

08-5598

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SHARON TURNBULL SYBRANDT,)	
)	
Plaintiff-Appellant,)	
)	
Vs.)	Appeal from the United
)	States District Court
HOME DEPOT, U.S.A., INC.,)	for the Middle District
)	of Tennessee, Case No.
Defendant-Appellee.)	3:07-cv-00031

BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Table of Authorities	ii
Statement in Support of Oral Argument	iii
Jurisdictional Statement	1
Statement of the Issue	2
Statement of the Case	2
Statement of the Facts	4
Summary of Argument	10
Standard of Review	11
Argument	14
Conclusion	16
Certificate of Compliance	17
Certificate of Service	18

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 343, 106 S.Ct. 2072,
 91 L.Ed.2d 202 (1986).....14

Kline v. TVA, 128 F.3d 337 (6th Cir. 1997).....13

Little Caesar Enterprises, Inc. v. OPPCO, LLC,
 219 F.3d 547 (6th Cir. 2001).....11

Manzer v. Diamond Shamrock Chemical Co.,
 29 F.3d 1158 (6th Cir. 1994).....12,13,16

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S.133, 120 S.Ct.
 2097, 147 L.Ed.2d 105 (2000).....13,16

St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 113 S.Ct. 272,
 125 L.Ed.2d 407.....12

Wexler v. White’s Fine Furniture, Inc., 317 F.3d 564 (6th Cir. 2000)
 (en banc).....15

Wheeler v. McKinley Enterprises, 937 F.2d 1158 (6th Cir. 1991).....12

Statutes and Rules

28 U.S.C.A. 1291.....1

28 U.S.C.A. 1331.....1

42 U.S.C.A. 2000e-2(a)(1).....1,2

FRCP 56.....11

Tenn. Code Ann. 4-21-101.....1,2

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Plaintiff submits that oral argument would be of benefit to the Court and requests that counsel be permitted to argue the cause before it.

JURISDICTIONAL STATEMENT

On January 8, 2007, the Plaintiff Sharon Turnbull Sybrandt brought this action for unlawful gender discrimination in the United States District Court for the Middle District of Tennessee. The Plaintiff claims violations of both 42 U.S.C. Section 2000e-2(a)(1) and the Tennessee Human Rights Act, T.C.A. Section 4-21-101, et seq. Jurisdiction was predicated upon 28 U.S.C.A. 1331 and was not contested. (Complaint, Record Entry 1, p. 1; ROA p.9). (Answer, R.E. 4, p. 1; ROA p. 13).

On April 15, 2008, United States District Judge William J. Haynes granted Defendant Home Depot's Motion for Summary Judgment and dismissed the case with prejudice. The Order stated that it was a final order. (Order, R.E. 83, p. 1; ROA p. 498). On May 12, 2008, the Plaintiff filed her Notice of Appeal. (Notice, R.E. 84, p. 1; ROA p. 500). This Court has appellate jurisdiction pursuant to 28 U.S.C.A. 1291.

STATEMENT OF THE ISSUE

Whether the trial court erred in granting Home Depot summary judgment in this sex discrimination case when assistant store manager Sharon Turnbull Sybrandt, who was discharged because she allegedly had “created and/or modified her own special order...on or about November 30, 2005, and December 28, 2005,” produced material evidence that Home Depot knew that she had not made any entries at all in her order on November 30, 2005, and that Home Depot also knew that she had not created or modified her order on December 28, 2005.

STATEMENT OF THE CASE

Sharon Turnbull Sybrandt sued Home Depot for unlawful gender discrimination in the United States District Court for the Middle District of Tennessee on January 8, 2007. The suit seeks relief under both Title VII, 42 U.S.C.A. 2000e-2(a)(1) and the Tennessee Human Rights Act, T.C.A. Section 4-21-101, et seq. (Complaint, R.E. 1, p. 1; ROA p. 9).

Ms. Sybrandt had been serving as an Assistant Store Manager at a Home Depot store in Nashville, Tennessee. In February, 2006, Ms. Sybrandt was terminated for allegedly modifying her own special service order. (Plaintiff’s

Resp. to Def.'s SUF, R.E. 33, pp. 1, 17-18; ROA pp. 340, 356-357). Ms. Sybrandt asserts that the charge is false and a pretext for unlawful discrimination. (Complaint, R.E. p. 2, ; ROA p. 10). On November 2, 2007, Ms. Sybrandt took a voluntary nonsuit of a companion of wage discrimination claim, and an order dismissing that claim without prejudice was entered on November 7, 2007. (Notice, R.E. 26 p. 1; ROA p. 26) (Order, R.E. 28, p. 1; ROA p. 320).

On November 5, 2007, Home Depot filed a Motion for Summary Judgment. (Motion, R.E. 21, p. 1; ROA p. 29). Home Depot contends that it is entitled to judgment as a matter of law because, it claims, it is undisputed that Ms. Sybrandt failed to act with integrity and honesty and committed a Major Work Rule Violation by "creating or modifying" her own special order on November 30 and December 28, 2005. (Memorandum, R.E. 21 p. 11; ROA p. 41). However, it is undisputed that Ms. Sybrandt did not make any entries to her special order on November 30, 2005, and that the entries were made by a co-employee who entered the transaction under Ms. Sybrandt's User ID. (Def.'s Resp. to Pl.'s Statement Additional Facts, R.E. 39, p. 3, ROA p. 462). As to the events of December 28, 2005, Ms. Sybrandt did not modify her own order. Rather, she entered notes in her order requesting that authorized co-employees, "the Desk," make the modification. (Pl. Resp. to Def.'s SUF, R.E. 33 p. 10; ROA p. 349).

In considering the defendant's motion, the trial court concluded that there was no evidence that Ms. Sybrandt's sex actually motivated the termination decision and that Ms. Sybrandt had failed to identify other comparable employees who were substantially similar or nearly identical in all relevant respects of their respective circumstances. (Mem. R.E. 82, p. 6; ROA p. 491). On this basis, the trial court granted Home Depot summary judgment by final order entered on April 15, 2008. (Order, R.E. 83 p. 1, ROA p. 498). The Plaintiff filed her timely appeal on May 12, 2008. (Notice, R.E. 84, ROA p. 500).

STATEMENT OF FACTS

1. Sharon Turnbull Sybrandt's Prima Facie Case

Home Depot for purposes of its summary judgment motion concedes Sharon Sybrandt's prima facie case. (Def.'s Resp. to Pl.'s St. of Additional Facts, R.E. 39, p. 1; ROA p. 460). According to her last performance evaluation, Ms. Sybrandt, "[i]n 2004, ...has had another strong year operationally. Quarter after quarter she continues to demonstrate a high expertise in her area." (Sybrandt Dep. Ex. 14, 2004 Performance Eval.). Ms. Sybrandt's store manager, Jeff Copeland, added that Ms. Sybrandt "lives integrity...Very honest and trustworthy." (Sybrandt Rec. Appx., R.E. 36, Dep. Ex. 14; ROA p. 392).

2. Nashville

Home Depot store Loss Prevention Manager Mike Pass reviewed CCTV footage of the 100 Oaks Special Services area and determined that on November 30, 2005, a transaction was entered on Ms. Sybrandt's special order #189775 by a co-employee who entered the transaction under Ms. Sybrandt's User ID. This information was known to Home Depot before it terminated Ms. Sybrandt. (Def.'s Response to Pl.'s St. Add. Facts, R.E. 39, p. 3; ROA p. 462). On December 28, 2005, Ms. Sybrandt made notes in her own special order asking **someone else**, i.e., the Special Services "Desk" to modify her order. (Pf.'s Resp. to Def.'s SUF R.E. 33, p. 10; ROA p. 349).

On January 11, 2006, District LPM Matt Bollinger and a Human Resources supervisor named Johnna Atwill interviewed Ms. Sybrandt. Ms. Sybrandt was told that she was the subject of an investigation regarding her special order. However, Bollinger told Ms. Sybrandt that her entering a note in her order was not a problem and was not of concern to him. Bollinger accused Ms. Sybrandt of snooping in Mr. Pass's office. (Rec. Appx., Sybrandt Aff., pp. 2-3; ROA pp. 400-401). Ms. Sybrandt told Bollinger that she had been out of town on the day in question. (Sybrandt Dep., p. 307, Def. Rec. Appx., R.E. 27 p. 26; ROA p. 203).

3. Atlanta

Bollinger and Atwill faxed information to Employment Practices Manager Ed Malowney in Atlanta, who asked them to do more fact-finding. (Pl. Resp to Def.'s SUF, R.E. 33, p. 16; ROA p. 355). Malowney tried to get to the bottom of the snooping allegation, but determined that the proof was insufficient to fire Ms. Sybrandt for snooping. (Def.'s Resps. Pl.'s Add. Facts, R.E. 39, pp. 8-9; ROA 467-468). Malowney then decided to recommend that Ms. Sybrandt be terminated for modifying her own order. Ms. Sybrandt's discharge notice stated that

On November 30, 2005, and December 28, 2005, Sharon made entries to her personal order #189775, therefore violating company policy regarding special orders.

Per company policy as stated in the Manager's Code of Conduct –
Failure to Act with Integrity and Honesty:

...Creating, modifying or completing Special Services or SOSI transactions including special orders...

Sharon was in direct violation of company policy when she performed transactions in her own special order. Failure to act with integrity and honesty is considered a major work rule violation and is subject to termination. Based upon

Sharon's actions the company has made the decision to end the business relationship effective immediately. (Pl.'s Resps. Def.'s SUF, R.E. 33, pp.16-17; ROA pp. 355-356).

4. EEOC

On August 29, 2006, in response to the charge of discrimination Ms. Sybrandt filed with the EEOC, Home Depot submitted to the EEOC a report containing the following written account of the events of November 30, 2005:

As [100 Oaks store LPM Mike] Pass was investigating Ms. Turnbull's Special Order number 189775, he observed that on or about November 30, 2005, Ms. Turnbull also used her computer user identification code and password to pull up her Special Service Order 189775, and she modified and completed part of her order by notating that "customer picked up" partial merchandise listed on the order on November 30, 2005. Notably, Ms. Turnbull paid for her Special Service Order 189775 on November 27, 2005, and some of the merchandise on her order came to the store on

November 30, 2005. Instead of following company policy in having another associate modify and complete the partial pick up of the merchandise on Ms. Turnbull's order, Ms. Turnbull did this herself. Ms. Turnbull was observed exiting the store with the merchandise that she had picked up on November 30, 2005. A copy of the notation Ms. Turnbull Entered for her Special Service Order 189775 on November 30, 2005, is attached as **Exhibit L**. (Pl.'s Rec. Appx., Home Depot Resp. to EEOC charge, p. 63; ROA p. 411).

5. District Court

In the deposition given in the district court proceedings, Ed Malowney admitted that he did not have any evidence that Ms. Sybrandt had made entries to her own order on November 30, 2005. Malowney was not prepared to say that Ms. Sybrandt had made a deliberate decision not to log out on that occasion. (Rec. Appx., Malowney Dep., p. 46, R.E. 36; ROA p. 277).

With respect to the entries in her order Ms. Sybrandt made on December 28, 2005, Malowney acknowledged that Ms. Sybrandt was not undertaking to change her order herself, but was asking the "Desk" to make the change. He conceded that the entry made by Ms. Sybrandt on this occasion did not have anything to do with

dishonesty. (Malowney Dep., pp. 57-58, R.E. 36; ROA pp. 425-426). Yet Malowney testified that if Ms. Sybrandt had made a note in her order like, “Hey, Jerry, did you see the game on Saturday? Go Vols!” he would have terminated her. (Pl.’s Rec. Appx., Malowney Dep. p. 54, R.E. 36; ROA p. 424). Nothing in the Code of Conduct Rule prohibiting “creating, modifying or completing” one’s own Special Services order makes any reference to the act of making a note in one’s own order. (Def.’s Resp. Pl.’s Statement Add. Facts, R.E. 39, p. 4; ROA p. 463).

It is Ms. Sybrandt’s evidence that she never created, modified or completed her special order. Prior to serving as the Operations Assistant Store Manager in Nashville, Ms. Sybrandt had worked for several years as a Special Services Supervisor and then as the District Special Services Peer. As the Peer, Ms. Sybrandt would spend a week in Atlanta every year getting specialized training in this area. She never received any information from Home Depot that going into one’s own order was not allowed, as long as you did not create, modify or complete it. (Sybrandt Aff., pp. 1-2, Rec. Appx., R.E. 36; ROA pp. 399-400).

SUMMARY OF ARGUMENT

The dismissal of Sharon Sybrandt's case on summary judgment should be reversed because a reasonable finder of fact could conclude that Home Depot's stated ground for discharging Ms. Sybrandt - that she committed a Major Rule violation by modifying her order own special order on November 30 and December 28, 2005 - is only a pretext for unlawful gender discrimination. With respect to the entries made into Ms. Sybrandt's special order on November 30, 2005, Home Depot concedes that the entries were not made by Ms. Sybrandt at all. They were made by a co-employee who used Ms. Sybrandt's ID. As to the entry Ms. Sybrandt made on December 28, 2005, Home Depot concedes that Ms. Sybrandt did not modify her own order. Instead, she through her note asked **someone else** at Home Depot to modify her order. Although Home Depot insists that the Major Rule in question should be read to prohibit an employee from making any kind of an entry in his or her own special order, this is not the way its rule is written.

In short, Ms. Sybrandt did not commit the acts that Home Depot claimed she did. And Home Depot knew it.

STANDARD OF REVIEW

A cogent description of the standard of review of summary judgment decisions is provided in Little Caesar Enterprises, Inc. v. OPPCO, LLC, 219 F.3d 547, 550-551 (6th Cir. 2000), to wit: [we review] summary judgment decisions *de novo* using the same Rule 56 standard applied by the district court. Under that standard, a motion for summary judgment should be granted if the evidence demonstrates that there is no genuine issue as to any material fact, and that the movants are entitled to judgment as a matter of law. The court must read the evidence, and all inferences drawn therefrom, in the light most favorable to the non-moving party. Summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. The court's function is not to weigh the evidence and determine the truth of the matters asserted, but to determine whether there is a genuine issue for trial. The relevant inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. (Citations omitted).

ARGUMENT

Since there is material evidence, even undisputed evidence, that Sharon Sybrandt did not commit the acts, which Home Depot asserts led to her discharge, the summary judgment awarded to Home Depot by the trial court should be reversed.

To defeat Home Depot's motion for summary judgment and proceed to a trial of her case, Sharon Sybrandt must demonstrate that a reasonable jury could conclude that Home Depot's stated ground for terminating her – i.e., that she modified her own special order on November 30 and December 28, 2005 – is in fact a pretext for unlawful gender discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Sixth Circuit precedents have established that such a showing can be satisfied by producing material evidence that the employer's stated reason for the adverse action has no basis in fact, or that the reason offered was not the actual reason, or that the stated reason was insufficient to explain the employer's action. Wheeler v. McKinley Enterprises, 937 F.2d 1158, 1162 (1991). Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (1994). In addition, the Supreme Court has held that summary judgment may not be appropriate where the plaintiff has established a prima facie case of discrimination and a reasonable

finder of fact could conclude that the employer's stated reason for taking the adverse employment action is not credible. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). See, also, Kline v. TVA, 128 F.3d 337, 347 (6th Cir. 1997), which is to the same effect.

In the present case, Sharon Sybrandt has put forth ample material evidence that could lead a reasonable jury to conclude that she did not commit the acts attributed to her. To use the definition provided by the Sixth Circuit in Manzer, supra, this means that the alleged misconduct "never happened" and is "factually false." 29 F.3d at 1084 (citations omitted). Here, Home Depot has conceded that the entries made into Ms. Sybrandt's special order on November 30, 2005, were not made by Ms. Sybrandt, but by a co-employee. (Def.'s Resp. Pl.'s Add. Facts, R.E. 39, p. 3; ROA p. 462).

There is not the slightest suggestion from Home Depot that the transaction videotaped on November 30, 2005, depicted anything more than an employee who had forgotten to log off the computer before her special order was processed by a co-employee who had forgotten to log on. With respect to the entries Ms. Sybrandt made on December 28, 2005, it is clear that Sharon was not modifying her order herself, but asking the [Special Services] Desk to make the modification

in the order. “DESK>>>>PLEASE CANCEL RO8-R13 AND REFUND BACK TO MY HD CARD...” (Resp. to Def. SUF, p. 10,R.E. 33; ROA p. 349). Sharon Sybrandt is entitled to having this evidence construed in the light most favorable to her, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2072, 91 L.Ed.2d 202 (1986), and the most legitimate inference to be drawn from this evidence is that she did not on either date modify her own special order.

The only argument Home Depot can muster on this point is to assert that the rule is broader than it is written. Home Depot could have written a rule that imposed discipline when a co-employee accidentally made entries under another employee’s User ID, but it didn’t. Home Depot could have written a rule that imposed discipline for entering one’s own special order to ask an authorized co-employee to modify it, but Home Depot didn’t do that, either. Given that the rule in question appears in the, “Failure to Act with Integrity & Honesty,” section of the Home Depot Code of Conduct, and given that these acts that are attributed to Ms. Sybrandt do not have anything to do with dishonesty, Home Depot’s interpretation of its rule seems more than strained.

Moreover, Home Depot failed to disseminate its interpretation of the rule. Ms. Sybrandt had years of experience as an Operations Assistant Manager and had had previous experience and training as a Home Depot Special Services Supervisor and District Special Services Peer. No one ever informed her that going into one's own order to enter a note was not allowed, and District LPM Matt Bollinger had told Ms. Sybrandt that there was no problem with it. (Sybrandt Aff., pp. 2-3, Rec. Appx., R.E. 36; ROA pp. 399-400).

Collaterally, Home Depot's decision to apply this rule to terminate Sharon Sybrandt under these facts is unfair and extreme. The reasonableness, or lack thereof, of an employer's decision may be considered to the extent that such an inquiry sheds light on whether the employer's stated reason for the employment action was its actual reason. Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 576 (6th Cir. 2003)(en banc).

Thus, a reasonable jury could find pretext not only because the charges against Sharon Sybrandt had no basis in fact, but also because the events of November 30 and December 28, 2005, did not provide the actual reason why Sharon Sybrandt was discharged. Disbelief of Ed Malowney on this point, coupled with Sharon Sybrandt's prima facie case, give rise to a finding of pretext under the

authority of Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) and Kline v. TVA, 128 F.3d 337 (6th Cir. 1997), supra. Indeed, the nature of Ms. Sybrandt's actions on those two dates, forgetting to log out of her User ID and entering notes asking others to modify her order, fall so far short of failing to act with integrity and honesty that a reasonable finder of fact could conclude that pretext is established because the acts were insufficient to support a termination decision.

Finally, with respect to the decision of the trial judge, Sharon Sybrandt respectfully submits that the court imposed a greater burden of establishing pretext than is required under the published authority cited herein. In the present case, Ms. Sybrandt has produced evidence that meets the standards set forth in Reeves and Manzer, supra, and, in this case, the existence of the plaintiff's prima facie case is conceded for motion purposes.

CONCLUSION

For the reasons set out hereinabove, this Court should reverse the grant of summary judgment awarded to Home Depot and the taxation of costs against Ms. Sybrandt, and remand this case for trial on the merits.

Respectfully submitted,

/s/August C. Winter

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies compliance with F.R.A.P. 32, as this brief contains 3,403 words.

/s/August C. Winter

August C. Winter

CERTIFICATE OF SERVICE

I certify service on defense counsel via the Court's ECF filing system on this the 10 day of November, 2008.

/s/August C. Winter

August C. Winter

