COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0947

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

KATHY HIGGINS,

PLAINTIFF-APPELLANT,

V.

KENTUCKY FRIED CHICKEN,

DEFENDANT,

WMCR ACQUISITION CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

DYKMAN, P.J. Kathy Higgins appeals from an order denying her motion for a new trial on her hostile work environment claim, and from an order denying her motion for the trial court to reconsider its grant of partial summary

judgment in favor of Kentucky Fried Chicken (KFC) on her retaliation and constructive discharge claims. Higgins contends that the jury's verdict that KFC took appropriate corrective action regarding her hostile work environment claim was contrary to the weight of the evidence, and the trial court therefore erred in denying her motion for a new trial. However, because Higgins has failed to include the trial transcript in the record, we have no way to determine whether the jury's verdict was contrary to the weight of the evidence. Therefore, we must conclude that there was adequate evidence to support the jury's findings. Higgins next asserts that the trial court erred in granting partial summary judgment in favor of KFC on whether she was retaliated against and constructively discharged for objecting to the hostile work environment and for filing a complaint with the State of Wisconsin's Equal Rights Division (ERD). We are satisfied that Higgins has not established that she suffered a materially adverse employment action, nor has she established that she was constructively discharged. Accordingly, we affirm.

BACKGROUND

Kathy Higgins began her employment with KFC in April 1989, as a part-time crew member. She was promoted to manager in 1992. In October 1993, Higgins accepted a voluntary transfer to the assistant manager position at another store where she worked for Dennis Dahlke, the store manager. Dahlke's direct supervisors were David Labitzke, the assistant district manager, and Dave Porter, the district manager. While Higgins was to report to her superiors any incidents of misconduct by her subordinates, Dahlke asked her to consult with him prior to issuing any disciplinary actions against those employees.

From late 1994 to late 1995, Higgins contends that she experienced significant sexual harassment and offensive conduct from subordinate employees.

For example, male cooks would undress and change into their uniforms in the kitchen area of the store in the presence of female employees. There also were instances in which two male employees designed female body parts out of biscuit dough, and then asked Higgins to "feel them up." In another instance, these male employees designed penises out of shortening. Higgins reprimanded these employees and reported their conduct to Dahlke, but no disciplinary actions were ever taken against them.

In March 1995, Reginald Warner, a male employee, made sexual statements regarding Higgins' "behind" while she was bending over. Higgins reported this behavior to Dahlke and Labitzke. Dahlke reprimanded Warner for this statement and told him to apologize to Higgins, which Warner did, but Warner did not stop making vulgar comments to Higgins and other female employees. Higgins responded by repeatedly complaining to Dahlke about Warners's behavior and recommended that Dahlke issue Warner a written disciplinary notice for his statements and actions. On two separate occasions, Higgins herself wrote the employee up for his sexual comments and vulgar behavior, but both reprimands were ripped up and discarded by Dahlke.

In a separate incident, Ramiro Rodriguez, a male cook, began to demand dates with Higgins and threatened to walk off the job if she refused. Higgins objected to his propositions and notified Dahlke of Rodriguez's conduct. Dahlke suggested that Rodriguez was just fooling around. Higgins reported the events to Labitzke, who directed Dahlke to speak with Rodriguez. There is no evidence that Rodriguez was ever disciplined for his behavior or statements.

Rodriguez continued to ask Higgins out on a date with him. At one point, he offered her thirty dollars if she would go on a date with him. Higgins

reported this to Dahlke, who verbally reprimanded him. Then, on May 24, 1995, after Higgins refused one of Rodriguez's requests for a date, he and another employee walked out of the store in the middle of their shift. Dahlke investigated the incident and submitted a report to Labitzke on July 6, 1995. Dahlke believed that Higgins was exaggerating the event and believed that she was unable to support her claims. In the end, Rodriguez and the other employee each received one-day suspensions for leaving the store in the middle of their shift. Higgins protested to her superiors that the suspensions were not enough and that the two employees should be fired for refusing to listen to her.

In June 1995, Warner made lewd sexual comments and gestures to a female customer. Higgins telephoned Dahlke, who instructed her to send Warner home and said that he would deal with it the next day. Higgins sent Warner home and left a write-up slip for Dahlke to sign. On a separate note, Higgins recommended that Warner be terminated for his conduct. The next day, Dahlke met with Warner regarding the incident. After a brief meeting with Warner, Dahlke ripped up the write-up slip and informed Higgins that he was not going to discipline Warner for this incident, because Warner denied that the events occurred and the witnesses who observed his conduct gave conflicting testimony.

A day or two later, Porter and Labitzke separately questioned Higgins about the incident. She explained the events and how other female employees felt harassed. Porter asked her to put her statement into writing. Warner was suspended for one month pending investigation of the incident; however, he returned to work on around July 31, 1995, and was given back-pay for the period of suspension.

In May 1995, Higgins filed a complaint with the ERD, alleging, among other things, a hostile work environment. After filing this complaint, Higgins contends that her relationship with Dahlke changed. She also stated that between May and June 1995, his answers to her got shorter, and he failed to back up her disciplinary recommendations. He was colder to her and he even refused to greet her with a hello. He also began to "nitpick" at everything she did.

Higgins eventually hired an attorney. On June 30 and August 4, 1995, Higgins' attorney sent letters to Dahlke stating that his actions against Higgins were retaliatory and asking him to stop. When Dahlke received these letters, he slammed the door and yelled, "This is bullshit, just bullshit."

During a meeting with Labitzke and Porter on June 29, 1995, Porter asked Higgins to provide dates and times of the alleged incidents of sexual harassment or else it would be her word against the employees. Higgins responded that he should direct his questions to her attorney because she had provided her attorney with all of the information. Porter expressed his displeasure that she had retained an attorney, and from that point on, Higgins asserts Porter was cold toward her.

On July 31, 1995, during the meeting in which she was informed that Warner would be reinstated, Higgins told Potter that she felt that she was being retaliated against and placed under greater scrutiny for bringing an action against the company. Higgins states that Porter agreed and told her that they were watching everything she did more closely.

On July 31, 1995, Labitzke informed Higgins that they could arrange for her to transfer to another store. She declined the transfer because she did not

feel it was a palatable solution as she no longer trusted management. She felt that they would continue to retaliate against her at another location.

On August 10, 1995, Dahlke reprimanded Higgins for failing to set the air conditioning, leaving the lights on, failing to prepare the restaurant for dinner, and failing to turn off the fryer. Despite her clean work record, Dahlke issued Higgins a written disciplinary notice and allegedly threatened her with termination. Higgins signed the written disciplinary notice under protest because she did not believe that she had done the things she was accused of doing. On August 25, 1995, Higgins hand-delivered her resignation.

Higgins proceeded with her discrimination complaint against KFC. She argued that she was subjected to a hostile work environment and retaliated against after filing her claim under Title VII, 42 U.S.C. § 2000e, *et seq*. KFC responded by moving for summary judgment on all claims. The trial court granted summary judgment on her retaliation and constructive discharge claims but denied summary judgment on the hostile work environment claim. Higgins moved the court to reconsider its decision, but the trial court denied the motion.

At trial, the jury was presented with two special verdict questions regarding KFC's liability for the existence of a hostile work environment. The first question was whether Higgins was subjected to a hostile work environment that constituted sexual harassment. The second question was whether KFC failed to take appropriate corrective action after it knew or should have known that Higgins was subjected to a hostile work environment. The jury answered the first question "yes" and the second question "no." Higgins then filed a motion for a new trial pursuant to § 805.15, STATS., claiming that the jury's verdict was

contrary to the weight of the evidence. The trial court denied the motion. Higgins now appeals.

DISCUSSION

1. *Hostile Environment Claim*

Higgins first contends that the jury's response to the second special verdict question was contrary to the weight of the evidence presented at trial. She argues that the evidence establishes that management, specifically Dahlke, knew or should have known of the hostile work environment and failed to take appropriate corrective action. Higgins therefore asserts that the trial court erred in denying her motion for a new trial under § 805.15(1), STATS.

Section 805.15(1), STATS., reads as follows:

> A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice. Motions under this subsection may be heard as prescribed in § 807.13. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

The decision whether to grant a new trial is within the trial court's discretion and will not be disturbed absent an erroneous exercise of discretion. *See* ***Dostal v. Millers Nat'l Ins. Co.***, 137 Wis.2d 242, 253, 404 N.W.2d 90, 94 (Ct. App. 1987). We will usually defer to the trial court's ruling because of that court's opportunity to observe the trial and evaluate the evidence. *See* ***Krolikowski v. Chicago & N.W. Trans. Co.***, 89 Wis.2d 573, 581, 278 N.W.2d 865, 868 (1979).

Higgins points out several facts that she says support her assertion that the jury's answer to the second special verdict question was contrary to the weight of the evidence. She asserts that Dahlke testified at trial that he received approximately twenty sexual harassment complaints from her, as well as from other former employees, which established that he had actual knowledge that sexual harassment was occurring in the store. As far as corrective action, Higgins states that Dahlke required that she submit all recommended disciplinary actions to him, and although she submitted several written and oral recommendations, he routinely would ignore them. Porter stated that if Dahlke was aware that sexual harassment was occurring in the workplace, then he had a responsibility to contact Porter. However, Porter states that Dahlke did not contact him until the summer of 1995. Dahlke apparently admitted that he did not report many of the complaints he received to either Porter or Labitzke. Therefore, according to Higgins' summary of the trial, KFC essentially admitted to not taking appropriate corrective action until several months had passed. She also offers additional evidence that the steps taken, when ultimately taken, were wholly inadequate.

While this evidence, if presented, might support Higgins' assertion that the jury's response to the second special verdict question was contrary to the weight of the evidence, she has failed to provide us with the critical document to make this determination – a trial transcript. For us to determine whether the jury's decision was contrary to the weight of the evidence, we need to determine what evidence it heard. Without the trial transcript, we cannot make this determination. *See generally* ***Ryde v. Dane County***, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977). Appellate review is limited to the record before the appellate court, and we will assume in the absence of a transcript that every fact essential to sustain the

trial judge's exercise of discretion is supported by the record. ***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979).

Higgins argues that her failure to include the trial transcript in the record is immaterial because the same information presented at trial is included in the record, either as a deposition, affidavit, interrogatory, or some other document. We disagree. We cannot simply assume, based on a review of the record, what information was presented to the jury. Without the transcript, we must affirm the trial court's decision not to grant a new trial in this case.

2. *Retaliation and Constructive Discharge*

Higgins next asserts that KFC retaliated against her for complaining to her superiors about the hostile work environment and for filing a complaint with the ERD. She contends that this retaliation lead to her constructive discharge. The trial court dismissed both of these claims on summary judgment. We review orders granting summary judgment de novo, using the same methodology as the trial court. This methodology is set forth in § 802.08(2), STATS. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). The moving party is entitled to summary judgment when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. ***Id.***

Title VII prohibits retaliation against employees who oppose unlawful employment practices or participate in any charge or investigation under the Act. *See* 42 U.S.C. § 2000e-3(a). To prevail, a claimant bears the burden of first establishing a prima facie case of retaliation. A prima facie case of retaliation is made when the plaintiff shows that: (1) he or she engaged in statutorily protected expression; (2) he or she suffered an adverse action by his employer; and (3) there is a causal link between the protected expression and the adverse action.

Hunt-Golliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004, 1014 (7th Cir. 1997). There is no question that Higgins engaged in protected expression when she filed a hostile work environment claim with the ERD. Therefore, we will proceed to the second element, which is whether the claimant has suffered an adverse employment action.

Higgins alleges that she suffered a multitude of adverse employment actions. Prior to filing the complaint, Higgins contends that she and Dahlke had a good working relationship. After filing the complaint, she asserts that he was colder to her, refused to back her up on disciplinary recommendations,[1] began to "nitpick" at her, and refused to even greet her with a hello. She also contends that he wrongly accused and reprimanded her in August 1995, because he believed that she failed to set the air conditioner, left the lights on, failed to prepare the restaurant for dinner, and failed to turn off the fryer. Higgins states that Dahlke wrote out a disciplinary notice regarding these events and informed her that these omissions could result in her termination. As additional evidence of retaliation, Higgins states that when Dahlke received the letters from her attorney requesting that he stop retaliating against her, he walked into his office, slammed the door, and yelled "this is bullshit, just bullshit." Higgins asserts that Dahlke did not start acting in this manner toward her until after she filed a complaint with the ERD.

Higgins also contends that Porter subjected her to adverse actions after she filed her complaint with the ERD. For example, after she informed

[1] Higgins asserts that her management decisions were unsupported, and her recommendations for discipline against the harassing employees were either reversed or ignored. She contends that while KFC argues that it was important for her to initiate discipline, she was unable to fulfill this aspect of her job description because of Dahlke's refusal to support her recommendations. In short, one of her job functions was adversely affected by KFC's retaliatory acts.

Porter that he should direct his questions surrounding her hostile work environment claim to her attorney, he expressed his anger that she had retained an attorney and he thereafter was cold toward her. Higgins also states that after a meeting on July 31, 1995, Porter allegedly told her that her superiors would be watching everything she did more closely.

The critical question is whether these constitute adverse employment actions. When interpreting federal laws, we turn to federal case law for guidance. The Seventh Circuit has held that the employment actions must be materially adverse in order to satisfy the second element. *See* ***Rabinovitz v. Pena***, 89 F.3d 482, 489 (7th Cir. 1996); *see also* ***Smart v. Ball State Univ.***, 89 F.3d 437, 441 (7th Cir. 1996). It defined a material adverse employment action as follows:

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993); *see also* ***Sweeny v. West***, 149 F.3d 550, 556 (1998) (instances of different treatment are insufficient to establish retaliation if differences have little or no effect on an employee's job).

We must decide whether KFC's employment actions were "materially" adverse. We are satisfied that the cold shoulder and failing to say hello are insufficient to constitute materially adverse employment actions in this

context.[2] *See* ***Sweeny,*** 149 F.3d at 556 (1998). We also are satisfied that Dahlke's failure to back-up Higgins on disciplinary recommendations does not constitute a retaliatory employment action because Higgins admits that he routinely declined to back her up on these matters even before she filed the complaint. Retaliation cannot be predicated on the same treatment before and after the employee engages in protected expression. We also are not persuaded that Porter and Dahlke's expression of frustration over Higgins' decision to involve an attorney constitutes an adverse employment action. Employers need not feign exuberance when they are confronted with the possibility of being sued. That leaves the August 1995 incident in which Dahlke reprimanded Higgins for allegedly failing to perform certain tasks at the restaurant and informed her that it could lead to her termination.

Higgins has not shown how this disciplinary notice would have affected her employment status had she not resigned. She only has stated that Dahlke informed her that she could be terminated for what she did. Because we are uncertain as to the future repercussions of this disciplinary notice, we will assume for the sake of argument that it was equivalent to receiving a poor performance evaluation. Whether a poor performance evaluation constituted a materially adverse employment decision was addressed in ***Rabinovitz***.

In ***Rabinovtiz***, a former Federal Aviation Administration (FAA) employee brought suit against the agency for age and religious discrimination, retaliation, and constructive discharge. Rabinovitz filed a discrimination

[2] Higgins asserts that Dahlke also began to "nitpick" at everything she did. With specific examples, we cannot determine whether this type of behavior amounted to an adverse employment action.

complaint after he was twice denied a promotion. After filing the suit, Rabinovitz asserts that FAA retaliated against him. The first alleged adverse employment action was that his supervisor gave him a lower performance rating. Rabinovitz received a rating of "fully successful" rather than a rating of "exceptional," which he routinely received on prior evaluations. The supervisor testified Rabinovitz received a lower rating because he lacked necessary computer skills. The lower rating meant that Rabinovitz did not receive a $600 merit bonus. The second adverse action was that his supervisor imposed certain workplace restrictions on him. Some of those restrictions were: he was only allowed to talk to others about business matters; he was to report to his supervisor when he arrived and before he left his office; and he was to limit his breaks to twenty minutes.

The court concluded that neither of the alleged retaliatory acts by the employer constituted a materially adverse employment action. As for the lower performance rating, the court held that it was not material because it did not alter Rabinovitz's responsibilities and it did not affect his salary, because he was not automatically entitled to the bonus. The same could be said in this case. We have no evidence that the written reprimand would have altered Higgins' responsibilities or salary. We therefore conclude that issuing a formal disciplinary notice and informing Higgins that her conduct could result in discharge are insufficient to constitute an adverse employment action. Without an adverse employment action, there can be no retaliation.[3] *See* ***Smart***, 89 F.3d at 441. We therefore need not address whether Higgins satisfied the third element.

[3] Because the formal disciplinary notice was not a materially adverse employment action, we are satisfied that there is no material issue of triable fact as to whether Higgins failed to perform these functions and, therefore, whether the disciplinary notice was warranted.

Higgins next asserts that she was constructively discharged. She alleges that she suffered retaliatory action due to her opposition to the harassing conduct of the subordinate employees. As a result of such retaliation, she was forced to resign, and the forced resignation constituted a constructive discharge. To state a claim for constructive discharge, a plaintiff needs to show that his or her working conditions were "so intolerable that a reasonable person would have been compelled to resign." ***Rabinovitz***, 89 F.3d at 489. "The working conditions must be more than merely intolerable; they must be intolerable in a discriminatory way." ***Id.*** Conditions that might be adequate to establish a hostile working environment for purposes of Title VII will not necessarily support a constructive discharge claim, which requires that the plaintiff demonstrate harassment that is more severe or pervasive. *See* ***Landgraf v. USI Film Products***, 968 F.2d 427, 430 (5th Cir. 1992), *aff'd*, 511 U.S. 244 (1994). Furthermore, the Seventh Circuit has noted that "an employee may not be unreasonably sensitive to his working environment and that he must seek redress while remaining in his job unless confronted with an aggravating situation beyond ordinary discrimination." ***Rabinovitz,*** 89 F.3d at 489. With this in mind we turn to Higgins argument.

Higgins asserts that she suffered retaliatory action due to her opposition to the harassing conduct. As a result of such retaliation, she was forced to resign, and that this forced resignation constitutes her constructive discharge. In short, Higgins contends that her working conditions became so intolerable because of her employer's retaliatory acts that she was forced to resign. However, we already have concluded that Higgins suffered no adverse employment action and, thus, KFC did not retaliate against her for filing the complaint. Higgins has not provided any additional facts that support her assertion that KFC's retaliation was so intolerable as to result in her constructive discharge. Accordingly, we affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.