IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 7, 2020

KAREN POTTER v. YAPP USA AUTOMOTIVE SYSTEMS, INC.

Appeal from the Circuit Court for Sumner County
No. 83CC-2017-CV-1184 Joe H. Thompson, Judge

No. M2019-01351-COA-R3-CV

An employee filed and settled a workers' compensation claim against her employer for injuries sustained in an assault. The employee then filed a complaint under the Tennessee Human Rights Act ("THRA"), Tenn. Code Ann. § 4-21-101 to -702, alleging that the assault, in conjunction with a previous incident, constituted sexual harassment that created a hostile work environment. The trial court granted summary judgment for the employer, and the employee appealed. We affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J., joined.

Stephen C. Crofford and Mary Ann Parker, Brentwood, Tennessee, for the appellant, Karen Potter.

Timothy K. Garrett and Kimberly S. Veirs, Nashville, Tennessee, for the appellee, Yapp USA Automotive Systems, Inc.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Karen Potter began working for All-Star Personnel ("All-Star"), a staffing agency, in the spring of 2017. On June 5, 2017, All-Star assigned Ms. Potter to work for YAPP USA Automotive Systems, Inc. ("YAPP"), a company that makes gas tanks for various automotive manufacturers. YAPP assigned Ms. Potter to work the third shift on an assembly line in an area of its plant where approximately ten to twelve other employees worked. The employees on this assembly line worked in pairs with job assignments rotating each night based on team assignments provided by the team leader, Lisa

Johnson.[1] During her assignment at YAPP, Ms. Potter occasionally worked with former YAPP employee, Gary Treadaway.[2]

Ms. Potter was working with Mr. Treadaway on June 22, 2017, when he requested that she retrieve a tag so he could show her how to tag a failed gas tank. As Ms. Potter reached for a tag, Mr. Treadaway rubbed her breast twice, smelled her, and said, "You smell so good. I want to pour your perfume on my wife and lick it off." Ms. Potter immediately reported the incident to Ms. Johnson. That evening, both Ms. Potter and Ms. Johnson provided written statements about the incident to the production manager, Bill Good.[3]

Following the June 22 incident, Ms. Potter and Mr. Treadaway did not work together for approximately two weeks. On July 6, 2017, however, Ms. Johnson assigned Ms. Potter and Mr. Treadaway to the same assembly line where their work stations were on the same side of a large table and were separated by approximately eight to ten feet. Ms. Potter's job that night was to operate a helium machine that placed parts in the gas tanks. When she finished with a gas tank, it was sent down the table to Mr. Treadaway for him to conduct a quality check. Mr. Treadaway then tagged each gas tank as either passing or failing inspection. Without performing the required inspection tests, Mr. Treadaway returned several gas tanks to Ms. Potter claiming that she needed to re-run them through her station because they had failed his inspection. Ms. Potter confronted Mr. Treadaway several hours into the shift and told him to stop returning tanks to her because he was backing up the line and causing tanks to fall on the floor. The confrontation quickly escalated as Ms. Potter and Mr. Treadaway began yelling at each other. At one point, Mr. Treadaway spit in Ms. Potter's face and shoved her to the ground, injuring her left arm, hand, elbow, and tailbone.

As a result of the injuries she sustained during the July 6 incident, Ms. Potter submitted a request for medical treatment and filed a workers' compensation claim with All-Star. Ms. Potter executed a workers' compensation settlement agreement that was approved by a workers' compensation judge on August 23, 2018. In the settlement agreement, Ms. Potter agreed that the July 6 incident "ar[ose] out of and in the course and scope of [her] employment." She received $10,584.32 in permanent disability benefits and $7,235.21 for medical expenses.

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[1] Ms. Johnson's name also appears in the record as "Lisia."

[2] Mr. Treadaway's name also appears in the record as "Treadway."

[3] It is unclear what Mr. Good initially did with the written statements. The following day, Ms. Johnson and Mr. Good met with Rene Clark and Anita Horton, from the human resources department, to discuss the incident. According to Ms. Clark, the human resources department repeatedly asked Ms. Potter to provide a written statement because they did not receive the written statements from Mr. Good for several days.

On December 21, 2017, Ms. Potter filed a complaint for damages pursuant to the THRA against YAPP in the Circuit Court for Sumner County. She asserted that Mr. Treadaway's actions on both June 22 and July 6 constituted sexual harassment that created a hostile work environment at YAPP.[4] Following discovery, YAPP filed a motion for summary judgment arguing that the exclusive remedy provision of the Tennessee Workers' Compensation Act ("TWCA") barred Ms. Potter from aggregating the June 22 and July 6 incidents to establish her claim because she filed and settled a workers' compensation claim with All-Star as a result of the July 6 incident.[5] YAPP further argued that the June 22 incident alone was insufficient to establish there was a hostile work environment. The trial court agreed and, in an order entered on July 17, 2019, granted YAPP's motion for summary judgment. Ms. Potter appealed.

On appeal, Ms. Potter presents the following issue for our review: whether the trial court erred in granting summary judgment because the workers' compensation agreement barred her from relying on the July 6 incident to establish her THRA claim.

STANDARD OF REVIEW

We review a trial court's summary judgment determination de novo, with no presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). This means that "we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Id.* We "must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002); *see also Acute Care Holdings, LLC v. Houston Cnty.*, No. M2018-01534-COA-R3-CV, 2019 WL 2337434, at *4 (Tenn. Ct. App. June 3, 2019).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." TENN. R. CIV. P. 56.04. When a party moves for summary judgment but does not have the burden of proof at trial, the moving party must either submit evidence "affirmatively negating an essential element of the nonmoving party's claim" or "demonstrating that the nonmoving party's evidence *at the summary judgment*

[4] In her complaint, Ms. Potter also alleged that there were incidents between Mr. Treadaway and another employee prior to the June 22 incident. The trial court concluded that the prior incidents were not sufficient to establish Ms. Potter's claim. Because she has not raised this as an issue on appeal, we will not address it.

[5] If the exclusivity provision of the TWCA applies, Ms. Potter's settlement of her workers' compensation claim with All-Star would also provide YAPP with tort immunity as an employer under Tenn. Code Ann. § 50-6-108. *See Travelers Prop. Cas. Co. of Am. v. Unitrac R.R. Materials, Inc.*, No. E2006-02679-COA-R3-CV, 2007 WL 2437960, at *2 (Tenn. Ct. App. Aug. 29, 2007).

stage is insufficient to establish the nonmoving party's claim or defense." *Rye*, 477 S.W.3d at 264. Once the moving party has satisfied this requirement, the nonmoving party "'may not rest upon the mere allegations or denials of [its] pleading.'" *Id.* at 265 (quoting TENN. R. CIV. P. 56.06). Rather, the nonmoving party must respond and produce affidavits, depositions, responses to interrogatories, or other discovery that "set forth specific facts showing that there is a genuine issue for trial." TENN. R. CIV. P. 56.06; *see also Rye*, 477 S.W.3d at 265. If the nonmoving party fails to respond in this way, "summary judgment, if appropriate, shall be entered against the [nonmoving] party." TENN. R. CIV. P. 56.06. If the moving party fails to show he or she is entitled to summary judgment, however, "'the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails.'" *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008) (quoting *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998)).

ANALYSIS

This case involves two statutory acts: the TWCA and the THRA. The TWCA provides the exclusive remedies for employees who sustain work-related injuries. Tenn. Code Ann. § 50-6-108(a). An injury is compensable under the TWCA if it both "arose out of" and occurred "in the course of" employment. *Anderson v. Save-A-Lot, Ltd.*, 989 S.W.2d 277, 279 (Tenn. 1999); *see also Coleman v. St. Thomas Hosp.*, 334 S.W.3d 199, 203 (Tenn. Ct. App. 2010). The Tennessee Supreme Court has explained the distinction as follows:

> "The phrase, 'in the course of,' refers to time and place, and 'arising out of,' to cause or origin; and an injury by accident to an employee is 'in the course of' employment if it occurred while he was performing a duty he was employed to do; and it is an injury 'arising out of' employment if caused by a hazard incident to such employment."

Anderson, 989 S.W.2d at 279-80 (quoting *Travelers Ins. Co. v. Googe*, 397 S.W.2d 368, 371 (Tenn. 1965)). Furthermore, "an injury arises out of the employment 'when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work [was] required to be performed and the resulting injury.'" *Bell v. Kelso Oil Co.*, 597 S.W.2d 731, 734 (Tenn. 1980) (quoting *T.J. Moss Tie Co. v. Rollins*, 235 S.W.2d 585, 586 (Tenn. 1951)).

The THRA provides that it is unlawful for an employer "to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin." Tenn. Code Ann. § 4-21-401(a)(1). In sexual harassment cases, the THRA recognizes hostile work environment claims. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 31-32 (Tenn. 1996). In a hostile work environment, "'conduct has the purpose or effect of

unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'" *Id.* at 31 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). An employee in a sexual harassment case must prove five elements in order to prevail on a claim for hostile work environment:

> (1) the employee is a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment; (3) the harassment occurred because of the employee's gender; (4) the harassment affected a "term, condition, or privilege" of employment; and (5) the employer knew, or should have known of the harassment and failed to respond with prompt and appropriate corrective action.

Id. (citing *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986)).

When determining whether a hostile work environment exists, a court looks "at the totality of the circumstances" and evaluates the relevant conduct "by both an objective and subjective standard." *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 333 (6th Cir. 2008). Thus, an employee alleging a hostile work environment must show "both that the harassing behavior was 'severe or pervasive' enough to create an environment that a reasonable person would find objectively hostile or abusive, and that he or she subjectively regarded the environment as abusive." *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). The harassing conduct "need not be clearly sexual in nature." *Campbell*, 919 S.W.2d at 32. Rather, "'any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees,'" if sufficiently severe or pervasive, would constitute a hostile work environment. *Id.* (quoting *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985)).

To be considered severe or pervasive enough to be actionable, the harassing conduct must be to such a degree that the workplace becomes so "permeated with 'discriminatory intimidation, ridicule or insult'" that it "alter[s] the conditions of employment." *Hawkins*, 517 F.3d at 333 (quoting *Meritor Sav. Bank*, 477 U.S. at 65). It is not enough if the conduct "is merely offensive" or just consists of words that "simply have sexual content or connotations." *Id.* When determining whether conduct is sufficiently severe or pervasive to be actionable, courts consider the following factors: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance; and the employee's psychological well-being." *Campbell*, 919 S.W.2d at 32 (citing *Harris*, 510 U.S. at 23). "[N]o single factor is required or conclusive." *Id.*

In this case, the trial court determined that the June 22 incident alone was not sufficiently severe or pervasive to establish the existence of a hostile work environment. Ms. Potter does not challenge this determination on appeal. Instead, she focuses solely on the trial court's determination that the exclusivity provision of the TWCA barred her from relying on the July 6 incident to establish her hostile work environment claim. She asserts that this constituted reversible error because Tennessee jurisprudence allows her to recover for some injuries from the July 6 incident under the TWCA and to recover for other injuries from the same incident under the THRA. For the reasons discussed below, we respectfully disagree.

To support her argument, Ms. Potter relies on *Harman v. Moore's Quality Snack Foods, Inc.*, 815 S.W.2d 519 (Tenn. Ct. App. 1991). Ms. Potter's reliance on *Harman* is misplaced. In *Harman*, the plaintiff sued her employer under the THRA alleging that her immediate supervisor had continuously sexually harassed her. *Harman*, 815 S.W.2d at 520. The defendant filed a motion for summary judgment contending that the plaintiff's claims were barred by the exclusivity provision of the TWCA. *Id.* The trial court denied the motion, concluding that the exclusivity provision did not bar the plaintiff's claim under the THRA because "with the passage of the THRA, the exclusive remedy provision of the TWCA was impliedly repealed as to any rights and remedies a party might have under the THRA." *Id.*

On appeal, this court concluded that the trial court erred in finding that the THRA impliedly repealed the exclusivity provision of the TWCA. *Id.* at 521-24. The *Harman* court examined the provisions of both the TWCA and the THRA and determined that they harmoniously coexist and "protect the employees of this state in two entirely different ways." *Id.* at 523. The court explained that the THRA entitles a claimant to "'payment . . . of damages for an injury, including humiliation and embarrassment, caused by the discriminatory practice, and costs, including a reasonable attorney's fee,'" whereas the TWCA entitles a claimant to "compensation for loss of earning power or capacity sustained . . . through injuries in industry; to compensate for disability of the employee occurring under certain specified conditions while . . . working for the employer; [and] to increase the rights of employees to be compensated for injuries growing out of their employment." *Id.* at 523-24 (citations omitted). In light of these differences, the *Harman* court concluded that the exclusivity provision of the TWCA did not bar all sexual harassment claims under the THRA. *Id.* at 525. Rather, the court held as follows:

> There are too many variables in this issue to lay down a hard and fast mechanical formula into which trial courts may plug certain facts and come out with a specific answer. The trial courts of this state are going to be called upon from time to time to determine whether an employee's claim is based upon real discrimination or arises from employer misconduct that is a normal part of the employment relationship.

Id. at 527. The court remanded the case for a determination of the validity of the plaintiff's sexual harassment claims "and into which category they fall [TWCA or THRA], if any . . . ." *Id.* Thus, contrary to Ms. Potter's assertion, the holding in *Harman* provides an employee injured by sexual harassment with either the rights and remedies available under the TWCA or with those available under the THRA, but not both.

Ms. Potter also relies on *Anderson v. Save-A-Lot, Ltd.*, 989 S.W.2d 277 (Tenn. 1999). Her reliance is again misplaced. In *Anderson*, the plaintiff filed a complaint against her employer under the TWCA seeking workers' compensation benefits. *Anderson*, 989 S.W.2d at 278. She alleged that, during the course of her employment, her immediate supervisor had repeatedly sexually harassed her. *Id.* The trial court granted the employer summary judgment, and the Special Workers' Compensation Appeal Panel reversed, holding that the plaintiff's injuries were compensable under the TWCA because they "arose out of and in the course of her employment" and because she "would not have suffered an injury 'but for' her employment." *Id.*

The Tennessee Supreme Court reversed the Special Workers' Compensation Appeal Panel after concluding that the plaintiff's injury did not arise out of her employment because there was no proof that "sexual harassment was an inherent risk to which [she] was exposed when she accepted employment." *Id.* at 288. Thus, the *Anderson* Court held that the plaintiff's sexual harassment claim was not compensable under the TWCA. *Id.* The *Anderson* Court concluded, however, that the THRA provided a remedy for her injury. *Id.* at 289. The Court explained as follows:

> "Sexual harassment was probably never contemplated by the original authors of workers' compensation systems because women did not have a strong presence in the workplace. Furthermore, public policy against sexual discrimination had not been formulated and translated into statutory law. Therefore, sexual harassment is completely outside the contemplation of the workers' compensation scheme, and employers should not be allowed to use the exclusive remedy provision as a shield to avoid liability for permitting sexual harassment to occur in the workplace."

Id. at 290 (quoting Ruth C. Vance, Workers' Compensation and Sexual Harassment in the Workplace: A Remedy for Employees or a Shield for Employers?, 11 HOFSTRA LAB. L.J. 141, 192 (1993)). Thus, the *Anderson* Court concluded, "the THRA is the appropriate avenue of relief for plaintiffs who suffer injuries as a result of sexual harassment." *Id.*

In making its determination, the Court noted:

> [S]everal courts have painstakingly attempted to create a bifurcated system in which a sexual harassment victim may recover either workers' compensation benefits or human rights act damages depending upon the nature of the injury. We find such a distinction to be illusory in the context of our human rights act. The remedies provision of the THRA is designed to provide a sexual harassment victim with a full recovery, which includes damages for humiliation and embarrassment as well as damages for economic loss. Thus, there are no damages that a sexual harassment victim could recover under the workers' compensation scheme that he or she could not recover under the THRA.

Id. at 289 n.10 (citations omitted). Thus, complainants seeking compensation for injuries resulting from sexual harassment must generally file their claims under the THRA, not the TWCA.[6] Moreover, the THRA was designed to provide full compensation to a plaintiff who was a victim of sexual assault, so there should be no need to seek relief under another statute. *Id.* We discern from the holdings in *Anderson* and *Harman* that, contrary to her assertion, Ms. Potter may only recover for the injuries she sustained during the July 6 incident under one of the acts. The question then is under which act was Ms. Potter entitled to recover? For the reasons discussed below, we believe it is the TWCA.

Ms. Potter filed and settled a lawsuit under the TWCA for the injuries she sustained during the July 6 assault. In the settlement agreement, she expressly stated that her injuries occurred while engaging in "activity arising out of and in the course and scope of employment." The holding in *Anderson* makes clear that, if Mr. Treadaway's conduct on July 6 constituted sexual harassment, she would not have been able to recover damages under the TWCA because her injuries would not have arisen out of her employment. Moreover, the July 6 assault is the type of assault generally recoverable under the TWCA. In *Woods v. Harry B. Woods Plumbing Co., Inc.*, 967 S.W.2d 768, 771 (Tenn. 1998), our Supreme Court held that, when determining whether an injury from an assault arose out of employment, courts must determine which of the following categories the assault falls under:

> (1) assaults with an 'inherent connection' to employment such as disputes over performance, pay or termination; (2) assaults stemming from 'inherently private' disputes imported into the employment setting from the claimant's domestic or private life and not exacerbated by the employment;

[6] In *Jesse v. Savings Products*, 772 S.W.2d 425, 426-27 (Tenn. 1989) and *Beck v. State*, 779 S.W.2d 367, 368-69 (Tenn. 1989), the Tennessee Supreme Court determined that the plaintiff's, who were victims of sexual assaults, were entitled to compensation under the TWCA because the assaults were reasonably considered a hazard incident to their employment.

> and (3) assaults resulting from a 'neutral force' such as random assaults on employees by individuals outside the employment relationship.

Assaults classified in the first category are compensable under the workers' compensation scheme. *Id.* Those classified in the second category are not, and whether those classified in the third category are compensable depends "on the facts and circumstances of the employment." *Id.*

The assault on July 6 falls into the first category. During her deposition, Ms. Potter admitted that the July 6 incident was not sexual in any way and that it began with a discussion about work. She described the incident as follows:

> He was backing the line up purposely because he wasn't running the tanks to see if they failed. So I knew he was doing it out of meanness to back my line up. And he did back it up. Tanks was even falling on the floor cause it wasn't – I mean, you can only go so fast on a line. . . . I didn't want to go around him. I stayed my distance from him and every time he would come to me for something, you never seen me going to him cause I stayed my distance. And then finally I told him, I said, "You are backing us up. The tanks are falling on the floor." And he just started yelling at me, telling me not to worry about what he's doing. I mean, he was just ugly to me all night. And next thing I knew, we had words, and he was yelling at me, screaming, spitting in my face. Every time I backed up, he would move forward. The next thing I knew he shoved me.

These undisputed facts establish that the assault had an inherent connection to Ms. Potter's employment because it was a dispute over work performance—she confronted Mr. Treadaway because he was backing up the assembly line by repeatedly returning gas tanks to her. The assault, therefore, falls squarely within the contemplation of the TWCA rather than the THRA. Thus, Ms. Potter's injuries were compensable under the TWCA rather than the THRA, and she must accept the remedies of the TWCA "to the exclusion of any other right or remedy." *Coleman*, 334 S.W.3d at 203.

In light of the foregoing, we conclude that the trial court did not err in granting summary judgment to YAPP.

CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Karen Potter, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE