[Cite as *Foster v. Ohio Bell Tel. Co.*, 2009-Ohio-6465.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92828

EARL FOSTER

PLAINTIFF-APPELLANT

vs.

OHIO BELL TELEPHONE COMPANY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-655545

BEFORE: Gallagher, J., Cooney, A.J., and Stewart, J.

RELEASED: December 10, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Douglas L. Winston
Berger & Zavesky Co., LPA
1425 Rockefeller Building
614 West Superior Avenue
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEES

Carole S. Rendon
Paul D. Castillo
Giffen & Kaminski, LLC
1300 East Ninth Street, Suite 1600
Cleveland, Ohio 44114

SEAN C. GALLAGHER, J.:

{¶ 1} Appellant, Earl Foster, appeals the judgment of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of appellees, The Ohio Bell Telephone Co. ("Ohio Bell") and Dionna Prentice. For the reasons stated herein, we reverse the decision of the trial court and we remand the matter for further proceedings.

{¶ 2} Foster is employed as a customer service representative with Ohio Bell at the Erieview facility in Cleveland, Ohio. He filed this action against appellees, claiming that he experienced quid pro quo sexual harassment as a result of his refusal to comply with the sexual demands of his supervisors, and that he experienced a sexually hostile work environment. His claims are based upon the alleged conduct of Kristy Giffen, Diedre Thomas, and Prentice, each of whom is employed by Ohio Bell. Appellees have denied that any of the women engaged in the alleged conduct.

{¶ 3} In the fall of 2005, Giffen was a sales coach at Ohio Bell. Foster did not work under Giffen. He participated in a bowling league with Giffen and other coworkers. Foster testified in his deposition to an incident that occurred one night after bowling. He was under the impression that he and other coworkers were going to Giffen's home to continue socializing. Instead, he claims that he followed her to a hotel room, where Giffen came out of a bathroom wearing only

undergarments, and that she blocked him from leaving, she fondled and kissed him, and she expressed her sexual desires for him. Foster states that he kept pushing her off and ultimately managed to leave.

{¶ 4} Foster testified that he reported the Giffen incident to several persons in management at Ohio Bell. Specifically, he stated that he reported the incident to Vontrise Bogarty, his sales coach at the time, and was told "not to worry about it." He also testified that he told other members of management, including Michael Presley, Will Munoz, Erica Dismukes, James Parks, and Michael Presley. Foster stated that he told Parks that "I had an experience [with Giffen] that I was uncomfortable with, that was in a sexual nature" and that it made him "very uncomfortable about being [placed] on her team." Foster testified that he told Munoz, who inquired upon hearing rumors, that "a lot of things happened in that room that I was uncomfortable with," that he did not feel comfortable going into detail about exactly what happened, and that he was not comfortable with being placed on Giffen's team. Foster stated he told Dismukes that he did not have sex with Giffen but was placed "in a very compromising position * * * at the hotel." Foster claims that Ohio Bell failed to take any action, despite his reports to management concerning the incident. He also alleges that following the incident, Giffen made unfounded accusations against him, berated him in front of his peers, and engaged in other behavior against him.

{¶ 5} Foster also alleges that he was sexually harassed by Thomas, who was Foster's coach from sometime in late 2006 to November 2007. He testified

that Thomas, among other conduct, asked him about his sexual relationships with other employees, invited him to a nudist beach, referred to him as “baby,” told him how attractive he was, told him she wanted a friendship with somebody “with benefits” and asked Foster if he knew of anyone, told Foster how sexually frustrated she was, and asked Foster for details about his sexual life. He stated that she also would request hugs from him, she kissed him on the cheek a couple of times, she would rub his back, and she would put her hand on top of his hand during meetings. He claims that he reported Thomas’s conduct to Bogarty on numerous occasions between March and June or July 2007, and that no action was taken. Foster claims that he experienced a great deal of stress and anxiety because his complaints went unchecked.

{¶ 6} In early 2007, Foster was accepted into a management development program (“MDP”). The program is designed to help develop qualified representatives’ leadership skills. Foster was interested in moving into management, and the program allowed him to get a closer look at what managers do on a daily basis. During the period from March through June 2007, Foster worked on both the 10th and 11th floors. Although Foster was on Thomas’s team at the time, Prentice was the senior manager on the 10th floor, to whom Foster also reported.

{¶ 7} On February 27, 2007, Foster applied for a sales coach position. Foster was among the candidates selected for an interview.

{¶ 8} Ryan Gunn, who was the general manager of the Cleveland call center, stated in an affidavit that he was the ultimate decision maker for the hiring of sales coaches. In making his decision, he considered his own knowledge and observations of the candidates, their interview scores, and input from supervisors. The behavior-based interviews were conducted by various members of management. Foster's interview was with Associate Director James Tench, Acting Associate Director Dionna Prentice, and Associate Director Harry Morrow. Gunn indicated that no single supervisor's input convinced him whom he should hire for the position.

{¶ 9} The sales coach position was offered to Michael Matthews, who was the highest scoring candidate in the interview process. However, Matthews turned down the position. Thereafter, two coaching positions were posted and Foster reapplied. Foster again was not selected for the position. Gunn stated that his decision "was based solely on my assessment of the strengths of each of the candidates and my conclusion that Foster was not the strongest candidate for these positions." The positions were given to Eric Perry and Cheryl McCraw.

{¶ 10} According to Foster, during his time in the MDP, Prentice made sexually based comments to him. During his deposition, Foster stated that Prentice would make sexual jokes, comment about his lips and private parts, inquire about his sexual encounters with people at work, look him up and down, ask him if he liked her breasts, hug him from the back and kiss his neck, brush up against him as he walked past, ask him if he thought her skirts were too little, and

ask him if she was the type of female to whom he would be attracted. Foster stated that Prentice would make her sexual desires for him known on a regular basis. He indicated that when he would talk to her about the promotion, she informed him that he was a "shoo-in" for the position and always added comments about "what he would do for her" in a sexual context. Foster did not succumb to the alleged sexual advances. He stated that he reported Prentice's alleged behavior to various members of management, including Thomas, Bogarty, and Tench. Foster claims that no prompt and corrective action was taken by Ohio Bell. Prentice denied engaging in this behavior.

{¶ 11} Prentice was among the managers who interviewed Foster, Matthews, and Perry for the sales coach position. The members of the interview panel collaborated as to what score Foster should receive, and Prentice provided input in that decision. Foster claims that he was told by Tench, who was on his interview panel, that Prentice would be the person selecting the individual to fill the position. Among her job duties, Prentice was responsible for "staffing, directing and managing the activities of sales coaches." Prentice stated in her deposition that she had the power to recommend the hiring of sales coaches if she thought the candidate was qualified. Prentice recommended Matthews and highly recommended Perry, both of whom were offered the position. She voiced her recommendations to Tench and Gunn.

{¶ 12} Foster claims that after he learned that he was not selected for the sales coach position, he became distraught and saddened, and he felt distant

from his fellow coworkers. Gunn indicated that he observed a change in Foster's demeanor at work and that he was told by a number of managers that Foster's attitude and performance substantially diminished.

{¶ 13} Appellees filed a motion for summary judgment that was granted by the trial court. Foster has appealed the trial court's judgment and has raised two assignments of error for our review. Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 186, 2005-Ohio-4559, 833 N.E.2d 712. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 14} Foster's first assignment of error provides as follows: "1. The trial court erred in granting summary judgment as there were triable issues of fact that appellant suffered quid pro quo harassment."

{¶ 15} R.C. 4112.02(A) makes it an unlawful discriminatory practice "[f]or any employer, because of the * * * sex * * * of any person, * * * 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." The Ohio Supreme Court has recognized that "a plaintiff may establish a violation of R.C. 4112.02(A)'s prohibition of discrimination 'because of * * * sex' by proving either of two types of sexual harassment: (1) 'quid pro quo' harassment, i.e., harassment that is directly linked to the grant or denial of a tangible economic benefit, or (2) 'hostile environment' harassment, i.e., harassment that, while not affecting economic benefits, has the purpose or effect of creating a hostile or abusive working environment." *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 176, 2000-Ohio-128, 729 N.E.2d 726, 731.

{¶ 16} To succeed on a quid pro quo harassment claim, the plaintiff must show that "(1) that the employee was a member of a protected class, (2) that the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors, (3) that the harassment complained of was based on gender, and (4) that the employee's submission to the unwelcome advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment." *Schmitz v. Bob Evans Farms, Inc.* (1997), 120 Ohio App.3d 264, 269, 697 N.E.2d 1037, citing *Kauffman v. Allied Signal, Inc., Autolite Div*. (C.A.6, 1992), 970 F.2d 178, 185-186.

{¶ 17} In this case, Foster is a member of a protected class as R.C. 4112.02(A) protects men as well as women from all forms of sex discrimination in the workplace. See *Hampel*, 89 Ohio St.3d at 731. Foster has also set forth allegations and testified that he was subjected to unwelcome sexual harassment on the basis of his gender. The central dispute under this claim is whether Foster has demonstrated that he suffered a tangible employment action as a result of his refusal to submit to the alleged sexual demands of Prentice.

{¶ 18} There is no dispute that Foster was not selected for the sales coach position. Therefore, we find there is evidence that he suffered a tangible employment action. The issue that remains is whether the action resulted from his rejection of Prentice's alleged sexual advances.

{¶ 19} "[A] quid pro quo claim of harassment can rest on an alleged harasser's authority to influence an adverse employment decision, if that influence is so significant that the harasser may be deemed the de facto decisionmaker." See *D.T. v. Medco* (Apr. 26, 1998), S.D.N.Y. No. 95Civ.8401; see, also, *Sanders v. DaimlerChrysler Corp*. (Nov. 9, 2006), N.D.Ohio No. 3:05 CV 7056; *Hughes v. Texas Keg Steakhouse & Bar, Inc*. (Mar. 21, 2006), N.D.Tex. No. 3:05-CV-0061-M; *Jaudon v. Elder Health, Inc.* (D.Md. 2000), 125 F.Supp.2d 153, 167. To prevail on his claim, Foster must establish more than mere "influence" or "input" in the decision-making process. "The supervising employee need not have ultimate authority to hire or fire to qualify as an employer, so long as he or she has significant input into such personnel decisions." *Kauffman*, 970 F.3d at

185, citing *Paroline v. Unisys Corp.* (C.A. 4, 1989), 879 F.2d 100, 104. A quid pro quo claim requires "a demonstrable nexus between the offensive conduct of the supervisor and the adverse employment action." *King v. Enron Capital & Trade Res. Corp.*, Franklin App. No. 00AP-761, 2002-Ohio-1620, citing *Burlington Industries Inc. v. Ellerth* (1998), 524 U.S. 742, 753, 118 S.Ct. 2257, 141 L.Ed.2d 633.

{¶ 20} Appellees assert that because Gunn is the sole decision maker for the sales coach position and his decision was based upon his independent evaluation, Foster cannot impute Prentice's alleged discriminatory bias to Gunn or Ohio Bell. However, even if Gunn made the ultimate decision, we find that a rational trier of fact could infer from the evidence that Prentice had a significant influence on the decision not to offer Foster the position.

{¶ 21} The fact that Prentice was one of three persons on the interview panel and that other people were involved in the hiring process does not necessarily mean that Prentice could not have significant influence on the decision. Foster has presented evidence that Prentice's job duties included staffing the position he sought, that she evaluated the candidates she interviewed, that Gunn relied upon the interview scores as well as input from supervisors in reaching his decision, and that Tench advised Foster that Prentice was making the call. Foster also claims that Prentice told him he was a "shoo-in" for the position and she represented her authority by asking him what he was "willing to do" to get the position. Prentice recommended Matthews and Perry, both of

whom were offered the position. Prentice made her recommendations concerning the candidates known to both Tench and Gunn. From the record before us, we find sufficient evidence exists upon which a rational trier of fact could find Prentice's influence was significant.

{¶ 22} To the extent that Gunn represented that he was the sole decision maker, it is for the trier of fact to weigh the evidence and determine the credibility of the witnesses. We are not deciding whether Foster can ultimately prevail on his claim. However, we find that Foster has presented sufficient evidence to survive summary judgment on his quid pro quo sexual harassment claim.

{¶ 23} We find an issue of fact exists as to whether there is a causal nexus between Foster's refusal of Prentice's alleged advances and his failure to be offered the sales coach position. Construing the evidence most strongly in Foster's favor, a jury could reasonably conclude that Foster was subjected to quid pro quo sexual harassment. Accordingly, we find the trial court erred in granting summary judgment on this claim and we sustain Foster's first assignment of error.

{¶ 24} Foster's second assignment of error provides as follows: "2. The trial court erred in granting summary judgment as there were triable issues of fact that appellant experienced a sexually hostile work environment for which appellee may be held responsible."

{¶ 25} To establish a claim of hostile-environment sexual harassment a plaintiff must show the following: "(1) that the harassment was unwelcome, (2) that the harassment was based on sex, (3) that the harassing conduct was

sufficiently severe or pervasive to affect the 'terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment,' and (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action." *Hampel*, 89 Ohio St.3d at 176.

{¶ 26} In this case, Foster offered testimony claiming that he was subjected to unwelcome sexual harassment at Ohio Bell by three female employees, that he reported the conduct to various members of management, and that no immediate and appropriate corrective action was taken. In addition to being denied the sales coach position, Foster maintains that he was made uncomfortable at work and he experienced anger towards his coworkers. He also states that he experienced stress and anxiety.

{¶ 27} Appellees argue that Foster's claim fails because he failed to present evidence that the alleged harassment affected his employment. Appellees further state that the alleged Giffen incident involved a single episode and that the alleged conduct of Thomas and Prentice, while perhaps inappropriate, did not rise to the level of an actionable claim for hostile work environment sexual harassment.

{¶ 28} "In order to determine whether the harassing conduct was 'severe or pervasive' enough to affect the conditions of the plaintiff's employment, the trier of fact, or the reviewing court, must view the work environment as a whole and consider the totality of all the facts and surrounding circumstances, including the

cumulative effect of all episodes of sexual or other abusive treatment." Id. at 181. The circumstances may also include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Id. at 180.

{¶ 29} Our review reflects that Foster testified in his deposition to being sexually harassed by three female employees at Ohio Bell. The conduct relating to Prentice and Thomas occurred over a period of time and involved allegations of both verbal and physical sexual harassment. The conduct relating to Giffen involved a single incident, but was serious in nature and was part of the cumulative effect. Foster reported the conduct of each alleged offender, including the sexual nature of the conduct, to various members of management. He further states that no prompt and corrective action was taken following his reports of sexually harassing conduct. Ohio Bell's harassment policy states that "[o]nce a complaint or incident of sexual harassment is reasonably known by management, the manager must take immediate corrective action. It is strongly recommended that Human Resources personnel or the SBC Ethics and EEO Line be contacted to attempt to resolve the issue or when appropriate, to conduct a prompt and thorough investigation."

{¶ 30} We find that Foster has presented sufficient evidence from which reasonable minds could conclude, when considering the totality of all the facts

and surrounding circumstances, that the harassing conduct in this case was sufficiently severe or pervasive to affect the conditions of Foster's employment.

{¶ 31} Appellees also assert an affirmative defense to the hostile work environment claim. The Supreme Court has established that an employer facing vicarious liability for an actionable hostile environment created by a supervisor's harassing conduct can avoid liability by showing by a preponderance of the evidence the following: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Industries, Inc.*, 524 U.S. at 765*; Faragher v. City of Boca Raton*, (1998), 524 U.S. 775, 777-778, 118 S.Ct. 2275, 141 L.Ed.2d 662. The affirmative defense is not available, however, when the supervisor's harassment culminates in a tangible employment action. Id.

{¶ 32} In this case, Foster has presented evidence of a tangible employment action (failure to promote) insofar as the conduct of Prentice is concerned. Further, Foster claims that he reported the conduct of all three women to management and no prompt and corrective action was taken. Therefore, there are genuine issues of material fact in dispute that relate to the affirmative defense.

{¶ 33} Construing the evidence most strongly in Foster's favor, reasonable minds could conclude that Foster was subjected to a hostile and intimidating working environment. Accordingly, we find that the trial court erred in granting summary judgment on this claim and we sustain Foster's second assignment of error.

Judgment reversed, case remanded.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

COLLEEN CONWAY COONEY, A.J., and
MELODY J. STEWART, J., CONCUR