

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000218-MR

SONYA JEMLEY

APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 02-CI-00033

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF CORRECTIONS

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BUCKINGHAM,¹ JOHNSON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Sonya Jemley appeals from an order of the Oldham Circuit Court granting summary judgment to the Commonwealth of Kentucky, the Department of Corrections (DOC), and dismissing her claim for sexual harassment/hostile work environment under the Kentucky Civil Rights Act (KRS² Chapter 344). This case involves a physical examination of Jemley by

¹ This opinion was completed and concurred in prior to Judge David C. Buckingham's retirement effective May 1, 2006. Release of the opinion was delayed by administrative handling.

² Kentucky Revised Statutes

Dr. H. Douglas Crall at the Luther Luckett Correctional Complex (LLCC) in LaGrange, Kentucky, Jemley's allegations of inappropriate sexual contact by Dr. Crall, and the actions of the DOC in response to her complaints. We affirm.

In 1994, the Kentucky Board of Medical Licensure suspended Dr. Crall from the practice of obstetrics and gynecology for having unethical relationships with patients and nurses.³ Dr. Crall admitted to the relationships and confessed to the Board that he was a "sex addict" and was unable to control himself around female patients and staff. He underwent treatment for his problem with the assistance of the Kentucky Impaired Physicians Program (IPP).

After Dr. Crall completed the treatment, the Board reinstated his license under the restrictions that he refrain from practicing obstetrics and gynecology, complete a 12-step recovery program, and continue therapy. He was also required to have a chaperone present in the room every time he examined or treated a female patient.

Dr. Crall learned that a colleague who was under similar restrictions found employment in the Texas corrections system. Dr. Crall thereafter contacted Dr. Patrick Sheridan, the medical director of the DOC at the time, seeking employment.

³ In his deposition, Dr. Crall described these relationships as "consensual affairs."

Dr. Crall told Dr. Sheridan about the restrictions on his license and the reason for the restrictions. Dr. Sheridan discussed the restrictions with Dr. Crall's IPP sponsor, Dr. Burns Brady.

The DOC hired Dr. Crall in June 1998 to work at LLCC as a general physician. His duties included health care service for the all-male population of the prison, as well as conducting mandatory physical examinations of all new employees who worked in "hazardous duty" positions. As such, the job required Dr. Crall to examine female patients.

The physical examinations included checking each employee for an inguinal hernia, which requires palpation of the muscle lining surrounding the genital area. Other portions of the physical exam included listening to the patient's heartbeat and respiration, which requires placing a stethoscope in various places around the patient's breasts.

Dr. Crall asked nursing administrator Rhonda Kidd to chaperone him while examining female employees. He told her the reasons for his license restriction and the conditions placed on him by the Board. Kidd informed her nursing staff that Dr. Crall was to be chaperoned during his examinations of all female patients, which was standard procedure at LLCC. When Kidd was not available, nurses Della Eaves or Barbara Weickert substituted for Kidd.

Jemley joined the staff at LLCC in January 2001 as a classification and treatment officer. That position qualified her for hazardous duty pay. In accordance with the DOC policy, she was required to undergo a physical examination as part of her orientation. Jemley did not know what the physical examination would entail and was not familiar with the process the doctor would perform when checking for an inguinal hernia.

On January 25, 2001, Jemley reported to the medical department for her physical. Nurse Eaves was present in the exam room when Jemley entered. Dr. Crall took Jemley's medical history and reviewed her paperwork. He then asked her to sit on the exam table and unbutton her shirt. He placed a stethoscope under Jemley's bra, between her breasts, to listen to her heart. He then moved to the side of her torso, lifted her bra strap, and listened to her lungs. Jemley later said that she was uncomfortable and that it seemed strange to her that Dr. Crall did not listen to her heart and lungs through her t-shirt.

Dr. Crall then asked Jemley to lie down on the exam table and lower her pants. She testified that she pushed her pants down to "just above" her pubic hair. Dr. Crall then proceeded to place his fingertips on the right side of Jemley's vulva. He asked Jemley to cough and then moved to the left side of her vulva and again asked her to cough. Jemley stated that as Dr. Crall moved his hand from the right side to the left

side, his hand came into contact with her clitoris. Jemley said that Dr. Crall did not penetrate her and that his hand was inside her underwear "a matter of somewhere around a minute." Jemley also stated that Dr. Crall wore latex gloves during the examination.

After Dr. Crall concluded the examination, Jemley sat up to get dressed. When Nurse Eaves left the room, she left the door slightly ajar. Jemley later stated that she was "kind of nervous." Dr. Crall commented on Nurse Eaves' failure to close the door, and he then closed it completely. Jemley finished dressing and returned to the waiting room. It is not clear from the record whether or not Dr. Crall was inside the exam room while Jemley was dressing.

Later in the day, Audrey Morey, another employee, told Jemley that Dr. Crall was not supposed to be examining female employees. Jemley did not relate to Morey that she believed Dr. Crall had inappropriately touched her. Jemley asked Barbara Hutchison if she had heard the rumors about Dr. Crall, and Hutchison replied that she had "heard stuff." That evening, Jemley discussed her examination by Dr. Crall and what she had heard from other employees with her roommate, Beth Grossi. Grossi encouraged Jemley to report the incident.

The day after the examination, Jemley complained to Sherry Taylor, an institutional parole officer, that she felt

Dr. Crall had touched her inappropriately. Taylor took her to an office and had Jemley recount the details of the examination. Taylor then called in Deputy Warden Kathy Bingham, who listened to Jemley's account of the examination. Bingham then directed Taylor and Jemley to prepare written statements about the incident.

Warden Larry Chandler received the statements of Taylor and Jemley on the day following the examination. After reviewing the statements, he contacted Dr. Richard Kimbler, who was the DOC's medical director. Dr. Kimbler was in charge of monitoring Dr. Crall's compliance with his license restrictions and reporting to Dr. Brady, Dr. Crall's IPP sponsor. Dr. Kimbler requested and received a copy of Jemley's statement.

Warden Chandler then spoke with Lee Sheeting, the DOC's personnel director. Pursuant to Sheeting's instruction, Chandler confronted Dr. Crall about Jemley's allegations and told him to have no further contact with her.

On January 29, 2001, Dr. Kimbler reviewed Jemley's complaint. He conducted an investigation about how physical exams are conducted at other DOC institutions. He reported his findings to Deputy Warden Bingham. He also reported Jemley's complaint to Dr. Brady at IPP. Further, Dr. Kimbler ordered that all new employee physicals at LLCC be referred to private physicians.

On February 9, 2001, Dr. Brady and Dr. Kimbler held a lunch meeting with Dr. Crall to discuss the allegations. After they verbally reprimanded Dr. Crall for allowing Nurse Eaves to leave the room before Jemley was completely dressed, Dr. Kimbler informed Dr. Crall that no more employee physicals would be performed at LLCC. Warden Chandler considered that discussion to be the end of the matter.

Pursuant to the DOC policy, Jemley was informed of the outcome of the investigation. Deputy Warden Bingham told Jemley that no more employee physicals would be performed at the prison. Further, Jemley has acknowledged that after January 2001, Dr. Crall did not speak to her or even acknowledge her presence. The only interaction between the two occurred when Jemley asked Dr. Crall to tend to an inmate.

Jemley continued to work at LLCC. She was transferred to work in a segregation unit, and she considered that to be a "great compliment." She received favorable evaluations from her supervisor, Cookie Crews. Jemley also received regular pay raises.

In October 2001, Jemley expressed to Crews her dissatisfaction with the DOC's handling of her complaint against Dr. Crall. Crews suggested that she speak with Warden Chandler. Jemley wrote Chandler a letter on November 2, 2001, expressing her dissatisfaction. Warden Chandler later met with Jemley and

Crews to discuss the letter. Jemley stated that she felt the DOC should fire Dr. Crall, and Warden Chandler stated that he would have Dr. Kimbler look into the matter a second time. Chandler also asked personnel director Debbie Judd to assist Dr. Kimbler in order to have a set of "fresh eyes" for the review. In addition, Chandler forwarded Jemley's letter to Sheeting, who conferred with legal counsel and the DOC Commissioner, Vertner Taylor.

Judd interviewed Jemley and reported that Jemley was "distraught." Judd then held a meeting with Dr. Kimbler and Sheeting to discuss her review of the investigation. They took into account that DOC stopped employee physicals at LLCC, offered Jemley a new assignment so she would have no contact with Dr. Crall (which she did not accept), and verbally reprimanded Dr. Crall on his failure to have a chaperone present for the duration of the exam. Judd agreed that the DOC had acted appropriately in the first investigation and that nothing more needed to be done. Warden Chandler then informed Jemley of the outcome of the review.

Jemley left her job at LLCC in May 2002 in order to return to the University of Louisville as a student. She maintained that she was leaving in order to get away from Dr. Crall. However, she admitted that she asked her supervisor to

help her find part-time employment at LLCC. No part-time positions were available, so Jemley left LLCC in late May 2002.

The Board was informed of Jemley's complaint against Dr. Crall, but it did not open an investigation into the allegations. It was Dr. Kimbler's opinion that Dr. Crall conducted an appropriate physical examination of Jemley.

On January 15, 2002, Jemley filed a civil complaint in the Oldham Circuit Court against Dr. Crall and the DOC. The complaint contained allegations of negligence, assault, battery, intentional infliction of emotional distress, and sexual harassment. After considerable discovery, Dr. Crall filed a motion for partial summary judgment. In an order entered on January 5, 2005, the court denied the motion. Jemley and Dr. Crall later settled out of court.

The DOC moved for summary judgment on Jemley's hostile work environment claim. The court granted the motion and entered an order explaining its ruling. Jemley's appeal herein followed.

KRS 344.040(1) makes it unlawful for an employer to discriminate "against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's . . . sex . . ." Thus, "[s]uits for sexual harassment in the workplace may be brought under KRS 344.040." Hall v. Transit Authority, 883 S.W.2d 884, 886

(Ky.App. 1994). Because Kentucky's statute is similar to the federal statute, KRS 344.040 "should be interpreted consonant with federal interpretation." Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 821 (Ky. 1992). "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive work environment.'" Id., quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986).

Jemley's first argument is that the circuit court erred in granting summary judgment because it ignored the statutory duty on employers to prevent and eradicate sexual harassment in the workplace. She claims this duty is set forth in KRS 344.020(1)(b), which states one of the general purposes of the Kentucky Civil Rights Act is "[t]o safeguard all individuals within the state from discrimination because of ... sex." Specifically, Jemley states that "[t]he court has in effect drawn a line that begins with the report by Ms. Jemley that Crall molested her during the physical examination, ignoring all events that transpired before." She further states that "[t]he hostility was not limited to the events of the examining room alone, but began much earlier with the DOC's self-serving and knowing introduction of this sexual predator into the workplace."

We agree with the DOC that Jemley's arguments concerning its hiring of Dr. Crall and placing him as a physician to examine female employees is not evidence of a hostile work environment but may be evidence supporting a negligent hiring/retention claim. In Oakley v. Flor-Shin, Inc., 964 S.W.2d 438, 442 (Ky.App. 1998), this court held that "the established law in this Commonwealth recognizes that an employer can be held liable when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable risk of harm to a third person." However, Jemley has not filed a negligence claim against the DOC for the obvious reason that the DOC is protected from tort claims such as this by the doctrine of sovereign immunity. See Lisack v. Natural Resources and Environmental Protection Cab., 840 S.W.2d 835, 837 (Ky.App. 1992); Yanero v. Davis, 65 S.W.3d 510, 517 (Ky. 2001).

The Kentucky Civil Rights Act does, however, provide a limited waiver of immunity for causes of action against the Commonwealth for violations of the act. See Department of Corr. v. Furr, 23 S.W.3d 615, 618 (Ky. 2000). Unfortunately for Jemley, she has no cause of action against the DOC for any negligence in the hiring or retention of Dr. Crall. The standard "is one of failure-to-correct-after-notice or duty to act after knowledge of harm." Williams v. Gen. Motors Corp., 187 F.3d 553, 561 (6th Cir. 1999) quoting Fleenor v. Hewitt Soap

Co., 81 F.3d 48, 50 (6th Cir. 1996). The DOC had no notice of any inappropriate behavior by Dr. Crall until Jemley made her complaint following the examination.

We also agree with the DOC that Jemley's cause of action for sexual harassment was not actionable because it was not sufficiently severe or pervasive so as "to alter the conditions of the [victim's] employment and create an abusive working environment." Meritor, 477 U.S. at 67, 106 S.Ct. at 2405. In Ammerman v. Bd. of Educ., Nicholas County, 30 S.W.3d 793 (Ky. 2000), the court held that the "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." Id. at 798, quoting Carrero v. New York City Housing Authority, 890 F.2d 569, 577 (2nd Cir. 1989). In other words, a single episode or incident cannot support a claim for hostile environment sexual harassment. See Ammerman, 30 S.W.3d at 799.

Jemley next argues that the DOC has vicarious liability for the acts of Dr. Crall since he was a supervisor and not a co-worker. We believe this argument is without merit because Dr. Crall was Jemley's co-worker and not her supervisor. Thus, the DOC is liable only if it "knew or should have know of the charged sexual harassment and failed to implement prompt and appropriate corrective action." Hafford v. Seidner, 183 F.3d 506, 513 (6th Cir. 1999).

Finally, Jemley argues that there was a jury question concerning whether the DOC took prompt and corrective action. The court concluded that there was no fact issue in this regard and that DOC was entitled to a summary judgment. The court reasoned that Jemley could not prove her case because the DOC ordered Dr. Crall to have no contact with Jemley and she confirmed that there was no contact with him after that time. Jemley asserts that the DOC should have fired Dr. Crall based on what he did to her and on allegations made later by other female employees.

Whether DOC should have fired Dr. Crall or not is not the issue before this court. The issue is whether summary judgment was appropriate on Jemley's hostile work environment claim. The corrective action taken by DOC following Jemley's complaint included directing Dr. Crall to have no contact with her, reprimanding Dr. Crall for allowing the chaperone to leave the room before the patient had finished dressing, prohibiting Dr. Crall from any further physical examinations of DOC employees, and requiring that all future physical examinations be done by physicians who were not the DOC employees. Merely because the actions of DOC in this regard did not satisfy Jemley does not mean that they created a hostile work environment for her. We agree with the circuit court that "[t]he actions against the DOC for an employment discrimination claim based

upon hostile environment in the workplace are unsupported by any facts that could give rise to such a conclusion."

The judgment of the Oldham Circuit Court is affirmed.

ALL CONCUR.

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