[Cite as *McGraw v. Pilot Travel Ctrs., L.L.C.*, 2012-Ohio-1076.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Julia McGraw,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-699 (C.P.C. No. 10CVC-04-6288)
Pilot Travel Centers, LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 15, 2012

Duncan Simonette, Inc., Brian K. Duncan and *Bryan D. Thomas,* for appellant.

Littler Mendelson, P.C., Thomas M. L. Metzger and *Chad J. Kaldor,* for appellees.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiff-appellant, Julia McGraw, appeals the decision granting the motion for summary judgment filed on behalf of defendant-appellee, Pilot Travel Centers, LLC. ("Pilot"). For the following reasons, we affirm the judgment of the Franklin County Court of Common Pleas.

{¶ 2} Appellant McGraw presents three assignments of error:

> [I.] The trial court erred in granting defendant's motion for summary judgment with respect to the hostile work environment claim because there were genuine issues of material facts including, but not limited to, whether Reuben Carter was appellant's supervisor and whether 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.
>
> [II.] The trial court erred in granting defendant's motion for summary judgment with respect to finding that there was no constructive termination because there were genuine issues of material facts including, but not limited to, whether Plaintiff felt compelled to resign and/or procure subsequent employment due to working conditions being intolerable.
>
> [III.] The trial court erred in finding that plaintiff was entitled to judgment as a matter of law.

{¶ 3} McGraw began working as a coffee hostess at Pilot's Sunbury, Ohio location in July 2008. This location is divided into two sections, the Subway restaurant section and the gas station and convenience store section, know as the travel center. Pilot uses both sections of this location and Chris Thomas is the general manager of the entire location. In February 2009, McGraw moved into a position in the Subway section. The Subway manager was Roxanne Lewis. In November 2009, McGraw was promoted to overnight team leader of the Subway section. She worked the 11:00 p.m. to 7:00 a.m. shift.

{¶ 4} McGraw typically worked by herself overnight in the Subway section, and two other employees, Tara Anderson and Megan Manning, worked in the travel center. Reuben Carter, a manager for the travel center also worked a late shift, but he usually left by midnight or 1:00 a.m. Carter played no role in hiring McGraw and did not have the authority to terminate her. Occasionally McGraw would help out the travel center side as a cashier when Subway was slow.

{¶ 5} McGraw complained to Chris Thomas, as the general manager, about Carter right after he started to work at the travel center in November 2009. McGraw deposition 73 (hereinafter McGraw Depo. __.) McGraw complained that Carter smelled like alcohol

and she felt uneasy around him. She also felt that some of the comments he made were inappropriate. Specifically, he called her "Baby" instead of by her name.

{¶ 6} When McGraw spoke to Thomas, she felt like he was blowing her off. McGraw Depo. 77. Thomas never said anything to her that indicated he would talk to Carter or otherwise address the issue despite McGraw specifically asking him. McGraw brought this issue up with Thomas three or four times and she also repeatedly asked Carter to stop referring to her as "Baby," "Hun," or "Sweetie."

{¶ 7} McGraw alleges that an incident occurred during the overnight shift which began the night of December 26, 2009. McGraw and Carter were the only employees working that night for an extended period of time as Carter was covering a shift. McGraw testified in her deposition at 80-81:

> Every time we would walk in the back, there was a hallway where things were stocked that weren't any cameras. And he would always remind me that we could go back there and there weren't any cameras and nobody could see us. He asked me multiple times to give him a hug or come and stand by him or hold his hand, and I just kept telling him no. And Megan [Manning] is a close friend of mine, and he made the comment that if I came to his house, he would make me cum more times than she ever could.

{¶ 8} McGraw also testified Carter would rub past her every time he walked by, and every time she walked to the back of the supply hallway he would follow her and stand so that she would be forced to rub past him to exit even after asking him to move.

{¶ 9} Prior to that night, Carter had not said anything of a sexual nature to McGraw other than the previously mentioned names of "Baby," "Hun," or "Sweetie." Nor had Carter ever held hands with, hugged, or kissed McGraw.

{¶ 10} A few days later, McGraw reported the December 26 incident to her Subway manager Roxanne Lewis. McGraw then reported the incident a few days after that to Thomas as the location's general manager and to James Gwynn. McGraw reported everything about the incident and told Thomas she expected him to talk to Carter, that she did not want to work with Carter again, and asked that proper discipline measures be taken. McGraw expected Carter to be fired, though she does not remember telling her managers that.

{¶ 11} McGraw asked Gwynn after initially reporting the incident, if the management had talked to Carter yet. Gwynn said that Thomas was handling it. McGraw Depo. 96. Thomas avers he promptly discussed McGraw's complaints with Carter and that Carter denied that he had engaged in any inappropriate conduct. Thomas further says he verbally counseled Carter and reminded him that he was not to engage in any inappropriate conduct towards McGraw or anyone else in the workplace. Affidavit of Chris Thomas.

{¶ 12} McGraw did not work with Carter again.

{¶ 13} About one week after the incident, McGraw began looking for a new job because she felt that Pilot was not going to make any effort to discipline Carter and she did not want to work with somebody like that. She was offered a job at a Jersey Mike's at Polaris in Columbus and left Pilot about one month after the incident. She wrote a letter of resignation and left it for Lewis on January 11, 2010:

> I'm sorry to inform you that this is my last week. I know this is short notice, however I was offered [a] manager position at the Jersey Mike's in Polaris. After learning of the major hour cut, and seeing next weeks schedule, I'm taking the job as soon as possible. I feel horrible for not being able to talk to you about this. I just can't work 5 days and only have 32 hrs,

> or 26 for next week. I live too far to do that. I hope you understand, and I am sorry. I hate working for Pilot, it's not really the people or the job, it's having to jump through hoops to get anything. I know you understand this, wanting you to run a business with no hrs. to give employees. It saddens me to leave, but Pilot has become, for lack of a better words, a company full of bullshit. They have no respect the RGM's [restaurant general managers] nor their TL's or TM's [team leads and team managers]. I like my job, I just don't like coming to work to bust my butt (as some others do as well) for nothing, but to lose hours, and it 1/3 way through January and we still haven' t got the second half of our raises. Pilot has become ridiculous, and I'm not staying to watch. I'm sorry. */s/Julia McGraw*

{¶ 14} McGraw explained some of the references made in her letter. For example, she said her hours, as well as other Subway side employees, had been cut even though sales had remained the same. McGraw Depo. 117-18. Although she wrote in her letter that she hated working for Pilot, she said she enjoyed her job for the most part and enjoyed the people she worked with. She was dissatisfied with Pilot that they had not dealt with the recent incident with Carter and when her hours were cut, it put her "over the top." McGraw Depo. 122.

{¶ 15} After resigning, McGraw returned a few times to the travel center to buy gas and have a Subway sandwich once. She also returned to ask Thomas for a copy of the employee handbook, which he refused to give her as she was no longer an employee.

{¶ 16} On April 23, 2010, McGraw filed a complaint in the Franklin County Court of Common Pleas against Pilot and Carter. The complaint alleges the following eight causes of action: (1) Sex Discrimination; (2) Hostile Work Environment; (3) Termination In Violation of Public Policy; (4) Retaliation; (5) Outrage/Intentional Infliction of Emotional Distress/Negligent Infliction of Emotional Distress; (6) Respondent Superior; (7) Bad Faith; and (8) Punitive Damages.

{¶ 17} On May 27, 2011, Pilot filed a motion for summary judgment requesting judgment on all of McGraw's claims. The trial court entered its decision and entry finding that McGraw had not come forward with genuine issues of material fact as to any claim to withstand summary judgment. McGraw timely filed an appeal.

{¶ 18} McGraw contends that summary judgment was improperly granted. Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

> [T]he pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

{¶ 19} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65-66 (1978). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Once the moving party meets its initial burden, the non-moving party must then produce competent evidence showing that there is a genuine issue for trial. *Id.* Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio

St.3d 356, 358-359 (1992). De novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶ 20} McGraw's first assignment of error asserts the trial court erred with respect to the hostile work environment claim because there are genuine issues of material facts including whether Carter was McGraw's supervisor and whether Pilot failed to take immediate and appropriate corrective action.

{¶ 21} In order to establish a claim of hostile-environment sexual harassment, the plaintiff must show (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 v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 176 (2000).

{¶ 22} An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee. *Faragher v. Boca Raton*, 524 U.S. 775, 807-08, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). The 6th Circuit has held a supervisor is "an individual who 'serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment.' " (Citations omitted.) *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir.1994).

{¶ 23} McGraw affirmed in her deposition that Mr. Carter was not her named supervisor. She also stated "because he was a manager and I was a team lead, he would still oversee my actions." McGraw Depo. 111. McGraw's affidavit states that Carter "was in a supervisory role" and "acted as her supervisor." Affidavit of Julia McGraw 5, 10. It is clear that Carter did not hire and could not fire McGraw. However, he could direct McGraw what to do when she was "helping out" on the travel side. This helping out only occurred occasionally when McGraw would "jump on the cash register" for a few minutes. McGraw's responsibility was to the Subway. That was her area of responsibility and that was where she was scheduled to work at all times in question. Carter's ability to direct actions for the limited number of times McGraw was helping out the travel center side does not constituted significant control over conditions of employment. The conditions of employment would be directed by Roxanne Lewis as her supervisor or by Chris Thomas who was the general manager. While Carter was on a higher level of authority than McGraw, he did not have any direct control over McGraw and only indirect control in limited instances.

{¶ 24} As to the seemingly inconsistent statements between McGraw's deposition and McGraw's affidavit, we find the deposition testimony to be more on point and directly answers the question as to whether Carter was actually McGraw's supervisor. Further the conclusory statements made in the affidavit do not establish Carter as her supervisor without corresponding evidence as to how Carter controlled her conditions of employment. We find that, while Carter was a manager, he was not McGraw's designated supervisor. While he could direct actions when McGraw was helping out on the travel center side he could not significantly change her conditions of employment, as most of

those conditions were related to her working on the Subway side of the location. In viewing the evidence most strongly in favor of McGraw, we cannot overturn the trial court's finding that no genuine issue of material fact was presented.

{¶ 25} A company may be held liable for co-worker harassment if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known. A response is generally adequate if it is reasonably calculated to end the harassment. And whether a response is effective is measured not by the extent to which the employer disciplines or punishes the alleged harasser, but rather if the steps taken by the defendant halt the harassment. Evaluation of the response is a fact-specific inquiry and must be done on a case-by-case basis. *Satterfield v. Karnes*, 736 F.Supp.2d 1138, 1162-63 (S.D.Ohio 2010).

{¶ 26} After the December 26, 2009 incident, McGraw never worked with Carter again and there was no further harassment. Thomas stated in this affidavit that he counseled Carter against inappropriate conduct. Pilot's response to remedy the harassment must be deemed adequate as no harassment occurred in the future and Carter did not work with McGraw. Whether Pilot would have continued to honor McGraw's request cannot be known due to McGraw's resignation. In any case, we find that McGraw has failed to prove Pilot was negligent in remedying the harassment after December 26, 2009.

{¶ 27} To answer the question whether Pilot was negligent in remedying harassing behavior before the December 26, 2009 incident, it must be determined whether Carter continuously calling McGraw "Baby," "Hun," or "Sweetie" constitutes harassment. We examine the third requirement for a claim of hostile work environment; 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. *Hampel*, 89 Ohio St.3d at 176. Conduct must be severe or pervasive enough to create both an objectively hostile or abusive work environment—one that a reasonable person would find hostile or abusive—and a subjectively hostile work environment. *Chamberlin v. The Buick Youngstown Co.*, 7th Dist. No. 02-CA-115, 2003-Ohio-3486, ¶ 37. Conduct that is merely offensive is not actionable as hostile work environment harassment under Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000e et seq. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295, 301-02 (1993). Whether an environment is hostile or abusive must be determined by looking at all the circumstances. While no single factor is required, circumstances to consider may include the frequency and severity of the conduct, whether the conduct is physically threatening or humiliating as opposed to merely an offensive utterance, whether the conduct unreasonably interferes with an employee's work performance, and whether psychological harm results. *Id*.

{¶ 28} We find that McGraw has not presented any evidence that Carter's reference to McGraw as "Baby," "Hun," or "Sweetie" before December 26, 2009 were sufficiently severe or humiliating as to cause psychological harm or unreasonably interfered with McGraw's performance.

{¶ 29} There is no genuine issue of material fact that Carter's conduct prior to December 26, 2009, does not satisfy the third requirement for a claim of hostile work environment. This, in combination with our finding that Carter was not shown to be McGraw's supervisor and that McGraw failed to prove that Pilot negligently failed to

remedy the harassment so that it would not occur again, we find that summary judgment is appropriate as to McGraw's claim of a hostile work environment.

{¶ 30} McGraw's first assignment of error is overruled.

{¶ 31} McGraw's second assignment of error asserts that summary judgment was inappropriate with respect to finding that there was no constructive termination because there is a genuine issue whether McGraw felt compelled to resign and seek other employment due to working conditions being intolerable.

{¶ 32} McGraw's sex discrimination claim is based on the assertion that she was constructively discharged which goes to the second prong of a sex discrimination claim. To make a prima facie case of sex discrimination, a plaintiff must show that 1) they are a member of a protected group; 2) they were subject to an adverse employment decision; 3) they were qualified for the position; and 4) they were replaced by a person outside the protected class, or a similarly situated nonprotected employee was treated more favorably. *Peltier v. U.S.*, 388 F.3d 984, 987 (6th Cir.2004).

{¶ 33} The fourth prong of establishing a prima facie case of sex discrimination requires that the plaintiff show they were replaced by a person outside the protected class, or a similarly situated nonprotected employee was treated more favorably. McGraw has not offered any evidence, either from her affidavit or from her deposition, that she was either replaced by a person outside her protected class or that a similarly situated non-protected person was treated more favorably. Therefore, we are in agreement with the trial court that McGraw's claim for sex discrimination fails and summary judgment is appropriate. The issue of whether McGraw was constructively terminated becomes moot.

{¶ 34} McGraw's second assignment of error is overruled.

{¶ 35} McGraw's third assignment of error asserts the trial court erred in finding that Pilot was entitled to judgment as a matter of law.

{¶ 36} McGraw is merely stating that Pilot failed in fulfilling the second requirement for summary judgment. This issue was addressed in our analysis of the first and second assignments of error and McGraw does not argue any issue that has not already been addressed or rendered moot by our above findings.

{¶ 37} The third assignment of error is overruled.

{¶ 38} Having overruled all of McGraw's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
