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SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2014-SC-095

ASBURY COLLEGE, NOW ASBURY UNIVERSITY — APPELLANT

v.

DEBORAH POWELL, DEBRA A. DOSS, and BRYAN BEGLEY DALEY — APPELLEES

KENTUCKY COURT OF APPEALS
NO. 2012-CA-000653-MR

JESSAMINE CIRCUIT COURT
CIVIL ACTION NO. 09-CI-00140

REPLY BRIEF FOR APPELLANT ASBURY COLLEGE (NOW ASBURY UNIVERSITY)

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2015, ten copies of the following Reply Brief for Appellant were hand delivered to: Hon. Susan Stokley Clary, Clerk, Kentucky Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; and a true and accurate copy was also served by first class mail upon Hon. C. Hunter Daugherty, Judge, Jessamine Circuit Courthouse, 101 North Main Street, Nicholasville, Kentucky 40356; Debra A. Doss, Suite 200, 108 Pasadena Drive, Lexington, Kentucky 40503; Bryan Begley Daley, 2692 Richmond Road, Suite 204, Lexington, Kentucky 40509-1542; and Hon. Samuel Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

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APPENDIX

Asbury University requests that this Court reverse the judgment in Powell's favor as to her Kentucky Civil Rights Act retaliation claim, with instructions to enter judgment in Asbury's favor. The trial court's jury instructions used a reduced motivating factor standard conclusively rejected by the United States Supreme Court in *Nassar*.[1] Powell lacked evidence of causation sufficient to convince a reasonable jury of her claim under any standard. The jury's verdict in Powell's favor cannot stand.

Powell begins her Appellee's Brief with a lengthy recitation of her sex discrimination allegations. The jury found in Asbury's favor on Powell's sex discrimination claim. Powell has not appealed the jury's decision in Asbury's favor, and her time for doing so expired years ago. The jury's decision rejecting Powell's sex discrimination claim is final. Thus, this Court's decision must be based on the conclusively-decided fact that Asbury did *not* discriminate against Powell on the basis of her sex.

As to the only claim that is before the Court, Powell's retaliation claim, Powell first argues that the trial court's retaliation jury instruction complied with *Nassar*, or was not prejudicial, because it included both the "motivating factor" standard and the "but for" standard. The trial court's instruction misstates the law because it allowed the jury to find for Powell on a legally incorrect mixed motive theory of retaliation, and the instructions do not ask the jury the central question – whether Provost Kulaga decided to terminate Powell's employment because she had complained about sex discrimination. The trial court's recitation of conflicting

[1] *University of Texas, Soutwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (June 24, 2013).

standards is confusing, and the motivating factor standard is erroneous and inapplicable to Powell's retaliation claim. Although we cannot know which standard the jury applied, no reasonable jury could conclude that Provost Kulaga ended Powell's employment because she had made an internal grievance to a prior administration two years earlier, particularly since Powell admits Asbury's stated reasons for its decision. Asbury did not renew Powell's contract because her students complained about her embarrassing public displays of physical affection with her assistant coach. Powell admits that the students complained, and admits to the conduct. [VR No. 2: 1/30/12; 4:34:17-50].

An improper instruction on but-for causation is almost always prejudicial. *See United States v. Miller*, 767 F.3d 585, 600-601 (2014).

> [I]n the aftermath of *Gross*, *Nassar*, and *Burrage*, only one court has found a but-for instructional error harmless, and then only because the jury completed a special verdict form in which it expressly indicated "it relied *only* on a 'but for' theory of causation when finding liability and "did *not* reach or rely on the alternative 'mixed motive' theory presented to it."

The jury gave no such assurances in Powell's case. The Court *must* presume that the erroneous instructions were prejudicial to Asbury. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 276 (Ky. App. 2006).

Powell next argues that Kentucky should not follow *Nassar*. Powell relies on *Mendez v. University of Kentucky*, 357 S.W.3d 534 (Ky. App. 2011). *Mendez* is not a retaliation case. The question before the Court in *Mendez* was whether the plaintiff was prejudiced by the trial court's use of the lenient "substantial motivating factor" standard of proof. Here, Asbury asks the Court to decide that the defendant was

prejudiced by the use of the incorrect standard. Further, *Mendez* predates *Nassar* by two years, so the Court of Appeals did not have the benefit of the *Nassar* opinion when it rendered its decision.

In *Mendez*, the plaintiff claimed that he had been fired as a result of his religion. He sought to have his case tried under Title VII-like mixed motives jury instructions. The Court of Appeals noted that Kentucky did *not* adopt statutory language authorizing mixed motives claims, like that found in 42 U.S.C. § 2000e-2(m). Since the language of the KCRA did not match Title VII in this particular instance, the *Mendez* court decided it was not bound by precedent interpreting Title VII on the issue of mixed motives religious discrimination jury instructions.

On the other hand, as to retaliation, the language of Title VII and the KCRA are nearly identical. The retaliation provision of Title VII states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter....

The retaliation provision of the KCRA states:

> It shall be an unlawful practice for a person... [t]o retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter...

Where, as here, the language of the KCRA tracks that of Title VII, it "should be interpreted consonant with federal interpretation." *Mendez*, 357 S.W.3d at 541 (quoting *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 821 (Ky. 1992). Based on its own reasoning, the *Mendez* court would have applied *Nassar* to KCRA retaliation claims.

Nassar directly addresses the causation standard required by the "because" language contained in KRS § 344.280. *Nassar's* application is not limited to Title VII, or to civil rights statutes that expressly authorize mixed motives theories. *See Wholf v. Tremco, Inc.*, 2015 WL 268783 at * 10 (Ohio App. Jan. 22, 2015)[2] (because Ohio's anti-retaliation statute "is almost identical to 2000e–3(a)," "federal case law interpreting that section, including the "but-for" causation standard defined in *Nassar*, is applicable to [plaintiff'] retaliation claim.")

Powell argues that *Nassar* should not be applied retroactively, but she cites no authority for this proposition. Kentucky follows the rule of retroactivity. The Court of Appeals long ago recognized that "the rule of retroactivity in civil cases is limited only by the need for finality." *Washington v. Goodman*, 830 S.W.2d 398, 401 (Ky. App. 1992).

Powell's retaliation claim cannot survive under the legally correct "but for" causation standard. Powell's only causation evidence is that Provost Kulaga learned in 2008 that Powell had complained to a prior Asbury administration in 2005. Powell attempts to fill the gap between her 2005 grievance and 2008 termination with petty workplace gripes. But Powell's complaining about ordinary tribulations is not activity protected under the KCRA because minor annoyances do not rise to the level of tangible workplace detriments.[3] *E.g., Davis v. Town of Lake Park*, 245

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[2] Attached as Appendix Item 1. Like the KCRA, Ohio's anti-discrimination statute lacks a "mixed motives" provision. *Wholf* at * 6.

[3] Powell claims that AD Kempf actively prevented her from participating in athletic department audit, but the evidence at trial was to the contrary. Powell was not at work on the date of the audit due to a health issue with Powell's family member. [VR No. 2: 1/30/12; 5:34:18] Neither Powell nor AD Kempf anticipated that she would be absent from work on the date of the audit. The auditor's contact information was available to anyone who wanted it. [Id. at 5:33:15]. Powell made the choice not to look it up. [Id. at 5:33:38].

F.3d 1232 (11th Cir. 2001). Asbury was prejudiced by the introduction of Powell's petty complaints at trial because she relied on them to establish the causation element of her retaliation claim. Whether or not Powell's trifling complaints amounted protected activity, there is no dispute that Kulaga knew nothing about them. Having no knowledge of Powell's petty complaints, he could not have based his decisions on them.

In the absence of close temporal proximity between protected activity and the decision not to renew her contract, Powell had to produce other evidence that could establish causation. *See Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 804 (Ky. 2004)(four-month time lapse between protected activity and adverse employment decision too long to create inference of causation). In her brief, Powell lists allegations that she claims could meet her burden.

First, she says, in 2007, Provost Kulaga learned of rumors that Powell is gay, and he took no action to "quell the rumors." By not mentioning the rumor to others, the provost took the only action guaranteed not to perpetuate the rumor. At trial, Glenn Hamilton agreed that the best way to end a rumor is to stop talking about it. [VR No. 3: 1/31/12; 11:01:18]. Had the provost discussed the rumor about Powell with others, he would have spread the rumor, and drawn a defamation claim.[4]

Next, Powell claims that Provost Kulaga destroyed notes and emails regarding his investigation of the student complaints against Powell. As the provost

[4] Powell alleged that Gary Kempf defamed her by telling the provost about the rumors that Powell is gay. Powell admitted that there *were* such rumors, and therefore Mr. Kempf's statements were truthful, and the court dismissed the defamation claim on the grounds that the alleged defamatory statement was true. [RA 215-216].

explained at trial, he routinely replaces his initial notes with his formal summary and conclusion at the end of an investigation. [VR No. 3: 1/31/12; 2:00:15]. Thus, the content of the notes is preserved. As to the allegation of destroyed emails, the evidence at trial established that Provost Kulaga offered team members the opportunity to schedule a meeting with him to discuss their concerns about Powell. [VR No. 3: 1/31/12; 2:16:51]. A couple of the students emailed the provost to request such a meeting. The provost did not retain the email requests after the meetings were scheduled.

Third, Powell criticizes the provost's decision not to allow her to tape-record or include third parties in their meeting about the non-renewal of her contract. There is no evidence that Asbury ever allows employees to tape record such meetings.[5] Nor is there any evidence that anyone other than Powell had ever asked Provost Kulaga to include a third party in a contract non-renewal meeting.

Powell further claims that Asbury refused to allow Human Resources Director Glenn Hamilton to attend meetings with Powell and AD Kempf, or with Powell and Provost Kulaga. The evidence at trial established that Hamilton *did* attend meetings with Powell. [VR No. 3: 1/31/12; 10:53:44]. Hamilton was close friends with Powell. [VR No. 3: 1/31/12; 10:24:55; 10:54:17].

Powell's next allegation, that Kulaga failed to follow Asbury policy, is misleading. Powell is referring to Asbury's sexual harassment policy, but the

[5] Powell's citation on this point is misleading. Neither Glenn Hamilton nor Rita Pritchett were asked, or offered any opinion, about whether employees other than Powell were allowed to tape record meetings with the provost. Mr. Hamilton could not recall whether Asbury had denied any other employee's request to include a third party in an employment meeting with Provost Kulaga. [VR No. 3: 1/31/12; 10:57:23]. Kulaga assumed his role as Asbury's Provost less than one year prior to the date of his meeting with Powell, so it is very likely that he had not fielded such requests from anyone other than Powell.

students' complaints were not about sexual harassment. Accordingly, as Glenn Hamilton testified, the provost had the discretion to investigate the allegations as he did. [VR No. 3: 1/31/12; 11:08:45; 2:09:05]. Had Kulaga utilized the sexual harassment investigation procedure, Powell would have complained that Asbury's use of an inapplicable procedure was retaliatory.

Next, Powell complains that AD Kempf refused her offer to review all of her correspondence to "prove that she was not gay." AD Kempf was not the decision-maker in Powell's case, and had no authority to make any decision about Powell's continued employment. Moreover, Asbury was not investigating anything that Powell did in her personal life, so her personal correspondence was irrelevant. Asbury's investigation focused on whether Powell's conduct at work matched the students' allegations. Had Kempf accepted her offer, Powell would have claimed that no other employee's privacy had been so invaded in the course of an investigation of workplace conduct.

Powell further states that no other coach was denied access to the team during the course of an investigation. But Powell's situation was unique. Never before had a coach's team come forward with allegations like those against Powell. It is not surprising, then, that Asbury had not previously made the same response.

Powell complains that the team was not told that Powell wanted to talk to them. Asbury was in the process of investigating the students' complaints about Powell. It would have been inappropriate to coerce the students into talking to the person about whom they had complained. [VR No. 3: 1/31/12; 11:09:40]. The students had Powell's contact information. After Powell's contract term expired, she

contacted the team members. Most of them declined to speak with her, even then. [VR No. 2: 1/30/12: 5:54:35].

Contrary to Powell's next argument, Glenn Hamilton's account of his close relationship with Powell was not disregarded by the provost [RA Dep. Folder, Kulaga Depo. pp. 55-56], nor was it relevant to the investigation of the students' allegations. In any event, as Mr. Hamilton admitted, he was not a witness to any of the conduct alleged by the students. [VR No. 3: 1/31/12; 11:11:15].

Powell notes that the bus driver confirmed that he witnessed Powell touching her assistant coach on the bus in front of the team. It is not clear why Powell would list this as evidence of pretext. Rather, it is further confirmation of the students' allegations.

Finally, Powell challenges the provost's conclusion that every team member agreed that Powell's conduct was inappropriate and that they all wanted her removed as coach. Powell claims that team member Allison Smith indicated that she wanted Powell to continue as coach, but this was not Smith's testimony.[6] Smith testified that at the team meeting, Dr. Kulaga asked for a show of hands from any team members who wanted to keep Powell and Hadlock as coaches. The witness *twice* said that she *did not* raise her hand and did not know whether anyone else did. [RA Dep. Folder, A. Smith Depo. p. 27, 42-43].

Powell lacks evidence of causation sufficient to convince a reasonable jury of her claim under the correct but-for standard. Her causation evidence is too weak to

[6] Even if Smith had indicated that she wanted Powell as her coach, the fact that only one of fifteen team members would consider continuing with Powell supports Asbury's decision. It takes more than one student to make a basketball team.

survive under any standard. Further, if the Court decides not to follow the federal interpretation for retaliation claims, Powell's claim fails under Kentucky's *Parker* case.

A KRS § 344.280 retaliation claim must arise from an underlying violation of the KCRA. *Parker v. Pediatric Acute Care, P.S.C.*, No. 2007-CA-000548-MR, 2008 WL 746677 (Ky. App. March 21, 2008). Powell lacks a required predicate for her retaliation claim under *Parker* – an underlying violation of the KCRA. "A predicate for invoking [the retaliation] cause of action is the existence of an illegal practice for the aggrieved plaintiff to oppose; 'if no practice declared unlawful by this chapter has occurred, there can be no retaliation or discrimination as contemplated by KRS 344.280."[7] Since Asbury did not commit any underlying violation of the KCRA, Powell's retaliation claim fails.

Powell argues that the Court is not bound by *Parker*, *Thompson*, and *Himmelheber*, but these three cases are the only ones that directly address the issue before the Court, and in each case, the Court determined that the plaintiff could not proceed with her retaliation claim in the absence of an underlying violation of the KCRA. None of the three cases Powell cites (*Burlington*, *Crawford*, and *Thompson*)[8] address whether a plaintiff may proceed with a retaliation claim even though the defendant did not commit any underlying violation of the Civil Rights Act. Although

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[7] *Thompson v. Next-tek Finishing, LLC*, Civil Action No. 3:09-CV-940-S, 2010 WL 1744621 (W.D. Ky. April 28, 2010) *quoting Himmelheber v. ev3, Inc.*, Civil Action No. 3:07-CV-593-H, 2008 WL 360694 (W.D. Ky. Feb. 8, 2008).

[8] *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006); *Crawford v. Metro. Gov't of Nashville & Davidson County*, 555 U.S. 271 (2009); *Thompson v. North American Stainless*, 171 S. Ct. 863 (2010). Powell interprets the KCRA consistent with Title VII only when it benefits her, and rejects any federal interpretation that supports Asbury's defenses. This interpretation of the law is legally unsupportable and would only further confuse Kentucky's civil rights law.

Powell argues that federal law is inapplicable to KCRA retaliation claims, each of the cases she relies upon in her argument regarding *Parker* interprets federal law – Title VII – not the KCRA.

Apart from the trial court's application of erroneous legal standards, Rita Pritchett's improper testimony further prejudiced Asbury. Pritchett testified as a quasi-expert without the safeguards attendant to expert testimony. Since Pritchett admittedly did not witness any of the inappropriate conduct that led to Powell's discharge, her testimony about Powell's conduct violated KRE 602 and 701. Asbury was also prejudiced by the trial court's refusal of an at-will instruction. It was critical that the jury understood that even if it viewed Asbury's reason for ending Powell's employment as unfair, that alone was not sufficient to find that Asbury violated the law.

Finally, Asbury presented competent evidence that the jury's damages award was the result of a quotient verdict, or passion and prejudice. Powell produced no information to rebut the affidavit of Janet Dean submitted by Asbury.

In conclusion, Asbury did not discriminate against Powell on the basis of her sex. This fact is now conclusively established. Upon application of the correct legal standard, as a matter of law, Asbury did not retaliate against Powell. The judgment in this case as to Powell's retaliation claim, and the Court of Appeals' decision to affirm that judgment, must be reversed.

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