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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001678-MR

LINDA HARDISON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 02-CI-002858

ACORDIA OF KENTUCKY, INC. — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND JOHNSON, JUDGES.

COMBS, CHIEF JUDGE: Linda Hardison appeals following entry of partial summary judgment in favor of her former employer, Acordia of Kentucky, Inc. (Acordia), by the Jefferson Circuit Court. After applying our standard of review to scrutinize the record in a light most favorable to Hardison, we agree that the lower court erred in summarily dismissing her claims of gender

and age discrimination and retaliation based on the Kentucky Civil Rights Act, KRS[1] 344 *et seq.* Thus, we vacate and remand.

In 1992, Hardison, who was born in 1947, was hired by Robinson-Connor, an insurance agency. As a condition of employment, she executed an agreement in which she promised not to solicit business from her employer in the event that she was terminated for any reason. In 1994, she was promoted to producer (commonly known as an agent) of personal lines, a position in which she wrote homeowners, automobile, and umbrella insurance policies. She was paid a base salary plus a commission on the first year's premiums on the policies that she wrote, but she did not share in the renewal commissions paid to her employer on those policies.

In 1995, Robinson-Connor was purchased by Acordia of Louisville, Inc. At the company's request, Hardison entered into a similar non-compete agreement. In 1998, Acordia of Louisville, Inc., ceased doing business, and its assets were transferred to Acordia of West Virginia, Inc. In 1999, the assets were transferred to the appellee, Acordia of Kentucky, Inc., a wholly-owned subsidiary of Acordia of West Virginia. Hardison was not asked to enter into a non-compete agreement either with Acordia of West Virginia or with the appellee, Acordia of Kentucky.

[1] Kentucky Revised Statutes.

Acordia is primarily involved in the sale of commercial lines of insurance. Rather than receiving a salary, the commercial producers are compensated entirely based on commissions, which are paid on both new and renewed policies. Of the twenty-three commercial producers working at Acordia in May 2001, only one was a female. Hardison was the only personal lines producer employed by Acordia. Her status and the terms of her compensation remained the same throughout the series of changes in corporate ownership.

Because of the potential for greater earnings, Hardison desired to be transferred to Acordia's commercial division. On multiple occasions, she expressed an interest to be considered for the position of commercial producer to Jim Carrico, Acordia's Managing Director. However, Carrico never agreed to move Hardison to commercial sales. He told her that he did not believe that she would like the competitive nature of the work, nor would she like being paid on a commission-only basis. He also told her that she would have to obtain additional training before he would even consider the possibility of allowing her to work in commercial sales.

After these discussions with Hardison, Carrico hired three men (thirty years of age or younger) to work at Acordia as commercial producers. Some of these men lacked experience in the insurance business in general. Additionally, they had not

received the training that Hardison was told she would need before being considered for that position.

On September 6, 2001, Hardison complained about what she perceived to be discriminatory hiring practices to Pam Wessel, Acordia's Operations Manager. She told Wessel that she believed that she would never be considered for commercial sales because of her age and gender.

Soon after that conversation, Wessel recommended to Carrico that they terminate Hardison's employment with Acordia. On October 19, 2001, Wessel and Carrico met with Hardison to inform her of their decision. Hardison, who had never been fired from any employment, became visibly distraught. Carrico told her that she was not being discharged for any failing on her part but that they had decided to eliminate the position of personal lines producer.

Hardison soon found new employment at another insurance company, Vandivier, Maddox, Carpenter Insurance, Inc. (Vandivier). Many of Hardison's former clients moved their insurance business from Acordia to her new firm. The evidence reveals that most of her former customers sought her out on their own; others changed agencies after direct solicitations by Hardison.

On April 17, 2002, Hardison filed a complaint in the Jefferson Circuit Court alleging that Acordia had discriminated

against her in the terms and conditions of employment (primarily in failing to promote her to commercial sales) based on her age and gender in violation of KRS Chapter 344.040(1). She asserted a separate count alleging that her employment was terminated by Acordia in retaliation for her complaints of illegal discrimination in violation of KRS 344.280(1). Acordia denied the charges and filed a counterclaim in which it alleged that Hardison had breached the nondisclosure and anti-piracy provisions contained in the two non-compete agreements executed during the tenure of its corporate predecessors.

In her answer to the counterclaim, Hardison denied the breach of any agreement between herself and Acordia, contending that the non-compete agreements relied upon by Acordia had been abandoned. In the alternative, she pled that even if the agreements were deemed enforceable, Acordia had breached and violated both the "express promises and implied terms of reason and fairness" in the contracts, causing her to suffer damages. Hardison also amended her complaint to assert a post-termination claim of retaliation premised on Acordia's filing of the counterclaim for breach of contract, alleging that it was:

> improperly motivated, was in temporal proximity to, was caused by, and would not have occurred but for, [her] action in filing suit alleging violation of the Kentucky Civil Rights Act[.]

On January 14, 2003, Acordia filed a separate lawsuit against Hardison's new employer, Vandivier, charging tortious interference with contractual relations and prospective business advantages. Acordia alleged that Vandivier was aware that Hardison was using information which she had obtained while working at Acordia to produce business for her new employer.

On February 7, 2003, the Jefferson Circuit Court entered a partial summary judgment dismissing Hardison's amended claim of post-termination retaliation based on Acordia's counterclaim for breach of contract. In so ruling, the court concluded that there appeared to be "an arguably reasonable basis in law or fact upon which Acordia could pursue enforcement of the [non-compete] contract[s]." (Findings of Fact, Conclusions of Law, and Order entered February 7, 2003, at p. 3.)

Hardison filed a motion to vacate the partial summary judgment because she had not had an opportunity to take discovery regarding her amended complaint. She also sought to amend her complaint to add yet another claim for retaliation predicated on Acordia's lawsuit against her new employer. She claimed that by suing her current employer, Acordia was "improperly motivated" and was subjecting her to the threat of "loss of employment and other economic harm" to retaliate for

her "protected act of filing suit under the Kentucky Civil Rights Act."

Before considering the merits of these motions, the trial judge learned that he had a personal conflict requiring his recusal from the case. The case was transferred to a new judge. On June 20, 2003, the court granted the motion to vacate the partial summary judgment, agreeing that Hardison had not had "ample opportunity . . . to pursue discovery" as to whether Acordia acted with improper motives in filing its counterclaim.

On May 11, 2004, Acordia filed new motions seeking summary dismissal of Hardison's original claims of discrimination and retaliation as well as her claims of post-termination retaliation. While these motions were pending, Acordia reached an agreement settling its lawsuit against Vandivier. When Hardison failed to obtain the terms of the settlement by discovery, she filed a motion to compel Acordia to reveal the details of its agreement with Vandivier. She argued that if Acordia had paid Vandivier in order to settle the lawsuit, a jury might reasonably infer that Acordia had abandoned its pursuit of alleged damages in order to intimidate her into relinquishing her discrimination claims.

On August 6, 2004, while Hardison's discovery motions were pending, the trial court granted Acordia's motions for summary judgment and dismissed all of Hardison's claims with the

exception of her claim for breach of implied contract. In dismissing the original discrimination claim, the court determined that Hardison could not possibly make a *prima facie* case of either age or gender discrimination because she had not actually applied for the position of commercial producer. (Opinion and Order entered August 6, 2004, at p. 3.)

Addressing her claim of retaliation based on termination for allegedly voicing complaints of age and gender discrimination, the court concluded that Hardison failed to "set forth evidence upon which a jury could decide that Acordia's reason [for the termination] was pretext." (Id., at p. 4.) The court dismissed Hardison's remaining claims of post-termination retaliation without citing any authority or articulating any reasons.

Although the parties' breach of contract claims remained, Acordia persuaded the trial court to make its partial summary judgment final and appealable pursuant to CR[2] 54.02. This appeal followed.

Summary judgment is appropriate only where the evidence shows that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56.03; Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). When

[2] Kentucky Rules of Civil Procedure.

considering a motion for summary judgment, a court is required to view the record in a light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences that can be drawn from the evidence. Capitol Holding Corp. v. Bailey, 873 S.W.2d 187, 189 (Ky. 1994). Summary judgment may not be granted unless "it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 276 (Ky. 1991).

Our review of a grant of summary judgment is *de novo*. Hallahan v. The Courier-Journal, 138 S.W.3d 699, 705 (Ky.App. 2004). Because the Kentucky Civil Rights Act was modeled on the Federal Civil Rights Act of 1964, we shall rely on federal case law as well as Kentucky precedent in reviewing the summary judgment. Howard Baer, Inc. v. Schave, 127 S.W.3d 589, 592 (Ky. 2003).

The trial court scrutinized Hardison's claims under the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Kentucky Center for the Arts v. Handley, 827 S.W.2d 697, 699 (Ky. 1992), succinctly summarized these criteria as follows:

> First, the plaintiff must make a *prima facie* case of discrimination by offering proof that, 1) she is a member of a protected class, 2) she is qualified for and applied for an available position, 3) she did not receive the job, and 4) the position remained open and the employer sought other applicants. Second, the employer must then articulate a "legitimate nondiscriminatory" reason for its action. Third, once such a reason is given, it is incumbent on the employee to demonstrate that the stated reason is merely a pretext to cover the actual discrimination. (Citations omitted.)

Using this model, the trial court found that Hardison was a female within the protected age class and that the position she sought was filled by younger men. However, the court reasoned that Hardison could not possibly establish that either age or gender discrimination served as the basis for Acordia's failure to promote her to commercial producer. Applying the McDonnell-Douglas model strictly, the court determined that Hardison's failure to complete a formal, written application for the promotion prevented her from making a *prima facie* case of discrimination.

We believe that the court misconstrued McDonnell-Douglas as to Hardison's claim of gender and age discrimination and that it erred in summarily dismissing that portion of her complaint. Several jurisdictions have considered the issue of a formal application as a necessary element for a *prima facie* case

and have concluded that proof of a formal application is not a requirement.

> Courts have generally held that the failure to formally apply for a job opening will not bar a Title VII plaintiff from establishing a prima facie claim of discriminatory hiring, as long as the plaintiff made every reasonable attempt to convey his interest in the job to the employer. This is true both in failure to promote cases, *see Holsey v. Armour & Co.,* 743 F.2d 199, 208-09 (4th Cir.1984), *cert. denied,*470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 784 (1985) (where employee was never asked to fill out an application, the employer had no blacks in sales positions, and had actively discouraged black applicants, casual inquiry into the possibility of promotion to a sales job sufficient for application); *Paxton v. Union Nat'l Bank,* 688 F.2d 552, 568 (8th Cir.1982), *cert. denied,*460 U.S. 1083, 103 S.Ct. 1772, 76 L.Ed.2d 345 (1983) (where vacancy not posted and plaintiff did not hear about it from any other source until the position was filled, expression of a general desire to advance in bank was sufficient for application); *Abrams v. Baylor College of Medicine,* 581 F.Supp. 1570, 1579 (S.D.Tex.1984), *aff'd in part and rev'd in part on other grounds,*805 F.2d 528 (5th Cir.1986) (where interest in participating in career advancing program was not communicated by formal application but spread through word-of-mouth, plaintiff's informal communication to his supervisors of his desire to participate is enough for the prima facie case); *Ferguson v. E.I. duPont de Nemours and Co., Inc.,* 560 F.Supp. 1172, 1192-93 (D.Del.1983) (where job vacancies not posted or advertised, plaintiff's “generalized expression of interest [to supervisor] can be considered an application” even though communicated interest was actually for another position); *cf. Box v. A & P Tea Co.,* 772 F.2d 1372,

> 1376-77 (7th Cir.1985), *cert. denied,* 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986) (where employer had no system to ensure all interested applicants could apply, no formal applications were sought and job openings were not posted, "the plaintiff can establish the application element of the prima facie case by showing that, had she known of ··· [the] opening, she would have applied"), and in failure to hire cases.

E.E.O.C. v. Metal Service Company, 892 F.2d 341, 348 (3rd Cir.1990); see also, Babrocky v. Jewel Food Co. and Retail Meatcutters Union, Local 320, 773 F.2d 857 (7th Cir. 1985).

The record does not reveal whether Hardison was notified about the openings in the commercial lines division or whether she received an opportunity to make a formal application. There is no evidence that Acordia required all those seeking consideration for promotion within the company to have completed a formal application. However, Acordia acknowledges that Hardison expressed her desire to be transferred to the commercial lines department to Carrico on more than one occasion. He discouraged her from seeking a job in this competitive area of the business, one that was male-dominated as a matter of fact. Under the analysis from the numerous federal cases cited above, Hardison satisfied the requirement that she communicate her desire for promotion -- despite the fact that she did not fill out a written application.

Acordia argues that the trial court correctly dismissed Hardison's discrimination claim for an additional reason: "Hardison was not transferred to a commercial lines sales position because she did not obtain the **requisite training** and she never applied for any open positions." (Appellee's brief at p. 13, emphasis added.) However, as revealed in the following portions of Carrico's deposition testimony, the younger men whom he hired as commercial producers had not obtained the requisite training that he required of Hardison.

> Q. And do you recall what took place in those conversations [with Hardison]? Let's start with the first one.
> A. Well, they both essentially had the same content. We discussed the fact that if she wanted to go into commercial lines, one of the things she was going to have to do is get more knowledge of commercial lines, which she did not have, because her whole background had been in personal lines.
> Q. How would she go about doing that?
> A. She would go to any form of the – not only continuing education classes, but other classes that were offered by various insurance organizations and some carriers.
> Q. Did you suggest to her that that would be a good idea to do?
> A. I just mentioned to her that that would be one way – one thing she would have to do, and it would be up to her to do that, and she could certainly do that with her continuing education classes, if she desired, or some other classes.
> Q. Are you saying that the people that you hired into commercial lines all had this kind of training?

A. They didn't all have that kind of background coming in, no.
Q. But you hired them in any event?
A. For various reasons, all business decisions.

. . . .

Q. You did not suggest to her that you could move her into commercial lines and give her the training that you've indicated you required and gave to other new hires into commercial lines?
A. The only thing I said was she was welcomed to go try to get the training, and, then, we would discuss the possibility of her moving into commercial lines.
Q. Would you answer my question?
A. I thought I did answer your question.
Q. The question I asked you is: You did not offer to her the opportunity to be hired into commercial lines and give her the training that you've indicated you have given to new hires into commercial lines; is that correct?
A. Not at that time. I indicated to her to get the training and we would talk about it.

This testimony indicates that Acordia essentially utilized a double standard in hiring individuals as commercial producers -- sufficient evidence of discrimination that rendered dismissal of the complaint inappropriate and premature. See, Waldron v. SL Industries, Inc., 56 F.2d 491, 499-500 (3d.Cir. 1995). This evidence of a double standard in hiring, Hardison's statistical evidence, the evidence of Carrico's equivocal response to Hardison's request for a transfer, and her *prima facie* evidence of communicating her desire for a transfer would

allow a reasonable jury to conclude that Hardison's age and/or gender were more likely than not determinative factors in Acordia's decision not to consider her for promotion to commercial producer. Thus, we conclude that Hardison has produced sufficient evidence to overcome Acordia's motion for summary judgment and to entitle her to present her claim of discrimination to a jury.

Hardison argues that the trial court erred in dismissing her claim that Acordia discharged her in retaliation for raising complaints of age and gender discrimination. The trial court found that Hardison "was engaged in a protected activity" (complaining to Wessel) and that she "was disadvantaged" as evidenced by her termination of employment. (Partial summary judgment of August 6, 2004, at p. 3.) In dismissing the retaliation claim, the court held that she failed to present any evidence of pretext in Acordia's stated reason for discharging her.

When viewed in a light most favorable to Hardison, we believe there is evidence from which a reasonable jury could infer that the articulated economic basis for discharging Hardison was not the real reason. Acordia was unable to produce any records or documents in support of its claim that her position was not profitable. Wessel, to whom Hardison conveyed her complains of discrimination, testified that she recommended

to Carrico that he eliminate Hardison's job based on her belief that the position was not profitable. When asked how she arrived at that determination, she was unable to identify any specific financial records or data that she utilized. She also admitted that she did not take into consideration the commissions the company had earned on the renewal of policies that Hardison had produced. She testified that no analysis or written evaluation had been undertaken as to the profitability of Hardison's service:

> Q. Well, did you develop any types of analysis, a list of the expenses compared to the income, to determine if it was profitable or not?
> A. A list? No.
> Q. Did you develop any kind of written analysis or evaluation of the profitability?
> A. No.
> . . .
>
> Q. It is your testimony that you did not make a written comparison of the expenses to the income for Linda Hardison's position?
> A. No.

Carrico's testimony also confirmed the absence of any written documents and any analysis of the financial records of the company to support his decision to eliminate Hardison's position for lack of profitability. He testified that he mainly relied on figures in his head.

Q. How did you, and I assume Ms. Wessel, determine that the personal lines producer position was not profitable?
A. It's a matter of looking at the costs, of the salary, of the commissions being paid, the overhead of the department, the other salaries in the department, and coming up with a bottom line.
Q. Was it you and Ms. Wessel who did that determination?
A. I discussed it with her, yes. I did it.
Q. You were the one who did the figuring?
A. Yes.
Q. Did you look at any particular records or financial reports?
A. I can't say that I pulled any particular records to do it. . . .

. . .

Q. And where would those figures [her salary and her commissions, her benefits, the cost of running the department] be located?
A. They would be imbedded in the P&L for Acordia.
Q. P&L meaning profit and loss?
A. Profit and loss statement, yes.
Q. And how often is a profit and loss statement generated in your office?
A. Monthly.
Q. And that would reflect the costs of running the personal lines department?
A. It's not broken out by department.
Q. How would you determine the costs allocated or allocable to personal lines?
A. They are not broken out – I'm looking at a bottom line that we're trying to make for the whole office, and I looked at the expenses that go into that bottom line.
Q. So you do not have actually a figure for the expenses in the personal lines?
A. Not broken out, no.

Q. I'm having a little trouble understanding how you could decide that this was not profitable if you did not have the costs that were attributable to maintaining her position to compare the profits that she might be generating to.
A. I think the only way I could answer that question is if you look at production levels and personal lines, by producers such as Ms. Hardison, and you look at the salary we were paying her and the commission she was getting and the benefits alone, it drives it to an unprofitable status, not even taking into account overhead expenses, which are allocated to the agency.
Q. When did it become unprofitable?
A. I would say it never was profitable.
Q. So your testimony is that Acordia maintained this position for approximately a decade; is that a fair statement?
A. That's not a fair statement.
Q. How long?
A. I don't know exactly . . . but is was somewhere in late 1995, I believe. So it would be approximately six years.
Q. And Acordia maintained this position for about six years without profitability?
B. That's true.

. . .

Q. Are you testifying that at no time in that period, from your association with Acordia to the termination of Linda Hardison, you ever generated a written analysis or statement regarding the profitability of the position?
A. Not that I kept as a record.

. . .

Q. And you're testifying that you made the decision to eliminate the position,

resulting in the loss of a job by Linda Hardison, without having a written analysis or report or calculation of the profitability or lack thereof of the position?

A. I stated before that I had made several handwritten analyses of it to prove to myself that there was just no way in the long run we could make the bottom line profit that we wanted to make on this particular job.

. . .

Q. How many times do you think you did that?

A. I probably did it every year.

Q. You say probably. Does that mean you're not certain?

A. I looked at it every year when we were doing our overall budget process for the office.

Q. So you are certain you did it every year?

A. Yes.

Q. And never once kept them?

A. Never once kept the analysis, no.

Q. Even when you made the decision to eliminate the position . . . you did not keep this analysis?

A. That's correct.

Carrico's failure to identify or to produce any financial records to confirm his contention that Hardison's position was actually not profitable surely did not bolster his credibility. He acknowledged that the position of personal lines producer was not truly unprofitable -- but that it was **not as profitable** as he would like for it to have been. He also admitted that he did not have a clear idea of the profitability of the position:

Q. So, it's not so much that it was not profitable; it was not sufficiently profitable?
A. From our eyes it was not profitable.
Q. Well, are you saying you were actually losing money on Linda Hardison?
A. We certainly weren't making any money.
Q. You don't know if you were losing money. Am I correct?
A. That's true if you look at over the long – the business that had come in over the years, that's true.

Nevertheless, the trial court concluded that Hardison could not possibly establish that Acordia's decision to eliminate her position was merely a pretext. The court accepted as true Carrico's testimony that: (1) Hardison's position was never profitable; (2) after many years of trying to make it profitable, the decision was made to terminate it; and (3) it was a mere coincidence that the decision to terminate the position occurred within weeks of Hardison's complaints of gender and age discrimination. We disagree that the purported reason was so conclusively established as to entitle Acordia to a summary judgment.

We conclude that the evidence of retaliation is sufficient to overcome Acordia's motion for summary judgment. In light of Carrico's equivocal, undocumented testimony, the coincidental timing of the discharge (just weeks after her complaints of discrimination), and the fact that Wessel (the only individual at Acordia to whom Hardison vented her

complaints) personally directed the discharge, a jury would be permitted to infer that the purported lack of profitability was not the real reason for her termination. Rather, it might conclude that Acordia's stated reason for her discharge was indeed a subterfuge or pretext for age and/or gender discrimination. See, Kentucky Department of Corrections v. McCullough, 123 S.W.3d 130, 135-136 (Ky. 2003).

Hardison last argues that the trial court erred in summarily dismissing her remaining claims of retaliation based on Acordia's post-termination actions: the filing a counterclaim against her and a lawsuit against her new employer. Hardison argues that the filings were intended to deprive her of her right to seek redress for filing her complaint alleging violations of the Kentucky Civil Rights Act.

KRS 403.280(1) provides:

> It shall be an 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[.] (Emphasis added.)

As we noted in our earlier reference to this issue, the trial court did not state its reasons for dismissing Hardison's post-termination retaliation claims.

Acordia contends that it had a reasonable basis for filing its counterclaim against Hardison and in suing her current employer and that, therefore, its recourse to litigation does not constitute retaliation as contemplated by KRS 344.280(1). In arguing that it was entitled to summary judgment as a matter of law on this issue, Acordia relies on Bank One, Kentucky, N.A. v. Murphy, 52 S.W.3d 540, 546 (Ky. 2001).

In Murphy, the employer filed an action for a declaration of rights in federal court in anticipation of its employee's claim of gender discrimination. Our Supreme Court held that the filing did not constitute retaliation as a matter of law and emphasized that the employer sought "only a declaration of rights; it sought no damages or attorney's fees whatsoever." Id., at 546. The Murphy court narrowly limited its holding to post-termination actions for declaratory relief:

> Declaratory judgment actions are widely utilized to establish certain fundamental rights in ongoing disputes. KRS 418.045 contains an extensive list of subjects and transactions upon which declaratory relief is available. It would be unwise for this Court to introduce limitations upon the rights of parties to seek declaratory relief. Accordingly, the trial court's denial of Murphy's motion to amend her

> complaint to add a retaliation claim was proper.

Id.

Unlike the factual findings in Murphy, Acordia was not seeking declaratory relief in its post-complaint filing. Rather, it sought monetary damages and attorneys' fees from Hardison and Vandivier. Thus, we believe the more pertinent authority is Mountain Clay, Inc. v. Commission on Human Rights, 830 S.W.2d 395 (Ky.App. 1992), which broadly construes retaliation as susceptible of assuming many forms:

> The Kentucky Civil Rights Act was enacted "to safeguard all individuals within the state from discrimination because of race, color, religion, national origin, sex, and age" and to "further the interest, rights and privileges of individuals within the state." KRS 344.020(b). The prohibition against employer retaliation was enacted to protect these rights. As one court has said, "retaliation, whether in the form of a subsequent discharge **or court proceeding**, places an added cost on the exercise of those rights and as such has a 'chilling effect.' Only by enjoining suits filed in retaliation for the exercise of protected rights can those rights be ensured." *EEOC v. Levi Strauss & Co.,* 515 F.Supp. 640, 642 (N.D.Ill.1981). (Emphasis added.)

Id., at 397.

Acordia argues that because its counterclaim was compulsory in nature, it cannot be deemed retaliatory. It contends that to allow a claim for retaliation to be premised on

its counterclaim "would penalize any employer that does not 'win the race to the courthouse' against a former employee." (Appellee's brief at pp. 28-29.)

Regardless of whether the counterclaim was compulsory or permissive in nature, a jury would not be precluded from finding that it may have been asserted for an improper motive. There is evidence in the record from which a jury could indeed infer that the counterclaim and separate lawsuit against Hardison's current employer might have resulted from a retaliatory intent. For many months prior to the filing of Hardison's complaint, Acordia had been aware that its customers were transferring their business to Vandivier. Yet, it did not file a claim against Hardison **until after** she initiated her own lawsuit.

When coupled with all of the other evidence discussed of gender and age bias, the evidence of the "close temporal relationship between the protected activity and the adverse action" is sufficient to raise at least an inference that "the protected activity was the likely reason for the adverse action." Brooks v. Lexington Fayette Urban Housing Authority, 132 S.W.3d 790, 804 (Ky. 2004), citing, Nguyen v. City of Cleveland, 229 F.3d 559, 566 (6th Cir. 2000).

The summary judgment is vacated, and this matter is remanded for further proceedings.

ALL CONCUR.

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