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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000652-MR

KIMBERLY JUDD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 14-CI-00180

UNIVERSITY OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND KRAMER, JUDGES.

CLAYTON, CHIEF JUDGE: Kimberly Judd appeals from the Fayette Circuit Court's order granting summary judgment in favor of the University of Kentucky ("UK") in Judd's retaliation, sex discrimination, and disability discrimination lawsuit. Finding no error, we affirm.

BACKGROUND

In 2007, Dr. Stephen Wyatt, Dean of UK's College of Public Health ("CPH"), hired Judd as the CPH's Administrative Business Officer. Dr. Wyatt ultimately promoted Judd to Assistant Dean for Clinical Administration of the CPH. Beginning in 2010, Judd asserted that her workload was too intense and that the business office was understaffed. Dr. Wyatt and Judd requested funds from Associate Provost Lisa Wilson to add a new position which would provide Judd with additional support, but Wilson told them there were not adequate funds at that time for an additional position.

Meanwhile, in 2012, UK began its transition to a new budget model, which was set to begin in the 2013/2014 fiscal year. The new budget model would change the process of developing UK's budgets and would necessitate the individual colleges to take a larger role and more active participation in the budget process.

In April of 2013, Judd alleged that she had questioned a faculty merit pay plan proposed by Dr. Wyatt, despite the plan being approved by the Provost. Judd admits that, at that time, she did not convey her concerns to anyone other than Dr. Wyatt. Moreover, in June of 2013, Judd alleged that she objected to certain proposed grant changes directed by Dr. Wyatt. Again, Judd did not express her concerns to anyone other than Dr. Wyatt at that time. Around this time, Judd

informed Dr. Wyatt that she had applied for other positions at UK that provided upgrades in both title and pay. Judd subsequently received a pay raise in July of 2013.

Dr. Wyatt determined that Judd's Assistant Dean for Clinical Administration role would be divided into two separate positions: a Director of Business Operations position and a Director of Strategic and Financial Planning position. Dr. Wyatt stated that he based this decision on the fact that Judd was looking for other positions as well as the upcoming budget changes. Judd was transferred directly into the Director of Business Operations position and the position of Director of Strategic and Financial Planning was posted to search for appropriate candidates. Although the reorganization changed Judd's title from Assistant Dean to Director of Business Operations, neither her pay, benefits, nor grade were altered or reduced. Judd continued to apply for other positions at UK and informed Dr. Wyatt and Dr. Holsinger that she had been offered a position at Chase Bank, which she ultimately decided not to accept.

Throughout the time period in question, numerous faculty and staff at UK complained about Judd's work performance, including her failure to process in a timely manner important tuition waivers and human resources documents that were required for students employed as graduate assistants. Such processing issues resulted in the students not being paid in a timely manner and not receiving needed

health coverage. Dr. Wyatt recommended to Judd that she establish and implement a system for administering routine processes and suggested that Judd create a team to assess and review such routine business office functions. Further, Dr. Wyatt requested a written action plan by the end of September of 2013.

The situation continued to deteriorate, however, with CPH faculty members continuing to communicate significant concerns to Dr. Wyatt concerning the business office, including ongoing issues with the payment of staff and student employees. Emails from various staff state that “[t]he tension [was] pervasive throughout the CPH,” that the CPH was “in crisis mode,” and that meetings with Judd had “produced a trail of un-met promises.” Dr. Holsinger noted the faculty’s concerns, indicating that he was “working 70 hours a week” to address problems in the business office, and that he was unable to focus on his own work duties because of the constant need to address business office matters.

In response to the complaints concerning Judd’s performance issues, on September 19, 2013, Dr. Wyatt and Dr. Holsinger communicated via a private email message concerning feasible solutions, which included reorganizing the business office and providing Judd with three months to secure other employment. The foregoing email message was inadvertently left among a stack of documents on Judd’s desk and was discovered by Judd. Thereafter, on September 26, 2013, Judd contacted Associate Provost Lisa Wilson and others to complain about Dr.

Wyatt's management of faculty merit increases and grant charges, marking the first time Judd expressed her concerns about these matters to anyone other than Dr. Wyatt.

At this point, Judd admitted in her deposition that there had been an "implosion" of the business office. In September of 2013, Dr. Wyatt and Dr. Holsinger completely shut down the business office for two weeks to manage the backlog of outstanding matters and to get a handle on workflow. Also, around this time, the Director of Strategic and Financial Planning position was filled by John Collins. Judd did not apply for this position and participated in the hiring of Collins. In his new role, Collins assumed some of the duties for which Judd had previously been responsible, and Judd complained to both Human Resources and Dr. Wyatt that she had lost many of her job responsibilities in the reorganization and that she no longer had enough work to keep her busy. However, Dr. Wyatt pointed out that Judd was still responsible for "critical [CPH] core business functions," the majority of which remained unchanged.

Judd continued to apply for other positions within UK during this time, even asking Dr. Wyatt to put in a good word for her in an email dated January 14, 2014. The next day, however, Judd initiated this lawsuit alleging (1) violations of the Kentucky Whistleblower Act ("KWA") found in Kentucky

Revised Statutes (KRS) 61.102 and 61.103, (2) sex discrimination under KRS 344.040, and (3) disability discrimination under KRS 344.040.

Even after Judd filed suit against UK, Dr. Wyatt and other of Judd's superiors in the CPH endeavored to help Judd in remedying the shortcomings in her work performance. In February of 2014, Dr. Wyatt communicated with Judd concerning certain gift checks that had been given to CPH in December but that had just been received by the appropriate university department, thereby resulting in a tax-year deduction issue. Judd conceded that the delay in transmitting the checks to the appropriate department was her mistake. Notwithstanding her previous statements that her workload was no longer sufficient following the restructuring of her position, however, Judd again asserted that her mistake was the result of her excessive workload.

Thereafter, on May 6, 2014, Dr. Wyatt and Dr. Holsinger met with Judd to establish a 90-day corrective action probation period based on her numerous work performance issues. The performance issues stated in the plan included Judd's failure to respond to time-sensitive requests related to personnel, her failure to perform duties in a timely manner, and her excessive personal use of UK's property.

Thereafter, UK discovered that Judd had copied employee data onto a thumb drive in violation of the CPH's IT policy. Dr. Wyatt placed Judd on paid

suspension on May 20, 2014, while an investigation took place to review the IT policy violation. Judd admitted that she had copied information onto the flash drive – including wage information, addresses, and social security numbers – and deleted the files from her computer. Judd’s alleged reason for doing so was that she had lost the keys to her office and, due to the sensitive nature of the information on her computer, had placed the employee data on a thumb drive for safekeeping. Judd was subsequently terminated on June 14, 2014, with the stated reason being the violation of the IT policy.

UK subsequently moved for summary judgment in September of 2017 on Judd’s claims alleged in the January 2014 complaint. The trial court granted summary judgment in favor of UK in an order entered on March 27, 2018, and this appeal by Judd followed.

ANALYSIS

In reviewing a grant of summary judgment, our inquiry focuses on “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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03). The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service*

Center., Inc., 807 S.W.2d 476, 480 (Ky. 1991) (internal citations omitted).

However, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482 (internal citations omitted). “An appellate court need not defer to the trial court’s decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved.” *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004) (internal citations omitted).

It is important to note that, under the summary judgment standard “[a] party’s subjective beliefs about the nature of the evidence [are] not the sort of affirmative proof required to avoid summary judgment.” *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) (citing *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990)). “The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment.” *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001) (citing *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226 (Ky. 1984)).

I. Judd’s KWA Claim

On appeal, Judd asserts that the trial court erred in finding that Judd had not presented sufficient evidence to move forward with her KWA claim. To

set forth a claim for retaliation under the KWA, a claimant must establish the following:

(1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.

Davidson v. Com., Dep't of Military Affairs, 152 S.W.3d 247, 251 (Ky. App. 2004). A plaintiff must also prove “by a preponderance of the evidence that the disclosure was a contributing factor in the personnel action.” KRS 61.103(3). A contributing factor is one that “alone or in connection with other factors, tends to affect in any way the outcome of a decision.” KRS 61.103(1)(b). Under the statute, the existence of a “contributing factor” is presumed “if the official taking the action knew or had constructive knowledge of the disclosure and acted within a limited period of time so that a reasonable person would conclude the disclosure was a factor in the personnel action.” *Id.* Once the plaintiff has done so, “the burden of proof shall be on the agency to prove by clear and convincing evidence that the disclosure was not a material factor in the personnel action.” KRS 61.103(3).

We note that the only “whistleblowing” reports or disclosures that Judd references in her brief, and the only ones examined by the trial court, were

Judd's discussions with Dr. Wyatt in April of 2013 and her reports to Assistant Provost Wilson and the Comptroller in September and October of 2013. While Judd filed suit approximately five months before she was terminated, Judd never alleges that her termination was a result of the filing of her complaint in January of 2014. Therefore, we will only examine the "whistleblowing" activities that Judd argued to the trial court and that were detailed by Judd in her brief.

Judd alleges that she reported to Dr. Wyatt, Assistant Provost Wilson, and UK's Comptroller various instances of alleged improper faculty merit increases and grant charges by Dr. Wyatt, and that the restructuring of the CPH and reassigning of her job opportunities were done in response to such reports. In its grant of summary judgment, the trial court concluded that, assuming Judd satisfied the first three *Davidson* criteria, Judd's claim was "fatally deficient" because she put forth no evidence as to the fourth criterion that UK either removed many of her duties, changed her position, or terminated her based upon her complaints about Dr. Wyatt. We agree.

Judd offered no affirmative evidence showing that her disclosure was a contributing factor in either the division of the role of Assistant Dean for Clinical Administration nor in the reassignment of some of her previous tasks. As previously discussed, Judd was required to prove by a preponderance of the evidence "that the disclosure was a contributing factor in the personnel action."

KRS 61.103(3). First, as to Judd's assertion that she complained to Dr. Wyatt in April of 2013 concerning the allegedly improper faculty merit increases and grant charges, we note that "complaints by an employee directly to her supervisor concerning the supervisor's own wrongful conduct generally cannot qualify as a whistleblower disclosure." *Harper v. University of Louisville*, 559 S.W.3d 796, 802 (Ky. 2018) (citing *Pennyrile Allied Community Services, Inc. v. Rogers*, 459 S.W.3d 339, 345 (Ky. 2015)). Therefore, any complaints made by Judd to Dr. Wyatt cannot sustain Judd's claim under the KWA.

Likewise, Judd's complaints to Assistant Provost Wilson or UK's Comptroller in September and October of 2013 are not availing under the KWA. When Judd made those reports, Judd had already been informed of the restructuring of the business office and her change in duties. In her deposition, Judd noted that the Director of Strategic and Financial Planning position was created and posted, and that she had been notified of the fact that some of her duties would be reassigned, in August of 2013, which was one to two months before she made her complaints to the Assistant Provost and Comptroller. The evidence of record indicates that the division of Judd's role and the reassignment of approximately half of her duties was "in the works" for a considerable amount of time prior to any reports made by Judd to the Assistant Provost or Comptroller.

As such, those actions could not have been seen as “a contributing factor in the personnel action” or taken in retaliation for Judd’s reports.

Moreover, Judd simply cannot establish that her reports to the Assistant Provost and Comptroller were a contributing factor in her ultimate termination. Judd’s disclosures to Assistant Provost Wilson and UK’s Comptroller in September and October of 2013 were made approximately eight months prior to her termination in June of 2014. Further, in those approximately eight months, Judd had continuing documented work performance issues and had violated UK’s IT policy. The evidence of record indicates that Dr. Wyatt continually attempted to alleviate Judd’s workload and coach her through her various issues. The time period alone, without more, makes the nexus between Judd’s complaints to the Assistant Provost and Comptroller and Judd’s termination too attenuated. To circumvent summary judgment, Judd was obligated to offer precise facts that called into question Dr. Wyatt’s motive for her termination or causally connected her complaints with her termination. *See Thornton v. Office of Fayette County Attorney*, 292 S.W.3d 324, 332 (Ky. App. 2009). Judd did not provide such facts, and therefore her KWA claim cannot survive summary judgment.

II. Judd’s Gender Discrimination Claim

Judd next argues that the trial court erred in granting summary judgment in UK’s favor on Judd’s gender discrimination claim under KRS

344.040(1)(a) because the court placed unwarranted emphasis on the fact that Judd did not apply for the position of Director of Strategic and Financial Planning and that the trial court erred in ruling that UK articulated a business justification for the failure to hire Judd for that position. KRS 344.040(1)(a) provides that it is unlawful for an employer to “fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual’s . . . sex[.]”

To establish a *prima facie* case of gender discrimination, Judd must show: (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. *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 699 (Ky. App. 1991) (internal citation omitted). If a plaintiff establishes the elements of a *prima facie* case, the burden shifts to the employer to show a legitimate, nondiscriminatory basis for its action. *Id.* (internal citations omitted). Once an employer does so, the burden shifts back to the plaintiff to demonstrate that the employer’s proffered reason is mere pretext. *Id.* (internal citations omitted).

We agree with the trial court that the fact that Judd did not actually apply for the applicable position is fatal to her discrimination claim. A panel of

this Court found in *Lindsey v. Board of Trustees of University of Kentucky* that the plaintiff's failure to provide evidence in a discrimination claim under KRS 344.040(1)(a) that she had properly applied for a job posting was "fatal to her discrimination claim." 552 S.W.3d 77, 89 (Ky. App. 2018). Here, as the trial court accurately found, Judd produced no evidence that she "applied for an available position," the second *Handley* requirement. Thus, Judd cannot allege a *prima facie* case of sex discrimination, and her claim must fail.

III. Judd's Disability Discrimination Claim

Finally, we note that Judd is not appealing the trial court's decision granting summary judgment in favor of UK on her disability discrimination claim.

CONCLUSION

Accordingly, we affirm the Fayette Circuit Court's order granting summary judgment in UK's favor.

ALL CONCUR.

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