RENDERED: AUGUST 5, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001049-MR

PAULA KAY SLONE — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 00-CI-00292

TOYOTA MOTOR MANUFACTURING KY, INC.; DAVE HOWARD; AND JAMES LEMASTER — APPELLEES

OPINION
AFFIRMING IN PART,
AND
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a summary judgment entered by the Scott Circuit Court in favor of the employer, Toyota Motor Manufacturing, Kentucky, Inc. (TMMK), in a workplace sexual harassment claim. For the reasons stated hereafter we affirm in part, and reverse and remand in part.

Appellant Paula Kay Slone worked for TMMK as a temporary employee from November 1999 until she suffered a

work-related injury in October 2000. Slone claims that she was sexually harassed during a portion of that time by a permanent coworker, Dwayne Covey.

The record indicates that Covey was on leave when Slone first started working for TMMK, but that he returned to work around the end of December. Slone testified by deposition that when she first met Covey, he asked whether she would consider dating a married man. Slone refused and reported the conversation to a TMMK team leader, asking "what was up with [Covey]. I didn't think Toyota would allow something like that." Slone did not report the incident to her TMMK group leader, Dave Howard.

Slone reported that the next incident occurred when she bent over to get gloves and realized that, although he did not touch her, Covey "was in behind me acting like he was spanking me, saying, I'm going to spank that ass." Slone stated that the incident was witnessed by a few coworkers and that she reported it to Howard, asking why Covey was permitted to act that way and asserting that TMMK "needed to do something with" Covey and that Howard should "[m]ake him stop." Slone testified that Covey made the spanking comment to various coworkers a couple of times each week, "anywhere he felt like making" it.

Slone recalled that Covey next poked her "in the butt" with a wooden tool shaped like a short mop handle. Although a

coworker witnessed the incident, Slone did not immediately report it because she "was just kind of shocked." When the incident was discussed a couple of days later during a daily team meeting, Slone assumed that Howard had heard of Covey's "bad behavior." She testified by deposition as follows:

> Q. Did [Howard] say anything to indicate he had heard about it or knew about it?
>
> A. No. He just kind of lowered his head. He didn't have a response.
>
> . . .
>
> A. Well, I had assumed that Dave Howard might know something about it because after – I wouldn't leave the machine and Tim wouldn't leave the machine until Dwayne, you know, walked away.
>
> Q. Uh-huh. (Affirmative)
>
> A. And when I was walking out of the machine I saw Dave Howard. I assumed he knew what was going on. He was there.
>
> . . .
>
> Q. You don't have any – you didn't actually see that he saw it or that he was standing there and witnessed it?
>
> A. No, I didn't see.

Slone later stated that when Cowan suddenly ran off after the tool incident, she looked up and saw Howard, whom she then approached. However, according to Slone, Howard

> A. . . . turned around and walked back to the break room, so I just – I just walked

> back to my machine. I was numb from head to toe.
>
> Q. So you didn't say anything to Dave Howard about that incident?
>
> A. No.
>
> Q. Did you say anything to the assistant manager or manager in the area?
>
> A. I didn't really know at the time who the assistant manager was.

Slone stated that a week or so later, Covey approached her and started trying to pull up her shirt. She "slapped him and told him to leave" her alone. According to Slone, a few minutes later

> A. . . . [Covey] said do you have any Covey in you? I didn't get it. I thought he was talking about, you know, family or something, and I said, no, not that I know of. And he said, do you want some? And Dwayne and Todd started laughing, and that's when I got the joke.

Slone reported that when she subsequently walked into the break room for a team meeting, she told her coworkers to stop laughing about the incident and to leave her alone. Although she did not complain to Howard and he did not respond to the incident, he was at his desk in the break room and she felt that he "had to have heard" the comments because of "the way he acted. He just kind of lowered his head, you know, like he was trying to ignore me or something."

Slone indicated that the next incident occurred on a Saturday in early February, when team leaders Mike LeMaster and Mike Roarke went to her line to fix a machine problem. She stated that Covey

> A. . . . followed them, and he was pulling at my shirt again and, you know, asking me if I would kiss him and stuff like this, and I was telling him to leave me alone. And he wouldn't leave me alone, so I ran in the back to tell Mike LeMaster and Mike Roarke what he was doing, that he wouldn't leave me alone, and Mike LeMaster just kind of looked at me. He said, well, he's off the clock. That's all he said. And I said, well, what does that have to do with Dwayne leaving me alone? If he's off the clock he should be leaving, he shouldn't be standing around on my line.
>
> Q. Okay.
>
> A. And they just kind of went back to what they were doing and ignored me. . . .

Slone stated that later that day, when she went to her parked car, Covey

> A. . . . was there, and he wouldn't let me open my car door or anything like that and told me he wasn't going to let me go until I gave him a kiss and asked me to meet him somewhere so we could have sex.
>
> Q. How did you react to that?
>
> A. I got away from him and started running back toward the turnstile to run back into the building, and he, you know, raised his arms up in front of him, and he said, just forget it, okay, never mind, I'll leave you alone.

Slone didn't know of any witnesses to the parking lot incident. However, she stated that on the following Monday she approached Howard before work and told him that Covey "waylaid me at my car Saturday on the way when I was trying to get home, and he wouldn't, you know, let me get in my car, he was trying to get me to kiss him and stuff, and he was bothering me on carrier two, and Mike LeMaster wouldn't do anything about it." According to Slone, Howard "didn't say anything."

Slone further stated that subsequently, perhaps in late February, "Covey walked by and patted" her on the buttocks. Slone alleged that when she reported the incident to Howard during her next break, Howard said nothing and "just sat there." After Covey repeated his action in March, Slone asked a coworker to advise another group leader of "what was going on." During the investigation which immediately followed, Slone was asked about several other allegations. However, Slone did not initiate any discussions about other incidents involving Covey, either during the meeting with the TMMK investigator or during an earlier meeting with a TMMK human resources representative after Covey threw a part which struck Slone. Covey was terminated from his employment as a result of the investigation, and Slone continued working as a temporary employee until she slipped and suffered a work-related injury in October 2000. She has not returned to work at TMMK.

Slone filed a complaint and amended complaint asserting that she was subjected to sexual harassment and a sexually hostile work environment while employed at TMMK. She claimed that despite having actual or constructive notice, TMMK failed to exercise reasonable care to promptly prevent or correct the harassment. She also claimed that she suffered retaliation for filing her claim, and she sought damages for violations of the Kentucky Civil Rights Act.[1] TMMK eventually sought summary judgment, asserting that Slone could not assert a prima facie case of sexual harassment or a viable claim of retaliation.

The trial court found that there were genuine issues of material fact as to whether Slone produced evidence of sufficiently severe or pervasive conduct to render her claim of sexual harassment actionable, and as to whether the alleged harassment altered the conditions of her employment and created an abusive work environment. As to the issue of TMMK's liability, however, the court found that since it was

> Covey's employer and since Covey was [Slone's] co-worker rather than supervisor [TMMK] must have been negligent or reckless to be held liable for his conduct. Fenton v. HiSan, Inc., 174 F.3d 827, 829 (6th Cir. 1999). [Slone] must produce evidence that TMMK "knew or should have known of the harassment and failed to take action." Kirkwood v. Courier-Journal, Ky.App., 858

[1] *See* KRS Chapter 344.

> S.W.2d 194, 199 (1993) (Discretionary Review Denied). More specifically, [Slone] must demonstrate that TMMK "knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action." Felton [sic], supra, at 830. Further, "when an employer responds to charges of co-worker sexual harassment, the employer can be liable only if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known." Blankenship v. Parke Care Centers, Inc., 123 F.3d 868, 873 (6th Cir. 1997) (*cert. denied)*; Fenton, supra, at 829. The employer's act of discrimination in a co-worker sexual harassment case such as this is not the harassment, but rather the inappropriate response to the charges of harassment. Id.

The court agreed with TMMK's contention that it "reasonably took prompt and corrective action against Covey's conduct," noting:

> In reviewing Defendants' Exhibit "B" and the full deposition testimony of TMMK investigator, Stephen Day, it undoubtedly emerges that once TMMK knew of Covey's conduct towards Plaintiff, he was terminated without option for peer review. Further, TMMK sent Covey home pending investigation, which led to his termination, immediately following his most egregious act of grabbing [Slone] and patting her buttocks on March 17, 2000. Whether Covey's conduct towards [Slone] was the sole reason for his termination or the final straw doesn't change the fact TMMK took prompt and undeniably corrective action once it knew of Covey's actions towards [Slone].
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> . . . Here, once formally made aware of the harassing conduct by a single co-worker that occurred over a three-to-four month period, TMMK ended said conduct immediately and subsequently terminated the single

co-worker responsible. (Footnote omitted.)

The court held that there was "no genuine issue as to any material fact concerning Covey's conduct and subsequent termination," and that Slone could not "produce evidence at trial to meet the requirements above needed to hold TMMK liable." The court therefore concluded that TMMK was entitled to summary judgment as to the issues of both liability and retaliation, and it dismissed Slone's claim against TMMK. This appeal followed.

Slone first contends that the trial court erred by failing to find that there was no genuine issue of material fact as to whether TMMK "knew or should have known of the harassment and failed to take action."[2] We agree.

As stated in *Kirkwood v. Court-Journal,*[3] to be actionable a claim of workplace sexual harassment "'must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" A claim of sexual harassment may be actionable in regard to workplace conduct which affects a "term, condition or privilege" of employment.[4] However, sexual harassment by a

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[2] *Kirkwood v. Courier-Journal,* 858 S.W.2d 194, 199 (Ky.App. 1993).

[3] *Id.* at 198 (citing *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49, 59 (1986) (citation omitted)).

[4] *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986).

coworker violates Title VII only if "the employer knew or should have known of the harassment and failed to take action."[5] Moreover, "[c]laims of discriminatory workplace harassment are rarely summarily dismissed where there is any colorable evidence of such harassment."[6]

Here, TMMK certainly produced evidence to support its defense that it reasonably took prompt and appropriate action once Slone bypassed her immediate supervisors and notified another supervisor that she was being harassed by Covey. However, TMMK's position that Slone's immediate supervisors were not previously aware of any sexual harassment stands in marked contrast to Slone's testimony that, on several occasions, she complained to her supervisors about Covey's harassment of her, but no prompt and immediate corrective action followed. Such disputed evidence creates a genuine issue of material fact[7] as to whether TMMK is liable for failing to reasonably take prompt and appropriate action to correct the situation once it knew or should have known of the harassment. It follows, therefore, that the trial court erred by entering summary judgment as to the issue of liability.

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[5] *Kirkwood,* 858 S.W.2d at 199.

[6] *Id.* at 198.

[7] CR 56.03.

Slone also contends that the trial court erred by finding that there was no genuine issue of material fact as to whether TMMK or its employees acted in retaliation against her. We disagree.

Under KRS 344.280(1), it is unlawful for one or more persons "(t)o retaliate or discriminate in any manner against a person . . . 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[.]" In order to establish a prima facie claim of retaliation, Slone must demonstrate "'"(1) that [she] engaged in an activity protected by Title VII; (2) that the exercise of [her] civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to [her]; and (4) that there was a causal connection between the protected activity and the adverse employment action.'"[8] The conduct which will amount to an adverse employment action

> "'must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of

[8] *Brooks v. Lexington-Fayette County Urban County Housing Authority,* 132 S.W.3d 790, 803 (Ky. 2004) (quoting *Christopher v. Stouder Memorial Hospital,* 936 F.2d 870, 877 (6th Cir. 1991)). *See also Kentucky Center for the Arts v. Handley,* 827 S.W.2d 697, 701 (Ky.App. 1991) (citing *De Anda v. St. Joseph Hospital,* 671 F.2d 850 (5th Cir. 1982)).

> benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'"[9]

Here, it is not disputed that Slone engaged in a protected activity by filing her claim, and that TMMK and Slone's supervisors were aware of the pending claim. Slone alleged that TMMK acted adversely toward her when Howard allegedly refused to greet her or to call her by name, and when she was rotated through only two, or occasionally three, jobs rather than through the four jobs worked by the permanent employees. According to Slone, the fourth job was desirable because it was less physically demanding than the other jobs.

Although Slone alleged that another, less-experienced temporary employee said that he was going to be trained on the fourth job, she admitted that in fact no other temporary employees were trained on or worked the fourth job while she was at TMMK. Slone admitted that there were no changes in her pay, benefits or shift assignments after she filed her claim, that after filing her claim she received positive job reviews which qualified her for permanent employment, and that at the time of her injury she had started but not yet completed the training which was a prerequisite to permanent employment. Moreover, although Slone attempted to link her October 2000 injury to her

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[9] *Brooks,* 132 S.W.3d at 802 (quoting *Hollins v. Atlantic Co., Inc.,* 188 F.3d 652, 662 (6th Cir. 1999), quoting *Crady v. Liberty National Bank & Trust Co. of Indiana,* 993 F.ed 132, 136 (7th Cir. 1993)).

inability to rotate through all four jobs, she admitted that her injury in fact occurred not while she was working one of the jobs, but instead when she slipped while performing unrelated duties, and that there was no connection between her injury and the failure to be trained on the fourth job. Finally, Slone admitted that the medical restrictions which resulted from the injury prevented her from returning to the TMMK position.

Even when viewed in the light most favorable to Slone, her allegations simply do not support a prima facie case of retaliation since none of the alleged retaliatory actions could be construed as amounting to an adverse employment action as defined in *Brooks*.[10] It follows, therefore, that the trial court did not err by finding that TMMK was entitled to summary judgment in regard to the retaliation claim.

The court's order of summary judgment is affirmed in part, and reversed and remanded in part for further proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

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

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