation, Officer Berg was subsequently counseled about sexual harassment.

27. [Adkins] testified that Lt. Richardson had pursued her and asked her for dates from shortly after she returned to Northpoint Training Center to begin work following basic training. She also testified that Richardson had repeatedly called her house asking her for dates. However, [Adkins'] testimony was not corroborated by any other evidence in the record at the hearing. Specifically, [Adkins] testified she had told Capt. Danny Bottoms of Richardson's approaches. Bottoms, who is retired and no longer employed at Northpoint Training Center, in his testimony denied that [Adkins] had ever told him that Lt. Richardson was asking her for dates. The evidence in the record also showed that [Adkins] did not report to Deputy Warden Mitchell or the Warden or complain to them about Lt. Richardson allegedly asking her for dates, although [Adkins] had more than one meeting with Deputy Warden Mitchell

during her tenure at Northpoint Training Center.

28. Northpoint Training Center does have a policy against sexual harassment which was introduced through Ms. Kim Whitley. The policy, however, applies to employees at Northpoint and does not specifically apply to inmates. Evidence at the hearing showed that if inmates make inappropriate approaches or comments to a correctional officer, the matters are handled through an internal disciplinary process at Northpoint Training Center and the inmate may be subjected to disciplinary action.

29. While a number of instances of inmates engaging in inappropriate conduct or making inappropriate remarks toward [Adkins] were reviewed during the course of the evidentiary hearing, in virtually every instance in which improper inmate behavior was reported, the matters were investigated and disciplinary action was taken against the inmate if the allegations were found to be substantiated.

The Board concluded that Adkins failed to meet her burden of proving a

*prima facie* case of sex discrimination because she failed to establish that she was qualified for the position by demonstrating that she was meeting her employer's legitimate expectations and was performing to her employer's satisfaction. See, Warfield v. Lebanon Correctional Institution, 181 F.3d 723 (6<sup>th</sup> Cir. 1999). In this case, [Adkins] did not demonstrate she was qualified for her position by her repeated examples of the use of poor judgment in the exercise of her job duties, by not filing reports in a timely manner, by not showing the command presence necessary to control inmates, and by becoming too

friendly with the inmates at the institution.

The Board also found that although Adkins belonged to "a protected class and suffered an adverse job action in being dismissed," Corrections articulated legitimate nondiscriminatory reasons for her probationary period dismissal, as the evidence showed

numerous incidents of lack of good judgment by [Adkins] in dealing with inmates. Specifically, [Adkins] did not demonstrate a command presence necessary to control the inmates by showing that she was being firm, fair and consistent with the inmates. [Adkins] also was lax in filing reports of inappropriate behavior by the inmates which in several instances resulted in more serious inappropriate behavior by the inmate. Further, [Adkins] allowed her personal life to be discussed with other staff members and in the presence of inmates. All of these actions by [Adkins] tend to jeopardize security at the institution.

The Board concluded that Adkins failed to establish that she was harassed by her supervisor, noting both the absence of supporting witnesses, and Adkins' failure to report the alleged harassment prior to her dismissal even though she met numerous times with the warden, deputy warden and other supervisors. The Board also concluded that by taking actions such as "locking up inmates in administrative segregation, charging them with disciplinary violations, [or] finding them guilty and sentencing inmates to disciplinary segregation and forfeiture of good

time," Corrections "took reasonable steps to prevent and limit improper inmate behavior" as reported by Adkins and others. Further, the Board rejected Adkins' claim that inmates' rumors about her constituted actionable sexual harassment, as the evidence showed that the authorities investigated and found little merit in the rumors, and there was no evidence that the rumors were spread by Corrections employees. Finally, the Board concluded that the evidence as a whole showed that Adkins was dismissed primarily because of her deficiencies

in adapting to the environment at Northpoint Training Center and in performing her job duties. Specifically, there were numerous instances of [Adkins] failing to promptly and properly report instances of inmate misconduct, instances of [Adkins] failing to be firm, fair and consistent with inmates in order to maintain control over the inmates, and of [Adkins] becoming too friendly with inmates at the institution. The evidence introduced at the hearing clearly shows that these reasons were the primary reasons for which Warden Morgan determined to terminate [Adkins] before the end of her initial probationary period. The purpose of an initial probationary period is to determine whether an employee is suited to a position and is able to properly perform the duties and responsibilities of the position. It was proper and appropriate for the Warden at Northpoint Training Center to dismiss [Adkins] prior to completion of her initial probation when the Warden had determined that [Adkins] was not properly performing or able to perform the duties and responsibilities of the position of Correctional Officer despite numerous counseling sessions from her supervisors.

The Franklin Circuit Court initially dismissed Adkins' appeal for failure to serve an indispensable party, i.e., the Board. However, a panel of this court reversed and remanded the matter on the ground that the Board waived its right to object to personal jurisdiction. The circuit court affirmed on remand, finding that the Board applied the correct rule of law and that its decision was based on substantial evidence. This appeal followed.

First, Adkins contends that the circuit court and the board erred by applying an incorrect legal analysis. We disagree.

As established by *McDonnell Douglas Corporation v. Green*<sup>2</sup> and its progeny, an employee who alleges gender discrimination must establish a *prima facie* case by demonstrating that he or she (1) belongs to the protected class; (2) was qualified and sought the position; (3) suffered an adverse action; and (4) either was replaced by someone outside of the class or was treated differently from similarly situated members of the class. Once a *prima facie* case is established, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the employee's discharge.<sup>3</sup>

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<sup>2</sup> 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973).

<sup>3</sup> *Id.*

Hostile work environment situations, by contrast, should be considered in light of cases such as *Faragher v. City of Boca Raton*,<sup>4</sup> and *Bank One, Kentucky, N.A. v. Murphy*,<sup>5</sup> which address the existence of employer liability once an employer becomes aware of but fails to adequately address the workplace sexual harassment of an employee by a person with supervisory authority over the employee. As stated in *Faragher* and reaffirmed in *Bank One*, an employer may raise an affirmative defense against vicarious liability for a hostile work situation by showing both

"(a) that the employer exercised reasonable care to prevent and correct promptly any sexually 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."<sup>6</sup>

Here, as found by the circuit court, the Board clearly considered Adkins' claims in light of the standards set out both in *McDonnell Douglas*, and in *Faragher* and *Bank One*. More specifically, the Board found that Adkins did not make a *prima facie* showing of gender discrimination under *McDonnell Douglas*, as she failed to show that she was qualified for the job because

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<sup>4</sup> 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

<sup>5</sup> 52 S.W.3d 540 (Ky. 2001).

<sup>6</sup> *Id.* at 544, quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633 (1998), and *Faragher*, 524 U.S. at 807, 118 S.Ct. 2275.

she both met her employer's legitimate expectations and performed to her employer's satisfaction. The Board found that although Adkins belonged to a protected class and suffered an adverse job action, her job performance created legitimate nondiscriminatory reasons for her dismissal.

Despite Adkins' assertions to the contrary, the Board also clearly considered the workplace sexual harassment issues in light of *Faragher* and *Bank One*. First, the evidence shows that Corrections exercised reasonable care to promptly prevent or correct harassing behavior. More specifically, Corrections promptly investigated allegations of improper contact between Adkins and Berg as soon as a report was made by a third party, and Berg then was counseled regarding his behavior. Further, Corrections promptly investigated complaints and disciplined inmates who engaged in misconduct toward Adkins, and the record contains no evidence that employees promoted either the misconduct or the spread of rumors about Adkins.

Additionally, despite Adkins' complaints of misconduct by fellow employees and inmates, the record is replete with evidence that Adkins repeatedly failed to report misconduct or to otherwise take available steps to control or eliminate misconduct. Indeed, although Adkins now alleges that her supervisor sexually harassed her, the record shows that she never made such a claim until after she was dismissed from her

job, even though she had many opportunities to discuss concerns with various supervisors including the warden and assistant warden. Further, the record contains evidence that Adkins repeatedly engaged in behavior which hindered the development of an authoritative relationship with the inmates. It follows, in light of *Faragher*, that the Board and circuit court did not err by concluding that Adkins was not entitled to relief. Thus, any error in the Board's simultaneous consideration of the claims under *McDonnell Douglas*, as well as under *Faragher* and *Bank One*, was clearly harmless.

Next, Adkins contends that the circuit court and Board erred by failing to find that Corrections violated its duty to take reasonable steps to remove her from a hostile work environment. We disagree.

As discussed above, the record shows that Corrections promptly counseled and/or disciplined employees and inmates who were known or suspected to have engaged in misconduct toward Adkins. Despite these efforts, there is substantial evidence in the record to show that Adkins repeatedly failed to timely report employee or inmate misconduct, and that she repeatedly failed to take steps to maintain proper authoritative relationships with inmates, even after Corrections attempted to remove her from the allegedly hostile work environment by assigning her to a guard tower where she could have little or no

contact with inmates. Given the evidence of the attempts by Corrections to prevent and correct harassing behavior, as well as the evidence of Adkins' failure to promote or cooperate with such efforts, we cannot say that the circuit court or Board erred by concluding that Corrections satisfied its duty to take reasonable steps to remove Adkins from a hostile work environment.

Next, Adkins contends that the circuit court and Board erred by failing to find that Corrections condoned a hostile work environment by considering the "administrative burden" involved in addressing the sexual rumors when making its decision to discharge her. However, substantial evidence shows that legitimate nondiscriminatory reasons existed for Adkins' dismissal, and Corrections clearly was entitled to dismiss a probationary employee who repeatedly failed to maintain proper relationships with inmates or to otherwise satisfy the duties and responsibilities of her position. Adkins is not entitled to relief on this ground.

Adkins' final contention, pertaining to the alleged absence of substantial evidence to support her dismissal, was adequately discussed above and need not be further discussed in this opinion.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Andrew J. Ruzicho  
Lexington, Kentucky

BRIEF FOR APPELLEE JUSTICE  
CABINET, DEPARTMENT OF  
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