[Cite as *Varner v. Goodyear Tire & Rubber Co.*, 2004-Ohio-4946.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

JONI L. VARNER Appellant v. THE GOODYEAR TIRE & RUBBER COMPANY, et al. Appellees	C.A. No. 21901 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2002-01-0425

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Presiding Judge.

{¶1} Appellant, Joni Varner, has appealed the judgment of the Summit County Court of Common Pleas granting summary judgment in favor of Appellees. This Court affirms.

I.

{¶2} Appellant worked for Appellee, Goodyear Tire & Rubber Company, from 1975 until July 24, 2001. Appellant was terminated from her employment as Communications Engineer on July 24, 2001. Shortly before that time, Appellant had been given a below average rating on her performance review. As such, she

was asked to draft a letter of commitment admitting her weaknesses and detailing the steps she would take to improve. She failed to properly draft the letter despite several opportunities and she was terminated. As a result of her termination, Appellant filed a complaint on January 22, 2002. While Appellant asserted multiple causes of action, she voluntarily dismissed several of them. She retained causes of action for hostile work environment gender based sexual harassment and for retaliatory discharge for engaging in protected activity.

{¶3} Appellant's remaining causes of action are based upon the following allegations. With regard to Appellee John Sandora ("Sandora"), a co-worker, Appellant averred that Sandora grabbed Appellant's buttocks twice. These incidents were alleged to have occurred in 1997. However, Appellant did not report them to Appellee Goodyear until 2000. Upon learning of the incidents, Goodyear appointed an outside investigator to determine whether sexual harassment had occurred. The investigator determined that no harassment had occurred. Following Appellant's accusation that Sandora grabbed her buttocks, she averred that Sandora had stated on one occasion that he did not want to be in a confined space with her. Further, Appellant alleged that Sandora consistently stared at her during working hours. Appellant also alleged that Sandora and other co-workers spread a rumor that she was having an affair with an independent contract employee, a technician named Tim Huffman.

{¶4} With regard to Appellant's supervisor, Appellee Steve Murphy ("Murphy"), Appellant alleged that he called Appellant into his office to inform her that a rumor was circulating that she was spending too much time with male technicians, Tim Huffman in particular, and that it gave a bad appearance. Appellant also averred that Murphy improperly limited her from leaving her desk, prohibiting her from properly fulfilling her duties. Appellant alleged that Murphy also stated that he had a difficult time working with women. Further, Appellant averred that Murphy asked her once whether she was wearing panty hose and told her that she had nice legs. Additionally, Appellant stated that individuals in her department were not polite to her; specifically, she stated that they would not respond to her questions or greetings. Lastly, Appellant contended that she was not afforded the same training opportunities as others because she is a woman.

{¶5} On July 28, 2003, Appellees moved for summary judgment on Appellant's causes of action. It was in response to this motion that Appellant moved to dismiss all but the above two causes of action. On December 19, 2003, the trial court granted Appellees' motion for summary judgment. Appellant timely appealed, raising three assignments of error.

II.

ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT ERRED IN FINDING THAT [APPELLANT] FAILED TO ESTABLISH A *PRIMA FACIE* CASE OF RETALIATORY DISCHARGE."

{¶6} In her first assignment of error, Appellant has claimed that the trial court erred in granting summary judgment on her retaliatory discharge claim. We disagree.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co*. (1983), 13 Ohio App.3d 7, 12.

{¶8} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (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 viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead

must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶10} Federal case law interpreting Title VII of the Civil Rights Act of 1964 is generally applicable to cases involving alleged violations of R.C. chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civ. Rights Comm.* (1984), 66 Ohio St.2d 192, 196. As such, in order to establish a prima facie case of retaliation, Appellant must establish that:

> "(1) [s]he was engaged in activity protected by Title VII,
>
> "(2) the activity was known to the defendant,
>
> "(3) [s]he was subjected to tangible employment action, and
>
> "(4) there is a causal link between the protected activity and the adverse employment action." *Wade v. Maxwell Utility Bd.* (CA6, 2001), 259 F.3d 452, 463.

{¶11} In order to establish the causal connection, Appellant must present evidence that is sufficient to raise an inference that the protected activity was the likely motivation for the adverse action. *EEOC v. Avery Dennison Corp.* (CA6, 1997), 104 F.3d 858, 861.

{¶12} Once a prima facie case has been established, the burden is shifted to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action, and if the defendant meets that burden, the plaintiff must demonstrate that the articulated reason is merely a pretext. *Chandler v. Empire Chemical, Inc.*,

Midwest Rubber Custom Mixing Div. (1994), 99 Ohio App.3d 396, 402, appeal not allowed (1995), 72 Ohio St.3d 1415.

{¶13} This Court finds that summary judgment was appropriate on Appellant's claim for retaliatory discharge on several grounds. First, Appellant has failed to demonstrate a causal connection between her reports of misconduct and her termination. The record reflects that Appellant was given a below average performance evaluation for the year 2000. As a result, Appellant was required to submit a letter of commitment admitting her weaknesses and outlining a plan to improve them. Instead, Appellant submitted a letter stating that she felt that she had met her performance standards for 2000. As a result of failing to submit a proper letter, Appellant was terminated. She has provided no evidence that anything other than her failure to submit the letter contributed to the decision to terminate her employment.

{¶14} Further, even if this Court were to find that Appellant had demonstrated a prima facie case of retaliatory discharge, summary judgment was still appropriate. As previously noted, once the defendant provides a legitimate, non-discriminatory basis for termination, the burden shifts back to Appellant to demonstrate that said reason is merely a pretext. *Chandler*, 99 Ohio App.3d at 402. Appellant has provided no evidence that the above reason was a pretext. Appellant contends that another employee in her department, a male, also received a below average performance evaluation and was not terminated. However, the

record reflects that unlike Appellant, the male employee properly completed the requested letter of commitment. Further, Appellant was terminated immediately upon her failure to complete the letter, well after her complaints of misconduct. As such, Appellant did not demonstrate that the legitimate reason given for her termination was merely a pretext. Accordingly, Appellant's first assignment of error is not well taken.

ASSIGNMENT OF ERROR NUMBER TWO

"THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF-APPELLANT WAS NOT SUBJECTED TO HOSTILE WORK ENVIRONMENT GENDER BASED SEXUAL HARASSMENT."

{¶15} In her second assignment of error, Appellant has argued that trial court erred in granting summary judgment in favor of Appellees on her claim of sexual harassment. We disagree.

{¶16} As this is also an appeal from a grant of summary judgment, we will apply the same standard of review as explained in Appellant's first assignment of error.

{¶17} As previously stated, federal case law interpreting Title VII of the Civil Rights Act of 1964 is generally applicable to cases involving alleged violations of R.C. Chapter 4112. *Plumbers*, 66 Ohio St.2d at 196. Therefore, in order to demonstrate a prima facie case of sexual harassment, Appellant must produce evidence demonstrating a genuine issue of fact that:

"(1) she was a member of a protected class;

> "(2) she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature;
>
> "(3) the harassment complained of was based upon sex;
>
> "(4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile or offensive working environment that affected the psychological well-being of the plaintiff and
>
> "(5) the existence of *respondeat superior* liability." (Citations omitted). *Cully v. St. Augustine Manor* (Apr. 20, 1995), 8th Dist. No. 67601, 1995 Ohio App. Lexis 1643, at *19-20, appeal not allowed (1995), 74 Ohio St.3d 1404, certiorari denied (1996), 517 U.S. 1188. See, also, *Cechowski v. The Goodwill Indus. of Akron, Ohio, Inc.* (May 14, 1997), 9th Dist. No. 17944, appeal not allowed (1997), 80 Ohio St.3d 1414.

{¶18} In order to determine whether an environment is sufficiently hostile to warrant a finding of sexual harassment this Court examines the totality of the circumstances including:

> "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. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." *Harris v. Forklift Systems* (1993), 510 U.S. 17, 23.

{¶19} We note that the standards for judging hostility are demanding such that "the ordinary tribulations of the work place, such as, sporadic use of abusive language, gender-related jokes, and occasional teasing" will not constitute a hostile work environment. *Faragher v. City of Boca Raton* (1998), 524 U.S. 775,

788. In the instant case, the alleged discriminatory conduct in Appellant's case was infrequent. The only alleged physical touching of the Appellant occurred three years prior to Appellant reporting it to Goodyear. Appellant admitted that she told Sandora to stop touching her and that no incident has occurred since that time. Appellant was allegedly questioned on one occasion about whether she was wearing panty hose. Further, Sandora once told Appellant that he did not want to be in the same room as her and once called her a troublemaker. Appellant's other claims amount to the conclusion that she felt her coworkers were impolite. They failed to greet her in the morning or respond to her questions. As such, the alleged conduct was never physically threatening. Finally, Appellant alleges that she was restrained to her desk to the point that she could not perform the duties of her position. However, Appellant has provided no evidence that these restraints were placed upon her as a result of her gender. To the contrary, the record reflects that Appellees demonstrated that Appellant's movements were restricted as a result of complaints by technicians who felt she was hindering their ability to complete their work.

{¶20} It is worth noting that courts have found substantially more offensive conduct than that presented here insufficient to justify a finding of a hostile work environment. See *Mendoza v. Borden, Inc.* (CA11, 1999), 195 F.3d 1238, certiorari denied (2000), 529 U.S. 1068 (finding that the conduct of a supervisor which included looking at the plaintiff's groin area and making a sniffing noise

was insufficient to create a hostile work environment). See also *Burnett v. Tyco Corp.* (CA6, 1999), 203 F.3d 980, certiorari denied (2000), 531 U.S. 928 (holding that the conduct of plaintiff's supervisor, including placing a package of cigarettes inside plaintiff's brassiere strap and handing plaintiff a cherry cough drop while stating "[s]ince you have lost your cherry, here's one to replace the one you lost," did not create a hostile work environment). Based on the foregoing, this Court finds that Appellant has not demonstrated that the complained of conduct was so severe and pervasive as to alter the terms and conditions of her employment and create a hostile work environment. *Hampel v. Food Ingredient Specialties, Inc.* (2000), 89 Ohio St.3d 169, 175. As such, we find that Appellant has failed to establish a prima facie case of sexual harassment. Accordingly, Appellant's second assignment of error is not well taken.

ASSIGNMENT OF ERROR NUMBER THREE

"THE TRIAL COURT ERRED IN FAILING TO FIND THAT [APPELLANT] HAD NOT MET HER BURDEN OF PROOF IN HER DIRECT EVIDENCE/MIXED MOTIVE CASE."

{¶21} In her final assignment of error, Appellant has claimed that it was error to grant summary judgment in favor of Appellees because she provided direct evidence of sexual discrimination. This Court finds that Appellant's third assignment of error lacks merit.

{¶22} Since this is another challenge to the grant of summary judgment, the same standard as set forth above in Appellant's first assignment of error

applies. Further, as Appellant's claims are premised on violations of R.C. Chapter 4112, federal case law interpreting Title VII of the Civil Rights Act of 1964 is generally applicable. *Plumbers*, 66 Ohio St.2d at 196.

{¶23} In order to utilize the framework of mixed motive cases, Appellant must demonstrate that discriminatory animus played some role in the contested employment action. *Brown v. East Miss. Electric Power Ass'n* (CA5, 1993), 989 F.2d 858, 861. As discussed in response to Appellant's first assignment of error, Appellees' evidence demonstrated that Appellant was terminated for failure to submit a proper letter of commitment. Appellant has presented no evidence to the contrary.

{¶24} Appellant recites that another Goodyear employee, Dave Hagaman, was not terminated despite committing much more egregious acts than the Appellant. However, Hagaman's situation in no way parallels that of the Appellant. Hagaman had threatened the lives of several Goodyear employees, including Appellant. He was immediately placed on a leave of absence and required to attend counseling before returning to work. As Hagaman's conduct was substantially different than Appellant's, we find any analogy between the two has little value.

{¶25} However, a more apt comparison is presented by the record. In 2000, both Appellant and a co-worker in her department, a male, were given below average performance ratings. Both were required to submit letters of

commitment. While the male co-worker admitted his deficiencies and detailed how he would attempt to improve, Appellant refused to admit that she was deficient in her performance. As a result, the male employee was retained and Appellant was terminated.

{¶26} As such, Appellant has not demonstrated that gender played any role whatsoever in her termination. She has presented no evidence that a male refused to comply with the requirements of the letter of commitment, but remained employed at Goodyear. Accordingly, summary judgment on Appellant's claim of sexual discrimination was appropriate and her third assignment of error lacks merit.

III.

{¶27} Appellant's assignments of error are overruled, and the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

BETH WHITMORE
FOR THE COURT

SLABY, J.
BOYLE, J.
CONCUR

APPEARANCES:

NANCY HOLLAND and JOHN F. MYERS, Attorneys at Law, 159 South Main Street, 835 Key Building, Akron, Ohio 44308, for Appellant.

THOMAS R. CROOKES, Attorney at Law, 106 South Main Street, Suite 801, Akron Ohio 44308, for Appellee.