

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jillene (Campbell) Whatley,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-670
	:	(C.C. No. 2010-04840)
Ohio Department of Rehabilitation and	:	
Correction,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on March 8, 2012

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*Brezine Law Offices, and Don Brezine, for appellant.*

*Michael DeWine, Attorney General, and Velda K. Hofacker, for appellee.*

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APPEAL from the Ohio Court of Claims

TYACK, J.

{¶ 1} Jillene Campbell is appealing from the granting of summary judgment against her in her lawsuit against the Ohio Department of Rehabilitation and Correction ("ODRC"). She assigns a single error for our consideration:

The Court erred in granting Defendant's Motion for Summary Judgment, because the Court did not properly apply the standards that govern Summary Judgment Motions. The Court failed to make the Defendant meet its initial burden and failed to look at the record as a whole. These failures amount to improper application of the procedures that govern Summary Judgment, and these failures amount to reversible error.

{¶ 2} On March 18, 2010, counsel for Jillene Campbell re-filed a lawsuit in the Ohio Court of Claims. The named defendants were "Director, Department of Rehabilitation and Corrections [sic] and Montgomery Education Pre-Release Center." The complaint alleged that Campbell was an employee of the Montgomery Education Pre-Release Center (hereafter "MEPRC") working as a correction officer from June 5, 2000 onward. Campbell alleged that she was a white female who had suffered discriminatory treatment as a result of her personal relationships with a series of "black" males, including one man whom she married. She alleged that the discriminatory treatment began as far back as 2001. She listed two captains who supervised her and two wardens as being responsible for the harassment. She listed her claims for relief as "Race Discrimination," "Racial Harassment" and "Retaliation."

{¶ 3} On April 26, 2011, counsel for ODRC filed a motion for summary judgment. The motion alleged that claims pre-dating July 23, 2005 (two years before she filed her first complaint in the Ohio Court of Claims) were barred by the statute of limitations applicable to claims against the State of Ohio. The motion also asserted that Campbell had given up any claims related to a temporary termination of her employment when she entered an agreement with the help of her union which got her job back.

{¶ 4} Beyond the above argument, counsel for ODRC alleged that Campbell could not prove any racial discrimination had occurred with respect to her.

{¶ 5} Counsel for Campbell filed an extensive response to the motion for summary judgment. Campbell's own affidavit, included in the response, itemized several events which occurred before July 23, 2005, and other events which occurred before her return to work after she executed a settlement agreement to allow her to return to work on May 27, 2007. She indicated that approximately three months after her return to work, she was given a "last chance letter."

{¶ 6} The judge assigned to the case from the Ohio Court of Claims granted summary judgment as to all of Campbell's claims. The judge found that claims pre-dating July 23, 2005 were barred by the applicable two-year statute of limitations. The judge also found that claims that were settled in conjunction with Campbell's return to work were subject to a release. With those claims being barred, the judge found that the

remaining facts and allegations did not support a claim for relief based on racial discrimination.

{¶ 7} With respect to the allegations regarding May 27, 2007 and onward, the judge noted that Campbell and her counsel failed to authenticate over 20 documents attached to the memorandum contra the motion for summary judgment. Therefore, the judge did not consider the documents in ruling on the motion. Without the support of those documents, the judge ruled that the allegations in Campbell's personal affidavit were too vague and generalized to constitute proof of disparate treatment, hostile work environment, or racial discrimination.

{¶ 8} With this background in the record, we turn to the specific arguments in Campbell's brief. First, counsel argues that, for a defendant to be granted summary judgment, the defendant must show "a total lack of evidence" to support the appellant's claims. This argument is not accurate. The standard set forth in Civ.R. 56 is that there must be no genuine issues of material fact.

{¶ 9} Counsel argues that the numerous documents he attached to Campbell's memorandum contra should have been considered despite the lack of authentication. In fact, two of the documents, the Grievance Settlement Agreement, which got Campbell her job back, and the "Last Chance Agreement" which allowed Campbell to keep her job four months later, were before the court and were considered.

{¶ 10} This leaves two issues to be addressed. First, did Campbell's own affidavit, when linked with those two documents, make a showing that genuine issues of material fact remain. Second, did the affidavit of Dan Overstreet, filed on behalf of ODRC in conjunction with ODRC's motion for summary judgment, demonstrate a lack of issues of material fact.

{¶ 11} Addressing the Overstreet affidavit first, Overstreet alleges that the content of his affidavit is based upon his personal knowledge as the Labor Relations Officer for MEPRC. Much of what is contained in his affidavit clearly is based upon his personal knowledge, namely the documents attached as exhibits, including the Grievance Settlement Agreement, a leave request filed by Campbell, a Notice of Disciplinary Action, a Last Chance Agreement, and ODRC's Standard of Employee Conduct/Disciplinary Guide.

{¶ 12} Overstreet's affidavit, however, goes far beyond authenticating documents about which he has personal knowledge. He alleges conclusory statements such as "[t]hroughout her employment with [ODRC], Ms. Campbell has been treated in accordance with the same terms and conditions as other [ODRC] employees irrespective of her race. None of the discipline imposed upon her was related to her race." (Overstreet Affidavit, at ¶ 7.)

{¶ 13} Campbell's affidavit includes allegations that "[i]n 2006, Captain Sell[e]rs physically assaulted me on the grounds with impunity. Captain Sellers was not fired for assaulting me, she was told to stay away from me. I had to write several incident reports as Captain Sellers continued to harass me." (Campbell affidavit, at ¶ 42-44.) This incident between an African-American Captain and Campbell is in stark contrast to what Overstreet claims. The alleged assault was part of the settlement in spring 2007, but raises questions as to the accuracy of part of what Overstreet says in his affidavit.

{¶ 14} Further, Campbell swears that the treatment from Sellers and another African-American Captain remained unchanged after her return to work in 2007. She also identifies incidents involving African-American corrections officers who were not disciplined for using too much sick leave time, when Campbell was repeatedly disciplined.

{¶ 15} Specifically, Campbell alleged:

51. Upon return to work, I have found the treatment from Defendant's agents Ford and Sellers unchanged.

52. Despite being harassed, I continued to meet my job requirements as witnessed by my annual reviews and training certificates.

\* \* \*

64. Nothing was done to protect me from the continued harassment and physical intimidation by Defendant's agents.

\* \* \*

66. Throughout my employment with MEPRC, I suffered disparate treatment at the hands of my supervisors.

67. There were several instances when I was written up for disciplinary matters and similarly situated black employees were not written up.

\* \* \*

69. Even though I complained to MEPRC, nothing was done to prevent the continued harassment of me.

{¶ 16} Under the circumstances, there were and are genuine issues of material fact as to whether Campbell was given disparate treatment after May 27, 2007 when she returned to work following the execution of the Grievance Settlement Agreement on April 24, 2007 to give her job back. As a result, summary judgment was inappropriate as to that time period. Summary judgment was appropriate for acts which occurred before July 23, 2005 and for the acts settled as part of the April 24, 2007 agreement.

{¶ 17} We acknowledge that this is a case in which reverse discrimination is alleged. However, much of what Campbell alleges in her affidavit is activity of persons of one race against her as a member of a different race. A lawsuit in the Ohio Court of Claims does not permit having a single individual as a named defendant. The lawsuit is against Ohio as a state with a specific department as the primary entity making Ohio liable. Thus, we are not addressing the typical situation where a private employer as a whole creates a hostile work environment or permit a hostile work environment to exist.

{¶ 18} We sustain the assignment of error in part. We vacate the judgment of the trial court with respect to allegations involving May 27, 2007 and onward. We affirm the judgment of the Ohio Court of Claims with respect to claims involving acts before May 27, 2007. We remand the case for further appropriate proceedings.

*Judgment affirmed in part;  
case remanded for further proceedings.*

KLATT, J., concurs separately.  
FRENCH, J., concurs in part and dissents in part.

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KLATT, J., concurring separately.

{¶ 19} Although I concur with the judgment reached by the majority, I reach that result on more narrow grounds than expressed in the majority decision. Viewing the evidence in favor of the nonmoving party, I believe that there are issues of material fact regarding whether appellant was subjected to racial harassment and/or discriminatory conduct by appellee following her return to work in May 2007. Although the allegations in appellant's affidavit describing discriminatory conduct after May 2007 are vague, when considered in context, I believe they are sufficient to create issues of material fact precluding summary judgment. For this reason, I concur with the judgment reached by the majority decision.

FRENCH, J., concurring in part and dissenting in part.

{¶ 20} I agree with the majority's conclusion that ODRC is entitled to summary judgment on claims for acts that occurred before July 23, 2005, and for acts that were settled as part of the April 24, 2007 agreement. I disagree, however, with the majority's conclusion that ODRC is not entitled to summary judgment on Campbell's remaining claims.

{¶ 21} As pertinent here, R.C 4112.02 provides the following: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race \* \* \* of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." At issue here is Campbell's claim that ODRC took adverse employment actions against her because she is white.

{¶ 22} In count I of her complaint, Campbell alleged race discrimination. Specifically, she alleged that ODRC removed her in October 2006 and replaced her with a black corrections officer. In count II of her complaint, Campbell alleged that she had suffered racial harassment in the past, but she did not identify a specific timeframe. In count III of her complaint, Campbell alleged retaliation. Specifically, she alleged that harassment and her October 2006 removal were retaliation for a 2004 complaint she filed with the Ohio Civil Rights Commission ("OCRC").

{¶ 23} To establish a prima facie case of reverse race discrimination, Campbell must show the following: (1) "background circumstances supporting the inference" that ODRC "was the unusual employer who discriminated against non-minority employees"; (2) ODRC "took an action adverse" to her employment; (3) Campbell "was qualified for the position"; and (4) ODRC treated Campbell "disparately from similarly situated minority employees." *Mowery v. Columbus*, 10th Dist. No. 05AP-266, 2006-Ohio-1153, ¶ 44.

{¶ 24} To establish a prima facie case for a hostile work environment created by racial harassment, Campbell must establish the following: (1) she was a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the alleged harassment was based on race; (4) the harassment had the purpose or effect of unreasonably interfering with her work performance "or creating an intimidating, hostile, or offensive work environment"; and (5) ODRC is liable under a theory of respondeat superior. *Zacchaeus v. Mt. Carmel Health Sys.*, 10th Dist. No. 01AP-683 (Feb. 5, 2002).

{¶ 25} In order to establish a prima facie case of retaliation under R.C. 4112.02(I), Campbell must establish the following: (1) she engaged in a protected activity; (2) ODRC knew of her participation in the protected activity; (3) ODRC engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action. *Id.*

{¶ 26} Once Campbell establishes a prima facie case of discrimination, the burden shifts to ODRC to "articulate some legitimate nondiscriminatory reason for" its action. *Carney v. Cleveland Hts.-Univ. Hts. City School Dist.*, 143 Ohio App.3d 415, 429 (8th Dist.2001), citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). And, if ODRC carries its burden, then the burden shifts back to Campbell to prove that ODRC's proffered reason is pretext. *Carney* at 429, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

{¶ 27} On August 19, 2011, ODRC moved for summary judgment on Campbell's claims of racial discrimination, racial harassment, and retaliation. ODRC argued that all claims for conduct prior to July 23, 2005 were barred by the two-year statute of limitations. ODRC also argued that all of Campbell's claims arose from her October 2006

removal; therefore, those claims were barred by an April 2007 settlement agreement. Finally, ODRC argued that, in any event, Campbell had not presented valid claims for racial discrimination, racial harassment or retaliation.

{¶ 28} In support of its motion, ODRC submitted the affidavit of Don Overstreet, who denied any discriminatory acts against Campbell and authenticated documentary evidence concerning the discipline given to Campbell. ODRC also submitted Campbell's answers to interrogatories. In response to a question that asked her to identify "each and every wrongful action of [ODRC] that you allege occurred on or after May 27, 2007," Campbell stated the following: "I was put on 'Last Chance' after this date. However, beginning on this date and thereafter I no longer had to work with the 2 supervisors who were discriminating against me and harassing me. Captain Ford (now Captain Hogan) works at a different building, and Captain Sellers is off of work on disability."

{¶ 29} In her memorandum contra summary judgment and supporting affidavit, Campbell provided a chronological history of the alleged harassment and discrimination, beginning in 2001. For the most part, the arguments and affidavit relate to actions that occurred prior to July 23, 2005, or that related to the April 24, 2007 settlement. Campbell also alleged, however, that she was subjected to continued harassment by her supervisor, Captain Sellers, after Campbell returned to work in May 2007.

{¶ 30} In its decision granting summary judgment in ODRC's favor, the trial court excluded all of the documents Campbell attached to her affidavit for lack of authentication. This court has recognized previously that "Civ.R. 56(C) places strict limitations upon the type of documentary evidence that a party may use in support of or in opposition to summary judgment." *Thompson v. Hayes*, 10th Dist. No. 05AP-476, 2006-Ohio-6000, ¶ 103. Further, a party may introduce as proper evidentiary material documents that do not fall within one of the categories of evidence listed in Civ.R. 56(C) "only when incorporated by reference into a properly framed affidavit pursuant to Civ.R. 56(E)." *Id.*, citing *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222 (8th Dist.1986). Documents that are not sworn, certified or authenticated by way of affidavit "have no evidentiary value," and we may not consider them. *State ex rel. Shumway v. State Teachers Retirement Bd.*, 114 Ohio App.3d 280, 287 (10th Dist.1996). The most "common manner of identifying a document is through testimony of a witness

with knowledge." *St. Paul Fire & Marine Ins. Co. v. Ohio Fast Freight, Inc.*, 8 Ohio App.3d 155 (10th Dist.1982), paragraph four of the syllabus.

{¶ 31} Applying these principles here, I conclude that the trial court did not err by excluding exhibits B through X attached to Campbell's affidavit. The affidavit did not authenticate the documents. Rather, Campbell stated:

72. I have provided documents labeled Exhibits B through T and have asked my attorney to use them in this memo to support the aforementioned statements.

73. I have gone over the DCI/MEPRC Consolidated Seniority Roster [Exhibit C] and from my personal knowledge marked the white employees with a highlighter.

74. Documentation of the harassment I have suffered is extensive. I have personally selected the exhibits that are attached to this Affidavit and referenced throughout my Memorandum.

{¶ 32} Campbell's general statements about exhibits B through X do not meet the standard set by Civ.R. 56, nor does her attorney's use of those documents in her memorandum contra. Therefore, the trial court did not err in excluding them.

{¶ 33} Exhibit Y contains two affidavits from individuals who overheard a conversation between Campbell and an employee of ODRC concerning whether Campbell could take unpaid leave in order to attend a funeral in Indiana. The affidavits are signed and notarized, and the trial court should not have excluded them for lack of authentication.<sup>1</sup> *See* Civ.R. 56(E).

{¶ 34} In the first affidavit, Angela Johnson states that the employee confirmed to Campbell that the warden approved her request to take a day off to attend the funeral. Before the trial court, Campbell argued that this evidence supported her claims of discrimination and harassment because she later received only six hours of unpaid leave, which resulted in a deficit upon a subsequent leave request, discipline, and the last chance agreement. I consider the impact of this evidence below.

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<sup>1</sup> In its reply to Campbell's memorandum contra summary judgment, ODRC stated: "Exhibit Y appears to be a proper affidavit regarding a telephone conversation that was overheard."

{¶ 35} In the second affidavit, Mark French states that the employee said to Campbell that she would call Campbell back after she spoke to the warden; Mr. French does not state whether Campbell got permission for the unpaid leave or for how much. The affidavit provides no relevant information, and the trial court's erroneous exclusion of it for lack of authentication was harmless.

{¶ 36} As for Campbell's affidavit itself, as noted, most of the statements in the affidavit relate to actions that occurred prior to July 23, 2005, or that gave rise to, and were settled by, the April 24, 2007 settlement. None of those statements can support summary judgment.

{¶ 37} The affidavit also contains vague statements concerning "continued harassment" or "several instances" of discrimination. (Paragraph 64, for example, states: "Nothing was done to protect me from the continued harassment and physical intimidation by Defendant's agents.") Without more, however, these vague, conclusory allegations are insufficient to establish a genuine issue of material fact. *Gallagher v. O'Connor*, 2d Dist. No. 19702, 2003-Ohio-5095, ¶ 19 ("Mere conclusory, self serving statements in an affidavit do not create a genuine issue of material fact as they do not meet the requirements of Civ.R. 56(E) that 'affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence.' ").

{¶ 38} Removing the untimely and settled claims, as well as the vague and conclusory allegations, the only statements remaining in Campbell's affidavit concern an alleged 2006 assault by Captain Sellers and an August 27, 2007 last chance agreement.

{¶ 39} First, as to the alleged assault, Campbell states that Captain Sellers "physically assaulted [her] on the grounds with impunity." She also states that Captain Sellers was not disciplined, fired or told to stay away from her. As an initial matter, it appears that the April 2007 agreement settled any claim that the assault, which occurred while the investigation into her OCRC complaint was ongoing, was retaliatory. As Campbell states in her affidavit, ODRC returned her to work in April 2007 "[i]n response to my retaliation charge to OCRC based on [ODRC's] firing me and to the ongoing investigation of my original charge to OCRC based on [ODRC's] discrimination." But even if a claim based on the alleged assault were still viable, Campbell provided no evidence that the assault was racially motivated, that ODRC treated her disparately in

response to her complaint of the assault or that ODRC is liable for a supervisor's physical assault under a theory of respondeat superior. Therefore, even if a claim arising from the alleged assault were viable, Campbell's claim of discrimination, harassment or retaliation based on the assault fails as a matter of law.

{¶ 40} Campbell also lacked evidence to support her claim that the August 27, 2007 last chance agreement was racially motivated, even if we consider the affidavit of Angela Johnson and Campbell's request for unpaid leave. The stated purpose of the agreement was to stay any discipline of Campbell and to allow her the opportunity to remain on the job. While Campbell argued in her memorandum contra summary judgment, as she argues here, that the agreement constituted disparate treatment, she provided no evidence that the agreement was racially motivated or that she was treated differently from similarly-situated white employees.

{¶ 41} Nor did Campbell provide any such evidence for ODRC's handling of her request for unpaid leave in June 2007. Even if we consider Johnson's affidavit concerning Campbell's oral request for unpaid leave, ODRC submitted into evidence Campbell's leave-request form, which indicates her supervisor's approval and the following notation: "[E]xhaust all leave prior to Leave without pay." The discipline against Campbell arose when she left a training without having enough hours of leave available, a shortfall she contends resulted when ODRC failed to give her a full eight hours of unpaid leave. Campbell provided no evidence that her request was handled any differently than any other employee's request for unpaid leave. Rather, the deficit occurred because, as the leave form advised her, she had to take any remaining regular leave before she could take unpaid leave. Far from showing discrimination, reasonable minds could only conclude that ODRC advised her of its policy that she had to exhaust all other leave before unpaid leave could be triggered, and ODRC followed that policy.

{¶ 42} For all these reasons, Campbell's claims of racial discrimination, harassment or retaliation based on the last chance agreement and the discipline leading up to it must fail as a matter of law.

{¶ 43} Finally, Campbell made no claims of discrimination, harassment or retaliation for actions after the August 2007 last chance agreement. In fact, Campbell stated in her answers to interrogatories that after the agreement, she "no longer had to

work with the 2 supervisors who were discriminating against me and harassing me." Lacking evidence to support her claims of discrimination based on the agreement itself, and lacking evidence to show discrimination or harassment since then, Campbell's claims of continuing discrimination, harassment or retaliation also must fail as a matter of law.

{¶ 44} Having eliminated all of Campbell's remaining claims of discrimination, harassment, and retaliation, I would affirm the trial court's grant of summary judgment in favor of ODRC. Because the majority concludes otherwise, I concur in part and dissent in part.