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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

DORITA HERD, Plaintiff/Appellant, vs. STATE OF OKLAHOMA, ex rel. OKLAHOMA DEPARTMENT OF VETERANS AFFAIRS, Defendant/Appellee.	)	Case No. 122,193

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE SHEILA STINSON, DISTRICT JUDGE

AFFIRMED

Daniel Gamino
DANIEL J. GAMINO & ASSOCIATED, P.C.
Oklahoma City, Oklahoma — For Plaintiff/Appellant

Katie A. Wilmes
ASSISTANT ATTORNEY GENERAL
Oklahoma City, Oklahoma — For Defendant/Appellee

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Dorita Herd appeals the district court's grant of summary judgment against the claims of wrongful discharge, workplace bullying and hostile work environment, and failure to maintain a safe workplace that she brought against the Oklahoma Department of Veterans' Affairs (ODVA). On review, we affirm the judgment of the trial court.

BACKGROUND

Ms. Herd was employed by the ODVA as a construction programs administrator. Her position was unclassified, and her continued employment was thus, "at-will." She spent most of her recent employment working on a project known as the Sallisaw Veteran's Home Project. Ms. Herd and higher-ups in the ODVA disagreed substantially as to the appropriate budget, construction and finishing standards, and means of funding for this project. Their discussions about the project evidently became heated at times. Notably, Ms. Herd alleged that the OVDA executive director stated that he would "push her off a bridge before I take the blame for being over budget" on the project.

In July 2020, Ms. Herd was discharged from employment by the ODVA. In January 2021, she filed a notice of tort claim with the Oklahoma Office of Management and Enterprise Services (OMES). The claim asserted that she was subject to a public policy exemption from at-will employment if discharged for refusing to participate in an illegal activity; performing an important public obligation; exercising a legal right or interest; exposing some wrongdoing by the employer; or performing an action that public policy would encourage. She further alleged that she had a constitutionally protected interest in her employment with the ODVA. She also raised claims of "workplace bullying" and "failure to maintain a safe workplace." This tort claim was denied by the OMES.

In May 2021, Ms. Herd filed suit. In her original petition, Ms. Herd raised the following claims: 1) wrongful discharge; 2) being subject to a hostile work environment; and 3) failure to provide a safe workplace. In an amended petition,

she added claims that she had been dismissed on the basis of race and also alleged bullying and a hostile work environment on the basis of her race. In a second amended petition, she included her prior notice of tort claim.[1]

In December 2023, the ODVA filed a motion for summary judgment. The motion was largely based on the premise that Ms. Herd's claims for wrongful discharge and hostile work environment were based on racial discrimination only, and that she was required to exhaust an administrative remedy on these claims. It also argued that GTCA notice was insufficient on the unsafe workplace claim because the claim was based on Ms. Herd allegedly being forced to work in the office during the Covid-19 pandemic, and also that, even if properly noticed, she could not prevail on this claim as matter of law. The motion also argued that no public policy exemption to at-will state employment was applicable here.

Ms. Herd responded alleging the following facts and law were in controversy.

1. Her discharge contravened the public policy set out in 72 O.S. § 229.1.
2. Her discharge contravened public policy as an "act of retaliation."
3. The failure to provide a safe workplace contravened public policy.
4. The hostile work environment claim was not based solely on race, but on "age race and disability" and also on harassment/humiliation by supervisors.
5. Requiring Ms. Herd to work on site during the Covid epidemic when she was a cancer survivor and had a medical need to work

[1] The time frame was extended by the ODVA filing dismissal motions, and a period of one year in which there was no apparent activity in the case.

remotely contravened public policy and contravened 40 O.S. § 403.

6. The ODVA's failure to "establish a dynamic program of health and safety education and training" contrary to 40 O.S. § 413 contravened public policy and created an unsafe workplace.

The trial court granted summary judgment to ODVA, making the following findings:

1. Plaintiff has asserted claims for l) Wrongful Discharge, 2) Hostile Work Environment, and 3) Failure to Provide a Safe Workplace.
2. Based on Plaintiff's testimony, her wrongful discharge and hostile work environment claims are based on discrimination due to race and disability.
3. The Court finds Plaintiff was required and failed to exhaust her administrative remedies under the Oklahoma Anti-Discrimination Act, 25 O.S. § 1350(B).
4. The Court finds Plaintiff was required and failed to seek relief from the Oklahoma Merit Protection Commission under the Oklahoma Personnel Act. 74 O.S. § 840-2.9.
5. The Court finds Plaintiff was required, and failed, to properly notify Defendant of the general circumstances of her ultimately claimed loss through her Governmental Tort Claims Act Notice. The Notice addressed workplace bullying and intimidation. It did not address COVID-19 precautions or pre-existing conditions. Additionally, Plaintiff testified she did not suffer injury or damages due to the workplace conditions.
6. Plaintiff's claims do not meet any public policy exception as addressed in *Burk v. K-Mart Corp.,* 1989 OK 22.

Ms. Herd now appeals this judgment.

STANDARD OF REVIEW

A trial court's decision on summary judgment is purely legal: whether a party is entitled to judgment as a matter of law because there are no material disputed facts. *Carmichael v. Beller,* 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. Our standard of review, therefore, is *de novo. Id.* Even if the material facts are

undisputed, a motion for summary judgment must be denied if a reasonable person could reach a different inference or conclusion from the undisputed facts. *Buckner v. Gen. Motors Corp.,* 1988 OK 73, ¶ 30, 760 P.2d 803, 812. We draw all inferences in favor of the party opposing the motion. *Davis v. Leitner,* 1989 OK 146, ¶ 9, 782 P.2d 924, 926. To withstand appellate scrutiny, a summary judgment must be based on "evidentiary materials [that] as a whole (a) show undisputed facts on some or all material issues and (b) ... support but a single inference in favor of a successful movant's quest for relief." *Gray v. Holman,* 1995 OK 118, ¶ 11, 909 P.2d 776, 781 (emphasis omitted).

ANALYSIS

Title 25 O.S. § 1350(B) states:

> In order to have standing in a court of law to allege discrimination arising from an employment-related matter, in a cause of action against an employer for discrimination based on race, color, religion, sex, national origin, age, disability, genetic information with respect to the employee, or retaliation, an aggrieved party must, within one hundred eighty (180) days from the last date of alleged discrimination, file a charge of discrimination in employment with the Attorney General's Office of Civil Rights Enforcement or the Equal Employment Opportunity Commission alleging the basis of discrimination believed to have been perpetrated on the aggrieved party. Upon completion of any investigation, the Attorney General's Office of Civil Rights Enforcement may transmit the results of any administrative hearing and determination to the Equal Employment Opportunity Commission or issue the complaining party a Notice of a Right to Sue.

The statue is clear that Ms. Herd's claims of employment-related maltreatment or dismissal based upon race, color, religion, sex, national origin, age, or disability must be filed with the Attorney General's Office of Civil Rights Enforcement or the Equal Employment Opportunity Commission within one hundred eighty

days from the last date of alleged discrimination, and that this filing and process is a prerequisite to suit. We find no indication in the record that Ms. Herd did so.

The next question is, therefore, whether Ms. Herd brought claims outside of those statutorily barred by her lack of filing with either the Attorney General's Office of Civil Rights Enforcement or the Equal Employment Opportunity Commission. In her response to ODVA's motion for summary judgment, she offers several possibilities. We will examine each separately.

Contravention of the Public Policy of 72 O.S. § 229.1

Title 72 O.S. § 229.1 provides for the establishment of "two long-term care facilities" and that one of the facilities "shall be located within or near the corporate limits of the City of Sallisaw." The only apparent public policy in § 229.1 that interacts with Ms. Herd's work is in subsection (F)(4), which requires certain proceeds to be used, among other things, "[t]o complete the state match for a grant offered under the State Veterans Home Construction Grant Program of the United States Department of Veterans Affairs." Ms. Herd believed that the best procedure was for the state to attempt to match a $90,000,000 grant with state funds. ODVA officials evidently disagreed and sought to use only a $48,000,000 grant. Ms. Herd believed that this amount was insufficient to construct the veteran's home to an acceptable standard. This disagreement was a prime source of tension during her employment. We find however, no public policy in § 229.1 regarding the appropriate level of funding or building, or what size grant the state

was required to accept, or match. We find no error in the summary judgment on this basis.

Discharge Contravening Public Policy as an "Act of Retaliation"

Outside of matters involving workers' compensation, the Supreme Court has "recognized a very limited public policy exception to the employment-at-will doctrine. That exception can be triggered when a plaintiff alleging a *Burk* tort identifies a well-defined, clear, and compelling Oklahoma public policy that is 'articulated by constitution, statutory or decisional law.'" *Ho v. Tulsa Spine & Specialty Hosp., L.L.C.*, 2021 OK 68, ¶ 2, 507 P.3d 673, 685 (quoting *Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24). "The types of clear and compelling public policy exceptions recognized by this Court that bar termination are gender discrimination, racial discrimination, age discrimination, retaliation for reporting crimes, and prohibition from working while infected with a communicable disease." *Id.* ¶ 2. Ms. Herd's claims for gender discrimination, racial discrimination, and age discrimination are barred by her failure to follow the jurisdictional prerequisites of 25 O.S. § 1350 (B). This leaves "retaliation for reporting crimes," as there is no indication that Ms. Herd herself had a communicable disease. Even if the ODVA's funding decisions were questionable or plainly wrong—and we make no such finding here—we find no indication or evidence that they were, in any way, criminal. We find no error in the summary judgment on this claim.

Failure To Provide a Safe Workplace Contravening Public Policy

Ms. Herd argues generally that an employer's duty to provide a safe working environment—which the Supreme Court has directly recognized on occasion, *see e.g., Farley v. City of Claremore*, 2020 OK 30, ¶ 35, 465 P.3d 1213, 1231 (superseded by statute on other grounds)—supports her claim for wrongful discharge or otherwise constitutes the basis for tort liability here. We disagree. While the Supreme Court has made this general statement, it has never recognized that the failure to provide a safe or pleasant working environment overcomes the doctrine of at-will employment generally. *See, e.g., Anderson v. Oklahoma Temp. Servs., Inc.*, 1996 OK CIV APP 90, ¶ 16, 925 P.2d 574, 578 (denying an employee's wrongful discharge claim based on general allegations of "'an intolerable, offensive and degrading work environment'" because the employer's conduct did "not rise to the level of outrageous conduct, and [was] not otherwise unlawful") (citing *Burk v. K-Mart Corp.*, 1989 OK 22, ¶ 17, 770 P.2d 24, 28)). *See also Ho*, 2021 OK 68, ¶ 6 (Rowe, J., dissenting) (noting that neither *Silver v. CPC-Sherwood Manor, Inc.*, 2004 OK 1, 84 P.3d 728 nor *Moore v. Warr Acres Nursing Center, LLC*, 2016 OK 28, 376 P.3d 894 "established a duty on behalf of an employer to provide a reasonably safe workplace"). Rather, as noted above, the Court has required "a clear mandate of public policy as articulated by constitutional, statutory or decisional law." *Burk*, 1989 OK 22, ¶ 17. We decline Ms. Herd's invitation to expand this doctrine and will thereby focus on her references to specific positive law.

The only statutory authority cited by Ms. Herd for a public policy on safe workplaces appears to be 40 O.S. § 413, part of the Oklahoma Occupational Health And Safety Standards Act, (OOSHA). It states:

> A. Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, commensurate with the Occupational Safety and Health Act of 1970.
>
> B. No person shall discharge, discriminate or take adverse personnel action against any employee because such employee has filed any complaint, or instituted or caused to be instituted any proceeding under or related to this act, or has testified or is about to testify in any such proceeding, or because of the exercise by such employee on behalf of himself or herself or others of any right affected by this act.

Id. We find no evidence that Ms. Herd alleged harm from any recognized hazard covered by the OOSHA. We further find no evidence that Ms. Herd "filed any complaint or instituted or caused to be instituted any proceeding under or related to this act or has testified or is about to testify in any such proceeding" regarding workplace safety. She must therefore allege that she was fired "because of the exercise by such employee on behalf of himself or herself or others of any right affected by this act." At no time did she allege, however, that she attempted to exercise some right granted by the OOSHA. We find no error in the summary judgment under this argument.

This leads to the next claim that requiring Ms. Herd to work on-site during the Covid pandemic when she was a cancer survivor with a compromised immune system contravened public policy. Exhibit 6 of ODVA's motion for

summary judgment contains emails on this subject. On May 11, 2020, Ms. Herd wrote to supervisor Stacy Spencer:

> I propose that we continue to cover the office as we have been in the past few weeks. We have been coming to the office one to two times per week (Nish on Mondays or Thursdays and I've been coming in on Tuesdays or Fridays). We would also be in to meet with contractors or OMES facilities as required. Additionally, I think it would be best that in (sic) wear a mask when in the office or interacting with others and I will encourage Nisha to do the same.

The same afternoon, Ms. Spencer replied:

> I have reached a decision point for your condition. You have offered to come into the office one day per week and attend all necessary meetings that may arise. The remainder of your week will be covered by telework. That proposal is accepted and will run for the next two weeks, at which point we'll reassess the environment and determine if a change is needed.

In response, Ms. Herd testified in her deposition that she was, however, later required to be in the office considerably more than the agreed-on one day a week by two persons identified as "Joel or Sarah." Although ODVA describes this as an "unsupported assertion" it is not inherently incredible, and ODVA did not provide any records or testimony showing that Ms. Herd was only required to attend as per the agreement. As such, this does remain a disputed question of fact.

However, even though there is a question of fact whether Ms. Herd was required to be in the office more days that she agreed, this is immaterial unless requiring her attendance somehow breached public policy. In short, Ms. Herd asks us to find a public policy that forbids an employer from requiring an employee immuno-compromised by prior cancer treatment to attend an office in times of high potential Covid infection.

In *Ho*, a nurse was fired for refusing to come in to work when her employer was allegedly conducting elective surgeries in violation of the Governor's directive to discontinue them for a short time during the Covid-19 pandemic and was refusing to provide her with proper personal protective equipment. 2021 OK 68, ¶ 0 (syllabus). The Court found that the Governor's order halting elective surgeries expressed the established public policy of curtailing an infectious disease from March 24, 2020, until April 30, 2020. *Id.* ¶ 8. "Although the orders were short-lived, they expressed public policy at the time." *Id.* ¶ 25. In this case however, the work period of which Ms. Herd complains did not begin until "several weeks" after May 11, 2020.

More fundamentally, we find that *Ho* is not applicable to this situation. Its specific finding of a temporary public policy was grounded entirely in a short-term emergency order that was not in effect during the relevant period of this case. And further, although it identified a broad public policy that prohibited an employer from requiring an employee to work in a public setting "while infected with a communicable disease," *id.* ¶ 2, Ms. Herd effectively asks us to expand this public policy in the other direction. That is, to recognize a public policy prohibiting an employer from requiring an employee to work in a public setting where another employee may be infected with a communicable disease.

Public policy exceptions apply to only a narrow class of cases and must be tightly circumscribed. *Burk*, 1989 OK 22, ¶ 118, 770 P.2d at 28-29. Such an expansion as Ms. Herd seeks here would create a nebulous public policy that would be impossible to define. It is always *possible* that an employee may

contract a communicable disease in the workplace. The question of when that possibility becomes so great that public policy requires some restriction is better left to the legislature and lawful executive orders. As such we find no basis to expand *Ho*, as Ms. Herd's theory requires. We find no error in the summary judgment in this regard.

Hostile Work Environment

The phrase "hostile work environment" arises most often in the context of hostility directed on the basis of race, color, religion, sex, national origin, age, or disability. *See e.g., Fulton v. People Lease Corp.*, 2010 OK CIV APP 84, ¶ 56, 241 P.3d 255, 268. Such cases often claim that the harassment constitutes a constructive discharge against public policy. *Id.* In other cases, it arises as a claim that an employer either deliberately created a hostile work environment or knowingly allowed the environment to be so hostile that it supports a claim for intention infliction of emotional distress. *See Chenoweth v. City of Miami*, 2010 OK CIV APP 91, ¶ 7, 240 P.3d 1080, 1082. For a hostile work environment based on harassment due to sex or another protected class to be actionable, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405, (1986), (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). In cases outside Title VII or equivalent state law, cases typically use the standard that the conduct must be extreme and outrageous.

As we previously noted, any claims of a hostile environment motivated by race, color, religion, sex, national origin, age, or disability fail because of Ms. Herd's failure to meet the jurisdictional prerequisite of a complaint filed with the EEOC or the Attorney General's Office of Civil Rights Enforcement. This leaves only the following claims that do not appear to be based on a specific protected status or characteristic.

> 1. ODVA "harassed" Ms. Herd by requiring her to report to a representative of a consultant, a non-state employee, instead of the executive director.
>
> 2. The ODVA executive director "stopped responding" to Ms. Herd's emails, forcing her to take her concerns to him in person.
>
> 3. The ODVA executive director threatened Ms. Herd that he would "push [her] off a bridge before I take the blame for being over budget."
>
> 4. Ms. Herd was "placed on the defensive" about her work performance because she was "denied clarity and could not obtain answers" from other involved parties.

Doc. 2, Objection to Motion for Summary Judgment, 5-6.

Even accepting that these actions occurred as described and accepting Ms. Herd's argument that they were occasioned by some hostile intent, we find it clear that they do not rise to the pervasive level required under Title VII cases or the level of outrageous conduct required in other hostile work environment cases.[2] We find no error in the summary judgment on this claim.

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[2] *See e.g., Morris v. City of Colorado Springs*, 666 F.3d 654, 666 (10th Cir. 2012) (upholding district court's grant of summary judgment against employee although employee was hit on the head twice by her co-worker, had human tissue thrown at her, and her co-worker, on several occasions, yelled at her and made demeaning comments); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365–66 (10th Cir. 1999) (concluding that "five separate incidents of allegedly sexually-oriented, offensive comments either directed to [the plaintiff] or made in her presence in a sixteen month period" were not sufficiently pervasive to support a hostile work environment claim);

Retaliation

Ms. Herd also alleged that she was discharged in retaliation. Her response to summary judgment did not clearly detail what acts her discharge was in retaliation *for*, but it appears to have been because she was at odds with other employees as to the proper funding and construction of the project. Oklahoma is an at-will employment state, and the law generally permits an employer to discharge an employee for any non-prohibited reason. Oklahoma recognizes exceptions to that doctrine, in the form of claims for wrongful termination or retaliatory discharge, only "where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy." *Burk*, 1989 OK 22, ¶ 19. As we have previously found, no public policy is implicated here. We find no error in the summary judgment on this claim.

Failure To "Establish a Dynamic Program of Health and Safety Education and Training" Contrary to 40 O.S. §413

Title 40 O.S. § 413 provides:

The following is declared to be the public policy of the state:

> Occupational accidents produce economic and social loss, impair productivity and retard the advancement of standards of living. Both humane and economic considerations recommend the establishment and implementation of effective injury control measures. A unified, continuing, professional effort is required. A dynamic program of health and safety education and training is the best-known solution to the control of occupational accidents.

We find no record that Ms. Herd suffered any "occupational accident" related to § 413, nor any mandate that the ODVA establish a specific "dynamic

program of health and safety education and training." We find no error in the summary judgment on this basis.

CONCLUSION

The at-will rule provides that an employer may discharge an employee for no cause, or even for a cause that is morally wrong, without being guilty of a legal wrong. *Ho*, 2021 OK 68, ¶11. This is tempered by the rule that disapproves of workplace employment actions that contravene public policy. We find no public policy that is offended by Ms. Herd's discharge in this case. As such, we affirm the decision of the district court with no need to address either the court's findings that GTCA notice was insufficiently descriptive or that Ms. Herd, an unclassified employee, had relief available for all her claims from the Oklahoma Merit Protection Commission.

AFFIRMED.

HUBER, P.J., concurs, and HIXON, J., concurs specially.

HIXON, J., concurring specially:

I concur in the Majority opinion but write separately to clarify potential confusion which could arise with regard to the Court's discussion of Ms. Herd's claim for wrongful termination based on an alleged failure to provide a safe workplace.

The Oklahoma Supreme Court has recognized that an employer owes a duty to provide an employee with a reasonably safe workplace more than just occasionally. It has recognized this general duty repeatedly, for more than a century. *See generally Neely v. Southwestern Cotton Seed Oil Co.*, 1903 OK 88,

75 P. 537 (syllabus 3); *Chicago, I.R. & P. RY. Co. v. Wright*, 1913 OK 500, ¶ 0, 134 P. 427 (syllabus 1); *Kansas City Bridge Co. v. Gravitt*, 1940 OK 334, ¶ 0, 105 P.2d 767 (syllabus 3); *Chap-Tan Drilling Co. v. Myers*, 1950 OK 405, ¶ 5; 225 P.2d 373; *Healing Waters, Inc. v. McCracken*, 1960 OK 49, ¶ 14, 450 P.2d 295; *McClendon v. McCall*, 1971 OK 123, ¶ 11, 489 P.2d 756; *Horst v. Sirloin Stockade, Inc.*, 1983 OK 58, ¶ 4, 666 P.2d 1285, *disapproved on other grounds in Lay v. Dworman*, 1986 OK 85, 732 P.2d 455; *Bird v. Pruett's Food, Inc.*, 2023 OK 92, ¶ 10, 536 P.3d 578.

However, the Oklahoma Supreme Court has not recognized a wrongful discharge claim based on a breach of this duty. Rather, noted by Justice Rowe's dissent in *Ho v. Tulsa Spine & Specialty Hosp., L.L.C.*, 2021 OK 68, ¶ 507, P.3d 673 (Rowe, J., dissenting), the Oklahoma Supreme Court has required "specific public policies, expressed in statute and regulations, which were undermined by [the employee's] firing," to support a claim. *Id.* at ¶ 6. While the dissent recognized that neither *Silver v. CPC-Sherwood Manor, Inc.*, 2004 OK 12, 84 P.3d 728 nor *Moore v. Warr Acres Nursing Center, LLC*, 201 OK 28, 376 P.3d 894 "established a duty on behalf of an employer to provide a reasonably safe work place," it is clear when read in context that the dissent does not suggest an employer's duty to provide a reasonably safe workplace is in question, or is not well-established under Oklahoma law. Rather, neither *Silver* nor *Moore* were decided upon or even discussed such a duty. They concerned specific statutes or regulations which the Court found expressed clear statements of public policy that could support a wrongful discharge claim, should the employee refuse to violate them.

See Silver, 2004 OK 1, ¶ 4.[3] For this reason, to the extent Ms. Herd's wrongful discharge was a claim based on an employer's general duty of care to the employee to provide a safe workplace, it is not viable.

December 23, 2023

[3] *Silver* concerned a nursing home cook's termination after refusing to work while sick and vomiting. The Court found 63 O.S.2001, § 1-1102(a), (c) and 1-1109(a)(4) articulated a public policy against holding, preparing or delivering food prepared in conditions where it may have been rendered diseased, unwholesome or cause injuries to health, which could support a wrongful discharge claim. *Moore* reached a similar conclusion regarding a licensed practical nurse who was terminated after missing work while infected with influenza, based on a host of specific state and federal laws regarding infectious disease control.