

TENTH APPELLATE DISTRICT

Cindy Ballard,	:	
	:	
Plaintiff-Appellant,	:	No. 10AP-104
v.	:	(C.C. No. 2007-07914)
Community Support Network,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 30, 2010

Richard B. Reiling, for appellant.

Richard Cordray, Attorney General, and *Eric A. Walker*, for appellee.

APPEAL from the Ohio Court of Claims.

BROWN, J.

{¶1} Cindy Ballard, plaintiff-appellant, appeals from a judgment of the Ohio Court of Claims, in which the court granted judgment to the Community Support Network ("CSN") on appellant's claims for sexual harassment and retaliation.

{¶2} Appellant is a registered nurse. In February 2002, appellant began working as a nurse supervisor for the CSN program at Summit Behavioral Healthcare ("SBH"), located in Cincinnati, Ohio. Appellant worked first shift Monday through Friday. Appellant's supervisor was Matthew Rucker, the director of CSN. Appellant claimed that,

from the beginning of her employment, Rucker intentionally touched her, flirted with her, and made sexual statements. Appellant also claimed Rucker was very hostile toward her, particularly after he did not receive a promotion he expected.

{¶3} After an incident in August 2003, in which appellant claims Rucker entered her office to deliver a reprimand and intimidated her, appellant filed a report with the SBH police and asked for security from the state of Ohio. Appellant claimed that Rucker's behavior worsened after the incident.

{¶4} From July through September 2003, Rucker's supervisor and director of nursing at SBH, Malcolm King, met with appellant and Rucker on four occasions to try to resolve their conflicts. In November 2003, appellant also met with representatives from the state to discuss Rucker's behavior and made a written statement detailing her complaints. Later that month, Rucker followed her home in his automobile, and appellant reported the incident to campus police.

{¶5} On December 2, 2003, King informed appellant that she was being transferred to the second shift as a relief supervisor, effective December 8, 2003. Appellant told King she could not work this shift because of family commitments, but King did not respond. Appellant attempted to take leave to consider King's offer, but her request was denied. Appellant resigned in December 2003 before her new shift was to begin.

{¶6} On October 5, 2007, appellant filed a complaint in the Court of Claims against CSN, alleging claims for sexual harassment and retaliation. The court bifurcated the issues of liability and damages. A liability only trial was held starting February 16, 2009. On January 11, 2010, the trial court entered judgment in favor of CSN. The trial

court found that, although appellant had been sexually harassed by Rucker, Rucker's harassment was not sufficiently severe and pervasive as to alter the terms and conditions of her employment, given appellant was still able to perform her job duties while being harassed. The trial court further found that appellant's reassignment was not related to her sexual harassment complaints against Rucker. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

[I.] The Trial Court erred by denying Appellant's claim for sexual harassment as Appellant proved each element by a preponderance of the evidence.

[II.] The Trial Court erred by denying Appellant's claim for retaliation.

{¶7} Appellant argues in her first assignment of error that the trial court erred when it denied her claim for sexual harassment. R.C. 4112.02(A) prohibits an employer from discriminating against an employee with respect to any matter directly or indirectly related to employment because of the employee's sex. To be entitled to relief for a violation of R.C. 4112.02(A), a plaintiff must prove that the defendant unlawfully discriminated against her. To successfully prove a claim for hostile environment sexual harassment, the plaintiff must prove four elements: (1) the harassment was unwelcome, (2) the harassment was based on sex, (3) the harassing conduct was sufficiently severe or pervasive to affect the terms, conditions or privileges of employment, and (4) 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 v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 2000-Ohio-128, paragraph two of the syllabus.

{¶8} Here, the trial court found that appellant met the first two elements; that is, Rucker's advances were unwelcome, and Rucker's harassment until mid-2002 was based upon sex. The court also found that any abusive conduct or harassment by Rucker after mid-2002 was common to all of Rucker's subordinates and such was not based upon appellant's gender, and we concur in that assessment. At the outset, we find the record supports such, and appellant presents no supported argument to the contrary in her brief. Appellant's testimony at trial failed to provide any examples of conduct after mid-2002 to support sexual harassment by Rucker. Although appellant did testify to several other specific incidents and made other general allegations about Rucker's temper, use of foul language, and hostility toward appellant, there was testimony from others who worked at CSN during this period who confirmed that Rucker treated all subordinates in this same manner.

{¶9} Appellant's argument focuses upon the third element. With regard to this element, the trial court found that appellant failed to demonstrate that Rucker's harassment until mid-2002 was sufficiently severe and pervasive as to alter the terms and conditions of her employment. The court explained that Rucker's behavior did not impede her from performing her job, she made improvements to CSN's operations during her first months of employment, she did not perceive Rucker as threatening during the period of harassment until mid-2002, Rucker was excessively polite and kind to her until mid-2002, she was able to ignore Rucker's advances and continued her work, and she suffered no psychological harm as a result of the harassment.

{¶10} Whether the harassment is sufficiently severe or pervasive uses an objective standard; that is, a reasonable person in the plaintiff's position, considering all

the circumstances must think it severe. *Oncale v. Sundowner Offshore Servs., Inc.* (1998), 523 U.S. 75, 80-81, 118 S.Ct. 998, 1003, citing *Harris v. Forklift Sys., Inc.* (1993), 510 U.S. 17, 23, 114 S.Ct. 367, 370. The totality-of-the-circumstances standard employed here considers the entire work environment, all the relevant facts, all the surrounding circumstances, and the cumulative effect of all the incidents. *Hampel* at 181. In determining what a reasonable person would think, not only should the psychological effect of the conduct be considered, but also the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a merely offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.* at 180, citing *Harris* at 23, 114 S.Ct. at 371. No single factor is required. *Harris* at 23, 114 S.Ct. at 371.

{¶11} In the present case, appellant argues that it was not necessary for her to demonstrate that her actual job productivity was adversely affected, citing *Davis v. Monsanto Chemical Co.* (C.A.6, 1988), 858 F.2d 345. Instead, appellant contends, it is only necessary to demonstrate that the harassment made it more difficult to perform her job. However, the trial court did not find that it was required that appellant show her job productivity was affected. In discussing the third element, the trial court indicated that one factor to consider was whether the conduct unreasonably interfered with an employee's work performance. In discussing this factor, the trial court found that Rucker's harassment did not impede her from performing her job, and, in fact, she made significant improvements to CSN's operations during the time of harassment. The trial court then discussed other factors and specifically indicated that no single factor is required.

{¶12} Likewise, although appellant also contends that there was no requirement that she prove psychological injury in order to demonstrate that the harassment was sufficiently severe or offensive, the trial court never found that psychological injury is required. The trial court merely listed it as one of several circumstances that may be considered in addressing the third element. Again, the court explicitly indicated that no single circumstance was required.

{¶13} As to the merits of appellant's argument, appellant claims that Rucker's unwelcomed advances and unlawful conduct made her job more difficult to perform. Although the argument section of appellant's brief does not contain any supporting evidence or citations to the record to support this assertion, we will, nevertheless, review the record and address the issue. The most pertinent testimony on this issue came from William Cahalan, a former psychologist at CSN, and appellant. Cahalan testified appellant was a very dedicated worker, worked longer than required, helped patients, helped the staff, and seemed empathetic toward the patients. He stated that, eventually, the relationship between appellant and Rucker worsened, and Rucker communicated with her less and less.

{¶14} Appellant testified Rucker was overly complimentary of her every day from the beginning of her employment and thanked her for being there and for every little thing she did. Rucker asked her for hugs, which she thought was "weird." While training her to use the computer program, he would try to get close to her. He breathed in her ear, which "annoyed" her. She said she tried to ignore his acts toward her. Once when she was reading charts, he intentionally bumped into her and he cut off her train of thought and she could not think. He told her that she could not think because he was standing so

close, and she said that was not it. He left without any response. For several months, he would make "annoying" innuendos about getting together. This behavior lasted for the first "several months" after she started working. She ignored the behavior, and he eventually "backed off." Appellant said that she was "uncomfortable" with the behavior, and she was "really upset" to think she had to put up with it. Appellant also testified that, when she started the job, the record keeping was very poor, and she implemented new procedures and "cleaned up" the system. She testified that she "always enjoyed" her job. Also, at the top of a highly complimentary job evaluation from Rucker in April 2003, she wrote, "I love my job." She described Rucker's behavior toward her prior to May 2003 as "tolerable."

{¶15} After reviewing the testimony and evidence presented at trial, we agree with the trial court that appellant failed to demonstrate that Rucker's harassment until mid-2002 was sufficiently severe and pervasive as to alter the terms and conditions of her employment. Considering the factors in *Hampel* under the reasonable person standard, none of the factors weigh in favor of a finding that Rucker's sexual harassment of appellant until mid-2002 was severe. As for the psychological effect on appellant, Rucker's actions did not appear to have much of a psychological effect. Appellant testified she thought it was "weird" when Rucker asked her for hugs. She also said it "annoyed" her when he breathed in her ear on one occasion, and it was "annoying" when he would use innuendos that they should "get together." Appellant also said she was "uncomfortable" with the behavior. That she found his behavior "weird," "annoying," and "uncomfortable" does not suggest a significant psychological effect. Although she said she was "really upset" to think she had to put up with the behavior, and while the term

"really upset" connotes a greater psychological effect, that she was able to ignore Rucker's behavior, and it stopped within a few months, does not support a finding that the harassment was severe.

{¶16} As for the frequency of the conduct, the evidence presented did not convey a clear view of the frequency of the conduct for the first few months of appellant's employment. Appellant testified to only two or three specific events, and the other incidents she described in more general terms seemed to happen periodically throughout the period in question. Appellant never indicated that the incidents of harassment were constant, all the time, or even daily, which would suggest that the occurrences were less frequent. Although appellant did testify that Rucker was overly complimentary of her every day during the beginning of her employment, there is no suggestion that Rucker's frequent praising made her job any more difficult to perform.

{¶17} With regard to the severity of the harassment, appellant indicated that Rucker was overly complimentary of her, thanked her for every little thing she did, asked her for hugs, tried to get close to her, breathed in her ear once, intentionally bumped into her once, and spoke to her in innuendos about how they should "get together." The most severe of this conduct was Rucker's breathing in her ear once and intentionally bumping into her once, but these events were only one-time occurrences. Rucker's speaking in innuendos and trying to get close to her seem to have occurred more often, but do not approach the level of being "severe." Based upon the record, we do not find the severity of the harassment to have been high.

{¶18} None of the behavior before mid-2002 was physically threatening. Although Rucker's asking for hugs, trying to get close to her, breathing in her ear, and intentionally

bumping into her are physical in nature, none was threatening. Appellant also never indicated she was humiliated by any of the behavior. As indicated above, she was annoyed and upset, but was able to ignore Rucker's advances.

{¶19} With regard to the last factor from *Hampel*, the evidence does not support that Rucker's behavior unreasonably interfered with appellant's work performance. Appellant argues that she need only show that the harassment made her job more difficult to perform; however, there was even little evidence that met this threshold. Although she said she was "annoyed" by and "uncomfortable" with some of Rucker's behavior, she did not indicate whether this annoyance affected her job performance. She said she was able to ignore him, and Rucker backed off. The only evidence that could be construed to relate to appellant's job performance was appellant's testimony that Rucker cut off her train of thought and she could not think when he intentionally bumped into her while she was reading charts on one occasion. Rucker told her the reason she could not think was because he was so close to her. However, when appellant told him that was not the reason, he left without any response. This fleeting period in which appellant lost her train of thought and was unable to think does not rise to the level of making her job more difficult to perform. Appellant also testified that she was "really upset" to think she had to put up with Rucker's behavior, but this general statement without any claim that it affected her ability to perform her job is insufficient. She also termed Rucker's behavior as "tolerable," which also lessens the likelihood that the behavior made her job more difficult to perform.

{¶20} Furthermore, as found by the trial court, there was evidence that appellant was performing her job very well. Appellant testified that, when she started the job, the

record keeping at CSN was very poor, but she implemented new procedures and "cleaned up" the system. She also testified that she "always enjoyed" her job. Rucker gave her a highly complimentary job evaluation in April 2003, and on the top of the evaluation she wrote, "I love my job." Cahalan testified appellant was a very dedicated worker, worked longer than required, helped patients, helped the staff, and seemed empathetic toward the patients. Thus, the evidence presented at trial fails to support a finding that Rucker's behavior had any material impact on her job performance or even made her job difficult to perform. Therefore, the trial court did not err when it found appellant failed to prove the essential elements of her claim for hostile environment sexual harassment. For these reasons, appellant's first assignment of error is overruled.

{¶21} Appellant argues in her second assignment of error that the trial court erred when it denied her claim for retaliation. R.C. 4112.02(l) provides that it is unlawful to discriminate against a person because that person made a charge of discrimination. A claim for retaliation invokes a shifting burden method of proof. First, a plaintiff must establish a prima facie case, consisting of four elements: (1) she engaged in protected activity; (2) the employer knew of her participation in the protected activity; (3) the employer took adverse action against her; and (4) a causal link existed between the protected activity and the adverse action. *Chandler v. Empire Chem., Inc.* (1994), 99 Ohio App.3d 396. If the plaintiff establishes a prima facie case, the burden shifts to the defendant-employer, and it must state a legitimate, non-discriminatory reason for taking the adverse action. *Id.* Finally, if the defendant-employer proves equal to its burden, the burden shifts back to the plaintiff, and she must prove that the defendant-employer's reason is mere pretext for unlawful retaliation. *Id.* A reason cannot be proved to be a

pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 515, 113 S.Ct. 2742, 2752.

{¶22} In the present case, appellant alleged that CSN reassigned her to the second-shift position in retaliation for her complaining of sexual harassment, and, thus, her resignation was essentially a constructive discharge. Appellant asserts she engaged in the following protected activity: (1) at her disciplinary hearing on November 4, 2003, when she gave the hearing officer, John Quigley, a written statement claiming Rucker had harassed her in 2002, and (2) on December 2, 2003, when appellant sent an e-mail to the SBH police indicating Rucker followed her home from work several days earlier.

{¶23} With regard to the first element of retaliation, the trial court was not convinced that appellant ever gave the hearing officer the written statement, and the court found it unclear whether appellant sent the e-mail to police before King informed her of her reassignment. Notwithstanding, the court went on to find that, even if both activities met the first element of retaliation, appellant did not meet the second element because King was not aware of Rucker's actions or any other sexual harassment claims prior to sending the memorandum reassigning appellant to another position. Furthermore, the trial court found that appellant failed to demonstrate the fourth element of retaliation, as the evidence did not support a causal connection between King's reassignment and her alleged reporting of Rucker's harassment. The court reasoned that, even if appellant had engaged in protected activity, King would have transferred her due to the prior managerial and personality conflicts between appellant and Rucker.

{¶24} Appellant's brief argument in support of her contentions focuses mainly on the fourth element from *Chandler*, which provides a plaintiff in a retaliatory discharge action must demonstrate a causal link existed between the protected activity and the adverse action. We agree with the trial court that appellant failed to demonstrate a causal link existed between appellant's alleged reporting of Rucker's harassment and King's reassignment of appellant to the second shift. King, the director of nursing at SBH, testified that Rucker told him in the spring of 2003 that appellant had quit interacting with him, she had started sending him hostile e-mails, she was not following his directives, she was undermining his credibility with the staff, and she was getting too personal with subordinate staff. In the summer and fall of 2003, King met with Rucker and appellant four times at Rucker's request in order to address the deteriorating relationship between Rucker and appellant. King testified that appellant arrived 30 minutes late to one meeting, which King saw as passive-aggressive on appellant's part. One issue discussed was appellant's telling staff members that Rucker had signed off on certain policies that were out of date and wrong. King also testified appellant never told him that Rucker had made any sexual advances toward her. King said that appellant told him that she would correct the issues to which he and Rucker objected. King gave a letter to Rucker and appellant on November 12, 2003, detailing their discussions and how they had agreed to correct the problems.

{¶25} However, King testified that there came a point when he decided appellant should be transferred to a new position because appellant was not meeting the expectations outlined in the November 2003 letter. He said things were becoming "destructive" at CSN, and her job performance over the prior six-month period was

jeopardizing the effectiveness of the program. King said that, by reassigning appellant to another shift, he was trying to "correct the ship" without disciplining her. He gave her a letter on December 2, 2003 that informed her she was being reassigned to the second shift. He said he did not remember appellant ever having told him that working first shift was important to her. He also indicated that he did not know anything about appellant's having filed a report about Rucker stalking her until after appellant left CSN. King testified that the reassignment was not in reaction to the report.

{¶26} The determination of whether a causal link existed between appellant's protected activities and King's reassignment of her turns on witness credibility. The trial court apparently believed King's testimony that he reassigned appellant to the second shift because of the deteriorating relationship between Rucker and appellant and because certain of her actions were disruptive to the organization and not because she had allegedly complained about Rucker's behavior. The trier of fact was in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Appellant has given this court no reason to question the credibility determination of the trial court, and we find none. King's testimony was believable, and we see no reason to disagree with the trial court's belief that King reassigned appellant to the second shift based upon valid business reasons and not improper retaliatory reasons. Therefore, the trial court did not err when it ruled in favor of appellee on appellant's retaliatory discharge claim. Appellant's second assignment of error is overruled.

{¶27} Accordingly, appellant's first and second assignments of error are overruled, and the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

TYACK, P.J., and CONNOR, J., concur.
