

No.38932-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

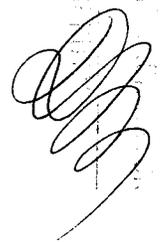
MACK LITTON,

Appellant,

v.

CLOVER PARK SCHOOL DISTRICT,

Respondent.



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BRIEF OF RESPONDENT CLOVER PARK SCHOOL DISTRICT

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A. INTRODUCTION

Plaintiff Mack Litton worked for Clover Park School District as a custodian from 1999 until June 28, 2006. At the beginning and end of his employment with the School District, he worked under the supervision of the Principal of Clarkmoor Elementary School, Molly Click. Litton's work performance did not meet the District's standards. He was counseled, placed on suspension and ultimately terminated for those performance issues. Plaintiff, who is African American, was replaced by another African American employee.

Plaintiff filed a Complaint For Damages against the District in which he alleged that he was racially discriminated against in violation of RCW 49.60. The only adverse employment action identified by plaintiff in his complaint was his termination. Plaintiff alleged that he was treated identically to another employee, Dan Marcus. Mr. Marcus is Caucasian. None of the causes of action in plaintiff's complaint includes a claim for gender discrimination.

Plaintiff also alleged that his supervisor, Virgil Cabigting, told him that Ms. Click referred to plaintiff and Mr. Marcus by using a racial slur. Defendant submitted declarations of both Ms. Click and Mr. Cabigting in which they denied that Ms. Click made such a statement and denied that Mr. Cabigting ever reported to Mr. Litton that such a statement was made.

On December 11, 2008, the District filed its motion for summary dismissal. That motion was supported by declarations with attached exhibits, including photographs which demonstrated the shortcomings in plaintiff's work performance.

Defendant's motion showed that plaintiff failed to establish a prima facie case of racial discrimination because there was evidence that his work performance did not meet standards and because he was replaced by another African American employee rather than someone outside of his protected class.

Further, defendant demonstrated that the stated reasons for the termination were legitimate and not merely protectual. Plaintiff argued that he could establish a case of disparate treatment, but he did not submit any admissible evidence controverting the facts that he was treated the same as a Caucasian employee, that his work performance was deficient and that he was not replaced by someone outside of his protected class. In his appeal, plaintiff has not included in his designation of clerk's papers any of the declarations submitted by the defendant. Consequently, this court is not able to conduct the *de novo* review which plaintiff requests.

Defendant's motion was noted for hearing on January 9, 2009, which was before the dispositive motion deadline. Prior to the hearing, the court contacted the parties and advised them that because of an overcrowded docket on January 9, the court was

setting the hearing over until January 23, 2009. Subsequently, the court rescheduled the hearing again until January 30, 2009. Plaintiff's counsel appeared for oral argument on defendant's motion, argued plaintiff's case and did not raise any issue with regard to lack of notice of the hearing.

B. COUNTERSTATEMENT OF ISSUES

1. Should summary judgment dismissal be affirmed where plaintiff has failed to provide the appellate court with a record containing the factual evidence considered by the trial court or to otherwise demonstrate the existence of material issues of fact? (Assignment of Error No. 1)

2. Should summary judgment dismissal of plaintiff's claim of outrage be affirmed where plaintiff has made no argument in support of this assignment of error and where the claim of outrage is based upon the same factual basis as the claim of discrimination? (Assignment of Error No. 2)

3. Should summary judgment dismissal be affirmed where defendant's motion was noted for hearing prior to the deadline for dispositive motions and the court reset the hearing because of congestion on its docket? (Assignment of Error No. 3)

4. Should summary judgment dismissal be affirmed where plaintiff has submitted no evidence of gender discrimination or evidence of racially based hostile environment? (Assignment of Error No. 4)

5. Should the Court award respondent attorneys' fees and costs pursuant to RAP 18.1 and 18.9 because plaintiff's appeal is frivolous?

C. COUNTERSTATEMENT OF THE CASE

Plaintiff began working for Clover Park School District as a temporary custodian at Clarkmoor Elementary School in 1999. CP 31 He worked under the supervision of principal Molly Click. CP 31 The District then hired Mr. Litton as a full-time custodian, working first at Woodbrook Elementary School and then at Clover Park High School. CP 31-32 In the fall of 2005, there was an incident where Mr. Litton got into a verbal confrontation with a student and used inappropriate language. The District directed Mr. Litton to have no further contact with that student. CP 32

In November, 2005, the District placed Mr. Litton on disciplinary suspension after learning that he had another confrontation with that same student. Following the disciplinary

suspension, Mr. Litton began working at Clarkmoor Elementary as a night custodian. CP 32

Principal Click became aware of deficiencies in Mr. Litton's work performance. She met with him on January 11, 2006 and reviewed those issues with him. CP 32 That discussion was confirmed in a memo to Mr. Litton on January 13, 2006. CP 32 On February 3, 2006, Ms. Click issued a letter of reprimand to Mr. Litton based on continued abuse of leaves and incidents of tardiness. CP 33 On February 28, 2006, the District administrator for human resources, Carole J. Burger, issued a letter to Mr. Litton advising him that he was placed on a 10-day suspension for negligent work performance. CP 34

Following that suspension, Mr. Litton was placed on probation and was directed to meet with William Taylor, a central district quality control and resource coordinator, to review his work assignments and to answer any questions that Mr. Litton had about what was required to meet the work standards. CP 34 Mr. Litton was also advised that if he successfully completed the probation, he would be expected to sustain the improvement and continue his work and attendance at an acceptable level or he would be terminated. CP 34

Following that meeting, Mr. Taylor performed observations of Mr. Litton's work. When he found deficiencies, he documented

those in writing and with photographs and Mr. Taylor advised Mr. Litton of those deficiencies. CP 35 Mr. Taylor reported that Mr. Litton's performance improved for a time, but then deteriorated. CP 35

Mr. Litton's performance problems continued and on May 26, 2006, Ms. Click was told by her secretary that she could hear Mr. Litton speaking very loudly and in an agitated manner toward his supervisor, Mr. Cabgiting, in a room that was quite some distance away. CP 35 Ms. Click went to the room to intervene and found that Mr. Litton was being disrespectful to his supervisor and using a raised voice. CP 35 Based on the incidents of Mr. Litton failing to properly perform his work as well as failure to respect his supervisor, Ms. Click recommended that Mr. Litton's employment be terminated. CP 35

On June 15, 2006, Ms. Burger issued a letter to Mr. Litton advising him that she would recommend to the Board of Directors that his employment be terminated effective June 28, 2006. The Board followed that recommendation and Mr. Litton's employment was terminated. CP 35

On February 12, 2008, plaintiff filed a Complaint For Damages. The complaint includes a section under the heading "Legal Framework". CP 7. That legal framework contains a discussion regarding hostile working environment and states, "Hostile working environment harassment is a form of

discrimination in that the harassing conduct subject (sic) employees to adverse working conditions based solely on their membership in one or more protected classes, in this case, race and gender.” CP 7. There is no other reference to gender in plaintiff’s complaint, nor is there any cause of action alleging that plaintiff was discriminated against based upon his gender. CP 1-19.

In plaintiff’s complaint and deposition testimony, he alleged that he was treated the same as another former custodian, Dan Marcus. CP13 Plaintiff acknowledged in deposition that he thought Mr. Marcus must have been African American because of the way he was treated. However, Mr. Marcus is not African American, he is Caucasian. CP 38.

On December 11, 2008, defendant filed its motion for summary dismissal, noting the motion for hearing on January 9, 2009. CP 29 Defendant’s motion was based upon the declarations of Molly Click, Carole Burger, William Taylor and Virgil Cabigting and excerpts of plaintiff’s deposition testimony. CP 31 The primary basis of defendant’s motion was that plaintiff could not establish a prima facie case of racial discrimination under RCW 49.60.180 because he could not meet the essential elements of that cause of action by showing that his work performance was

satisfactory and that he was replaced by someone outside of his protected class. CP 36 The declarations submitted by defendant described plaintiff's work performance deficiencies and included photographs which it showed how he had not properly performed his custodial duties. CP 34-35

On December 31, 2008, plaintiff filed his "Motion in Opposition to Defendant's Motion for Summary Dismissal." CP 44 His brief states that his complaint "alleges a prima facie case of disparate treatment." CP 55 Plaintiff then argued that there were situations where he was treated differently. CP 55 and 56. Although most of the incidents referred to in plaintiff's argument were not alleged in the complaint or in discovery, defendant responded to those in its reply brief. (Defendant's Reply Brief in Support of Motion for Summary Dismissal and Motion to Strike, p. 7-10.) The District also submitted the Supplemental Declaration of Molly Click which explained the circumstances of the incidents in which plaintiff alleged that he was treated differently. That declaration sets forth legitimate, non-discriminatory reasons for those actions. (Supplemental Declaration of Molly Click, P1-3 with Exhibit A.)

Prior to the January 9, 2009 hearing set for the District's

Motion for Summary Dismissal, the court contacted the parties to advise that the court was setting the motion over because of an overcrowded docket. RP 4. On January 14, 2009, plaintiff filed a Motion to Strike Motion for Summary Judgment in which he argued that the court should not hear the District's motion because the new date set for the hearing was after the deadline for dispositive motions, because the court had not provided plaintiff with an order that the hearing was being continued, and because plaintiff was not given an opportunity to be heard on the issue of continuing the motion. (Motion to Strike p 1-2.) That motion was never noted or heard by the court.

At one point, a hearing was noted for January 30, 2009 at Remann Hall before the settlement conference judge, Kathryn Nelson, for presentation of an order imposing sanctions against plaintiff's counsel for failing to attend the settlement conference. However, on January 21, 2009, Judge Nelson's department issued a letter to the parties advising that due to a scheduling conflict, it was resetting that Remann Hall matter to February 6, 2009. (Letter from Department 13.)

The hearing on the District's Motion for Summary Dismissal was held on the date reset by the court, January 30,

2009. Plaintiff's counsel appeared at the hearing, argued plaintiff's case and did not raise an objection to the hearing date. P3-21.

D. ARGUMENT

1. Plaintiff has Failed to Establish the Existence of Material Issues of Fact.

Plaintiff correctly states the law that an appellate court's review of an order granting summary judgment is *de novo*. *Fell v. Spokane Transit Authority*, 128 Wn.2d 615, 618, 911 P.2d 1319 (1996). Plaintiff also correctly states that summary judgment is proper when there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56. However, plaintiff failed to include in his designation of clerk's papers any of the declarations, deposition testimony and discovery responses submitted by the District in support of its motion. Consequently, plaintiff has not made a *de novo* review possible because he did not give this court the same materials considered by the trial court in reaching its decision to grant summary judgment.

It is the appellant's burden to provide this court with the necessary record to enable it to conduct its review and if he does not provide it, the issues need not be reviewed. *State v. Lough*, 70

Wn. App. 302, 853 P.2d 920 (1993). In *LeBeuf v. Atkins*, 93 Wn.2d 34, 604 P.2d 1287 (1980), the court said, at 35:

In an appellate review of a summary judgment of dismissal, the reviewing court must have before it the precise record considered by the trial court. *Jacobsen v. State*, 89 Wn.2d 104, 112, 569 P.2d 1152 (1977); *American Univ'l Ins. Co. v. Ranson*, 59 Wn.2d 811, 816, 370 P.2d 867 (1962).

As explained by the court in *Ranson*, at 815-16:

In an appellate review of a summary judgment entered pursuant to Rule of Pleading, Practice and Procedure 56, RCW Vol. 0, this court can review only those matters that have been presented to the trial court for its consideration for entry of the summary judgment. ... The reason is obvious: it would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration. **We must have before us the precise record -- no more and no less -- considered by the trial court.** (emphasis added)

Because plaintiff has not provided this court with the record reviewed by the trial court, the order granting summary judgment should be affirmed.

2. Plaintiff Has Provided No Argument in Support of His Claim of Outrage.

Plaintiff's Assignment of Error no. 2 is that the trial court erred in dismissing plaintiff's claim of outrage. Plaintiff's brief does not address that assignment of error. In a similar case

involving a claim of negligent infliction of emotional distress by an employee, the court in *Washington v. Boeing Co.*, 105 Wn. App. 1, 18, 19 P.3d 1041 (2000), declined to consider that claim because appellant provided no relevant argument or citation to authority with respect to that claim.

Where an appellant fails to present argument or authority with regard to one of his assignments of error, the court has considered that assignment of error abandoned. See, *State v. Motherwell*, 114 Wn.2d 353, 788 P.2d 1066 (1990). The same rule should apply here and the court should decline to consider plaintiff's assignment of error with regard to his claim of outrage.

Even if the court were to consider the outrage claim, dismissal was appropriate. Plaintiff did not allege that he suffered emotional distress as a result of any facts different than the same facts which formed the basis of his claim of discrimination. Unless there are separate facts forming the basis of the claim for emotional distress, the claim fails. See *Haubry v. Snow*, 106 Wn. App. 666, 678, 31 P.3d 1186 (2001):

An employee may recover damages for emotional distress in an employment context but only if the factual basis for the claim is distinct from the factual basis for the discrimination claim.

Because plaintiff did not present separate facts as the basis for his claim of emotional distress, it was properly dismissed.

3. Plaintiff Was Not Denied Due Process.

Mr. Litton alleges that he was denied due process because of procedural irregularities by the court. First, he contends that the court should not have heard defendant's motion for summary dismissal because it rescheduled the hearing on that motion to a date after the deadline for dispositive motions in the court's case scheduling order. Plaintiff argues, "good cause is required for extending that deadline" and that, "the court did not have good cause pursuant to the local rules because it failed to manage its own calendar." (Brief of Appellant, p.5) The trial court has discretion to control its own calendar. There is no reason why a party should be denied a hearing on its motion for summary judgment based on the fact that the court rescheduled the hearing to a date after the deadline in the court's own case scheduling order.

Plaintiff made the same argument in the motion to strike the District's motion for summary judgment. That motion was filed, but never noted for hearing. That argument is not only devoid of merit, but is also not properly before this court.

Plaintiff next contends that he did not receive notice of the hearing. Mr. Litton acknowledges that he received sufficient notice of the original hearing date of January 9, 2009. (Brief of Appellant, p. 5) But, he argues that he was denied due process because he did not receive further notice from the court of the rescheduled date of January 30, 2009. Plaintiff was represented by his attorney at the January 30, 2009 hearing. Plaintiff's counsel did not raise any objection to the hearing at that time. Therefore, there is no basis for Mr. Litton's contention at this point that he was unaware of the hearing and was somehow denied due process by the court's rescheduling of the hearing.

Mr. Litton's suggestion that the District attempted to get its motion for summary judgment "by default" because there was a hearing in this case noted before settlement conference Judge Nelson in Remann Hall on January 30, ignores the fact that Judge Nelson advised the parties that she was not going to hear the motion before her on January 30th. Judge Nelson's judicial assistant notified counsel in writing that the hearing at Remann Hall was rescheduled for February 6, 2009.

4. The Trial Court Properly Addressed the Causes of Action Raised by Plaintiff's Complaint.

Plaintiff argues that the court did not address the causes of action contained in this complaint because the court did not rule on a claim of gender discrimination or hostile environment. Plaintiff's complaint does not contain a cause of action for gender discrimination, nor does it make any allegations that Mr. Litton was treated differently than any female employee. CP 1-19. Additionally, plaintiff did not raise gender discrimination as an issue in his response to plaintiff's motion for summary judgment. CP 44-63. Plaintiff has provided this court with no evidence of gender discrimination. The summary judgment should be affirmed.

Plaintiff also contends that, "the court knew or should have known that Mr. Litton did not plead disparate treatment or intentional discrimination." Brief of Appellant, p. 8. This contention is directly contradicted by plaintiff's memorandum in opposition to the District's motion for summary judgment in which plaintiff states that his complaint alleged a cause of action for "Racial Discrimination RCW 49.60" and he argued, "Clover Park School District is not entitled to summary judgment because Mr.

Litton has established a prima facie case under disparate treatment. ...” CP 44 Defendant’s motion for summary judgment addressed the claims of racial discrimination and disparate treatment which were contained in plaintiff’s complaint and the trial court properly dismissed those claims.

Moreover, defendant also addressed new allegations of hostile working environment raised by Mr. Litton in his response to defendant’s motion for summary judgment. Defendant submitted a supplemental declaration of Molly Click which responded to each of those allegations by stating the legitimate, non-discriminatory reasons for her actions and also explaining how Mr. Litton had not been treated differently than other employees in any of those situations based on his race. Mr. Litton acknowledged that he was treated the same as Mr. Marcus, who is Caucasian. On this appeal, Mr. Litton is not alleging that there are material issues of fact. His only contention, that the court did not address his hostile working environment allegation, is incorrect.

Additionally, defendant pointed out that the only adverse employment action which plaintiff had experienced was the termination of his employment. Defendant provided substantial evidence that the reason for the termination of plaintiff’s

employment was solely Mr. Litton's work performance and provided evidence that the decision was not based upon his race. The District also pointed out that there was no issue over the fact that Mr. Litton was replaced by another employee in his same protected class. That fact alone is sufficient to show that plaintiff cannot establish a prima facie case of discrimination. Where plaintiff cannot establish a prima facie case of discrimination, "defendant is entitled to prompt judgment as a matter of law." *Hill v. BCTI Income Fund I*, 144 Wn.2d 172, 181, 20 P.3d 440 (2001).

5. The Court Should Award Costs and Attorneys'

Fees to Defendant Under RAP 18.9.

Sanctions against plaintiff and/or plaintiff's counsel, Brenda J. Little, are appropriate under RAP 18.9 which provides in pertinent part:

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purposes of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

Sanctions are appropriate here because plaintiff's appeal is frivolous.

The Washington Supreme Court defined a frivolous appeal in *State, Ex. Rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) as follows:

We have repeatedly noted:

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal.

Presidential Estates Apartment Assocs. v. Barrett, 129 Wn.2d 320, 330, 917 P.2d 100 (1996) (quoting *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990)); *State v. Rolax*, 104 Wn.2d 129, 136, 702 P.2d 1185 (1985).

In addition to the definition of a frivolous appeal as stated by the Court in *Verharen*, the appellate court also takes into consideration the following factors in response to a request for attorneys' fees under RAP 18.9:

(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous shall be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous.

Marriage of Wagner, 111 Wn. App. 9, 18, 44 P.3d 860 (2002).

Here, consideration of those factors, even resolving all doubts in favor of the appellant, should result in the Court finding that Mr. Litton's appeal meets the definition of frivolous. He has

failed to provide the court with any record upon which a *de novo* review could be conducted. He has failed to identify any material issues of genuine fact which would be the basis for the trial court denying defendant's motion for summary judgment. Mr. Litton assigns error to dismissal of his claim of outrage, but abandons that assignment by failing to provide any argument or evidence in support of that assignment. He contends that he was denied his due process right to jury trial because the court heard defendant's motion for summary judgment on a date after the deadline for hearing dispositive motions where the trial court itself scheduled that date because of congestion of its docket.

Further, Mr. Litton argues that the court did not have good cause for rescheduling the hearing because it failed to control its own docket. Mr. Litton also argues that he received no notice of the hearing when, in fact, he acknowledges in his brief that he did receive notice of the motion and the original hearing date and he appeared at the hearing through counsel and raised no objection to the motion being heard at that time.

Mr. Litton also contends that he did not make an intentional racial discrimination or disparate treatment claim under RCW 49.60 when, in fact, both his complaint and his pleadings in

response to the motion for summary dismissal do make such allegations. Finally, he contends that the court failed to hear his allegations of gender discrimination and hostile environment. The court did hear and address the claims of hostile environment. He has provided no evidence showing that there are genuine issues of material fact with regard to that claim. His complaint does not contain a cause of action for gender discrimination, nor does it contain any factual allegations which would support such a claim. Moreover, Mr. Litton did not raise, either at the trial court or in his appeal to this Court, any facts which would support a claim of gender discrimination. An award of attorneys' fees and costs as sanctions under RAP 18.9(a) is appropriate here.

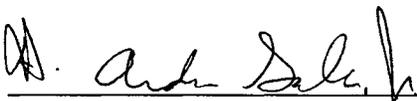
E. CONCLUSION

Respondent Clover Park School District requests the court to affirm the trial court's order granting summary judgment dismissal and to order plaintiff's counsel to pay all of respondent's

attorneys' fees and costs incurred on this appeal as sanctions under
RAP 18.9(a).

RESPECTFULLY SUBMITTED this 28th day of
September, 2009.

VANDEBERG JOHNSON &
GANDARA, LLP

By 
H. Andrew Saller, Jr., WSBA#12945
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct:

That on September 28, 2009 I caused to be delivered a true and correct copy of each of the following:

1. Brief of Respondent Clover Park School District.

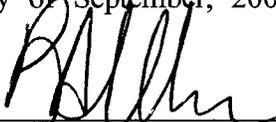
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600 First Avenue South, Suite 332
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by the following methods:

Via electronic mail to Brenda J. Little; and by

Delivering a copy to Legal Messenger Service, Inc., via same day delivery, with appropriate instructions to deliver the same to the person identified above.

DATED this 28th day of September, 2009, at Tacoma, Washington.



Rachel A. Schweinler

BY _____
STATE OF WASHINGTON
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