



Cimbalo v. BASF Corporation

2022 | Cited 0 times | W.D. Kentucky | March 8, 2022

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF KENTUCKY

LOUISVILLE DIVISION KERRY CIMBALO, Plaintiff, v. Civil Action No. 3:21-cv-309-DJH BASF CORPORATION, Defendant.

***** MEMORANDUM OPINION AND ORDER Plaintiff Kerry Cimbalo alleges that Defendant BASF Corporation, her former employer, retaliated against her for her opposition to race, gender, and sexual-orientation discrimination. (Docket No. 5, PageID # 41 43) Cimbalo also asserts that BASF discriminated against her based on her gender. (Id., PageID # 1

(D.N. 7-1) For the reasons explained below, the Court will deny motion.

I. [s] the facts only from the complaint, accepting them as true as [it] must do in reviewing a Rule Siefert v. Hamilton Cnty., 951 F.3d 753, 757 (6th Cir. 2020). BASF employed Cimbalo from October 2019 until her termination in March 2021. (D.N. 5, PageID # 40 41) As an employee, overseeing human resources and labor relations for Quincy, Florida site. (Id., PageID # 40) In July 2020, Cimbalo complained to her supervisor Fannie Milton that Daniel Dustin, a manager at the Quincy site, Id.) Specifically, Cimbalo told Milton that Dustin was

1 original complaint. (D.N. 4) The Court will deny this motion as moot.

Refusing to permit his subordinates at the site to observe a moment of silence for Laying off a disproportionate number of Black, female employees in a reduction of force move; Investigating Black, female employees when they were off duty; Expressing a refusal to fly a gay pride flag at the site; [and] Refusing to implement a diversity inclusion and infrastructure plan at the site. (Id.)

Milton initially failed to address Cim . (Id.) Consequently, Cimbalo . (Id., PageID # 41) Milton then initiated an investigation into allegations. (Id.) During the investigation, BASF terminated Cimbalo (Id.) Cimbalo concedes that she received a written warning prior to her termination

but asserts that for more serious violations than alleged violation. (Id., PageID # 41, 44) Instead of terminating these two employees, BASF increased their pay. (Id., PageID # 44)

Cimbalo initiated an action in state court in April 2021 (D.N. 1-1), which BASF removed to this Court. (D.N. 1) Cimbalo then filed an amended complaint, alleging retaliation and gender



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discrimination in violation of the Kentucky Civil Rights Act, Ky. Rev. Stat. § 344 et seq. (D.N. 5) BASF now moves to dismiss amended complaint. (D.N. 7-1)

II. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

Id. Factual allega

statements as true. *Id.* -pleaded facts do not permit the court to infer 8 and will not withstand a motion to dismiss. *Id.* at 679. -pleaded factual

allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id.* A. Retaliation Cimbalo alleges that BASF retaliated against her, in violation of the KCRA, for refusing to take part in and opposing race, gender, and sexual-orientation discrimination. (D.N. 5, PageID # 41 43) The KCRA prohibits retaliation or discrimination against an employee because she opposed a practice declared unlawful the KCRA has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing KCRA. Ky. Rev. Stat. § 344.280(1). Retaliation claims under the KCRA are evaluated under the same standard as Title VII claims. See *Montell v. Diversified Clinical Servs., Inc.*, 757 F.3d 497, 504 (6th Cir. 2014) (citing *Hamilton v. Gen. Elec. Co.*, 556 F.3d 428, 435 (6th Cir. 2009); *Brooks v. Lexington-Fayette Urb. Cnty. Hous. Auth.*, 132 S.W.3d 790, 801 02 (Ky. 2004)). At the motion-to-dismiss stage, Cimbalo is not required to establish a prima facie case of retaliation. See *Crowder v. Railcrew Xpress*, 557 F. App x 487, 492 (6th Cir. 2014) (quoting *Keys v. Humana, Inc.*, 684 F.3d 605, 609 (6th Cir. 2012)). Rather, Cimbalo amended complaint [must] contain[] sufficient factual content from which a court, informed by its judicial experience and common sense, could draw the reasonable inference, *id.* at 493 (quoting *Keys*, 684 F.3d at 610), that BASF retaliated against her because she Case 3:21-cv-00309-DJH-RSE Document 13 Filed 03/08/22 Page 3 of 13 PageID #: 94 the KCRA. § 344.280(1). The parties contest whether Cimbalo meets this pleading standard. (See D.N. 7-1; D.N. 10) Specifically, BASF argues that Cimbalo fails to plausibly allege that she . (D.N. 7-1, PageID # 53 55) BASF also contends that the KCRA does not prohibit discrimination based on sexual orientation. (See *id.*, PageID # 57)

1. Opposition Activity Protected activities under the KCRA include complaining to the Equal Employment Opportunity Commission and opposing an apparent KCRA violation. See *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 469 (6th Cir. 2012) (citing *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989)); *Sullivan v. Paycor, Inc.*, No. 3:13-CV-00028-H, 2013 WL 2286069, at *4 (W.D. Ky. May 23, 2013). to company management is classic opposition activi *Wasek*, 682 F.3d at 469 (citing *Johnson*

v. Univ. of Cincinnati, 215 F.3d 561, 580 (6th Cir. 2000)). Importantly, a retaliation claim requires only a reasonable and good faith belief that discrimination occurred the plaintiff does not have to show that the underlying conduct was actually unlawful. *Asbury Univ. v. Powell*, 486 S.W.3d 246, 252 (Ky.



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2016) (citing Johnson, 215 F.3d at 579) s retaliation provision can be found whether or not the challenged practice ultimately is found to be . BASF contends that Cimbalo did not engage in a protected activity because she neither took job to oppose discrimination nor had belief that unlawful discriminatory behavior had actually occurred D.N. 7-1, PageID # 54; D.N.

11, PageID # 86)

BASF first argues that additional opposition activity, were not protected because her job duties included reporting any employee complaint to her supervisor. (See D.N. 7-1, PageID # 54) But the Sixth Circuit has rejected the argument that a

human-resources officer like Cimbalo must her regular job duties to be entitled to protection under Title VII. Jackson v. Genesee Cnty. Rd. Comm n, 999 F.3d 333, 345 46 (6th Cir. 2021) (citing Johnson, 215 F.3d at 579 80); see also Trujillo v. Henniges Auto. Sealing Sys. N. Am., Inc., 495 F. App x 651, 655 (6th Cir. 2012) human resources personnel regarding potential violations of Title VII constitute protected activity

. In Jackson, the court cautioned against finding retaliation claims deficient complaints, which would otherwise constitute protected activity, . 999 F.3d at 345 (citing Johnson, 215 F.3d at 580). The court noted that this additional requirement would

Id. at 345 46 (citing Johnson, 215 F.3d at 580).

BASF next attempts to distinguish Sixth Circuit precedent by arguing that Cimbalo failed to assert in her amended opposing unlawful discrimination. (D.N. 11, PageID # 86) At this stage, however, it is

about was See Crawford v. Kohl s Inc., No. CV 5:21-119-DCR, 2021 WL 4189617, at *3 (E.D. Ky. Sept. 14, 2021) (noting that whether a plaintiff can satisfy the reasonable, good-faith belief standard necessarily fact-dependent and typically . . . not resolved through a motion on the pleadings (citing Asbury Univ., 486 S.W.3d at 252)); Wimberly v. Transcraft, No. 5:19-CV- 180-TBR, 2020 WL 3513244, at *4 5 (W.D. Ky. June 29, 2020) retaliation claim under 12(b)(6) when he asserted that he was terminated for opposing alleged sexual harassment by his superior and finding Case 3:21-cv-00309-DJH-RSE Document 13 Filed 03/08/22 Page 5 of 13 PageID #: 96 could conclude that [his su . Accordingly, fails. See Jackson, 999 F.3d at 345 46; Rhodes v. R&L Carriers, Inc., 491 F. App x 579, 580 84 (6th Cir. 2012) (holding that plaintiff, a human-resources officer, plausibly alleged retaliation when he claimed that his employer engaged in discrimination, including refusing to hire women in certain positions; that he complained to company executives and corporate counsel about such practices; and that his employer later terminated him).

2. Protected Group BASF argues that Cimbalo fails to allege advocacy on behalf of a protected group, which it asserts is required to state a retaliation claim. (D.N. 7-1, PageID # 55 57) advocacy is not



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required to maintain a claim under the KCRA. See *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 514 (6th Cir. 2009) (citing *Johnson*, 215 F.3d at 575); cf. *nty.*, 555 U.S. 271, 277 (2009) (holding that under Title VII does not require). Moreover, while the KCRA, as well as Title VII, prohibits discrimination against an employee for associating with or advocating for a protected group, Ky. Rev. Stat. § 344.040(1)(a); *Johnson*, 215 F.3d at 573-74, retaliation claim is based not on advocacy or association, but rather on her See D.N. 5, PageID # 40-44) As previously discussed, protected opposition include complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices. *Jackson*, 999 F.3d at 344-45 (quoting *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 721 (6th Cir. 2008)). Cimbalo asserts

that she complained to her supervisor, and then to the corporate legal department, that Dustin engaged in a variety of discriminatory behaviors towards protected groups, including female employees. (D.N. 5, PageID # 40-41) Cimbalo therefore has sufficiently alleged that she

opposed unlawful discrimination. See §§ 344.040(1)(a), 344.280(1); *Jackson*, 999 F.3d at 345 (citing *Crawford*, 555 U.S. at 276 (that the employer has engaged in . . . a form of employment discrimination, that communication

virtually always constitutes the employee's o)).

3. Discrimination Based on Sexual Orientation BASF contends that KCRA does not prohibit discrimination based on sexual that retaliation claim for opposing discrimination based on sexual orientation must therefore fail. (D.N. 7-1, PageID # 57) Both the KCRA and Title VII prohibit , and neither statute explicitly mentions sexual orientation. 42 U.S.C. § 2000e-2; Ky. Rev. Stat. § 344.040(1)(a). In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), however, includes discrimination based on sexual orientation. The issue here is whether the KCRA

discrimination also includes discrimination based on sexual orientation. See § 344.040(1)(a).

BASF, citing *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722, 727 (6th Cir. 2009), argues that the Sixth Circuit has determined that the KCRA does not protect against discrimination based on sexual orientation. (D.N. 7-1, PageID # 57) But in *Pedreira*, the plaintiff did not argue that the KCRA prohibited discrimination based on sexual orientation. See 579 F.3d at 727. Rather, the plaintiff she [did] not hold [her former religious belief that homosexuality is sinful. *Id.* at 727-28. Moreover, when the Sixth Circuit decided *Pedreira*, it had firmly established that Title VII did not prohibit discrimination based on sexual orientation a finding overruled by *Bostock*, 140 S. Ct. 1731. See *Pedreira*, 579 F.3d at 727 (citing *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006)

(holding that Title VII does not prohibit discrimination based on sexual orientation)). District courts have cited *Pedreira*, 579 F.3d 722, to find that the KCRA does not protect individuals from sexual-orientation discrimination, but they did so before the Supreme Court decided *Bostock*, 140 S.



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Ct. 1731, and often also relied on a finding that Title VII did not prohibit such discrimination. See, e.g., *Settles v. MSSC U.S., Inc.*, No. 5:17-CV-00129-TBR, 2018 WL 3745829, at *3 (W.D. Ky. Aug. 7, 2018) (-orientation discrimination claim because prohibited basis for discriminatory acts under Title VII (quoting *Vickers*, 453 F.3d at 762)); *Lindsey v. Mgmt. & Training Corp.*, No. 4:17-CV-00146-JHM, 2018 WL 2943454, at *2 (W.D. Ky. June 12, 2018) (relying on the to (citing *Vickers*, 453

F.3d at 762; *Pedreira*, 579 F.3d at 727)); *Wimsatt v. Kroger Co.*, No. 3:14-CV-712-CRS, 2015 WL 3622336, at *4 (W.D. Ky. June 9, 2015) (is, simply put, a claim that is not cognizable under the KCRA (citing *Pedreira*, 579 F.3d at 727)).

Accordingly, *Pedreira* is inapposite here. See 579 F.3d at 727.

The Court must therefore apply Kentucky law to determine whether the KCRA protects individuals from discrimination based on sexual orientation. See *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 607 (6th Cir. 2012) (citing *CenTra, Inc. v. Estrin*, 538 F.3d 402, 409 (6th Cir. 2008)) (noting that federal courts sitting in diversity jurisdiction must apply the substantive law of the forum state). This requires the Court to anticipate how highest court would rule *Id.* at 607 08 (quoting *In re Dow Corning Corp.*, 419 F.3d 543, 549 (6th Cir. 2005)) (internal quotation marks omitted). But neither party cites, nor is the Court aware of, a Kentucky Supreme Court or Kentucky Court of Appeals decision that has addressed whether the

KCRA prohibits discrimination based on sexual orientation. (See D.N. 7-1; D.N. 10; D.N. 11) Consequently, t must predict how the Kentucky Supreme Court would rule. *Berrington*, 696 F.3d ous *Id.* (quoting , 354 F.3d 568, 578 (6th Cir. 2004)).

As previously discussed, the KCRA is interpreted consonant with Title VII. *Hamilton*, 556 F.3d at 434 (quoting *Morris v. Oldham Cnty. Fiscal Ct.*, 201 F.3d 784, 793 (6th Cir. 2000)) (internal quotation marks omitted). This is because the purpose of the KCRA is, in part, [t]o provide for execution within the state of the policies embodied in . . . Title VII. § 344.020(1)(a). Additionally, the KCRA generally tracks the language of Title VII. *Hamilton*, 556 F.3d at 434 (alteration in original) (quoting *Morris*, 201 F.3d at 793) (internal quotation marks omitted); see *Stewart v. Univ. of Louisville*, 65 S.W.3d 536, 539 (Ky. Ct. App. 2001) (noting that . Due to these similarities the [KCRA]. *Stewart*, 65 S.W.3d at 539.

T *Bostock*, 140 S. Ct. 1731, and Kentucky courts reliance on federal law when interpreting the KCRA support a finding at this stage in the litigation that the KCRA protects individuals from discrimination based on sexual orientation. See *Hamilton*, 556 F.3d at 434. [F] interpreting the [KCRA]. *Roof v. Bel Brands USA, Inc.*, 641 F. App x 492, 496 (6th Cir. 2016)

(quoting *White v. Rainbo Baking Co.*, 765 S.W.2d 26, 28 (Ky. Ct. App. 1988)). Absent a state-court decision to the contrary and assuming the Kentucky Supreme Court continues its longstanding practice of interpreting the KCRA with Title VII, *Hamilton*, 556 F.3d



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at 434, the Court anticipates that sex discrimination would be found to include discrimination on the basis of sexual orientation. See § 344.040(1)(a); Asbury Univ., 486 S.W.3d at 253 (recognizing -accepted noti that the Kentucky Supreme Court (citing Brooks, 132 S.W.3d at 802)); Stewart, 65 S.W.3d at al .

The Court therefore will retaliation claim on this ground.

In sum, Cimbalo has plausibly alleged that BASF retaliated against her in violation of the KCRA. See Rhodes, 491 F. App x at 584 (reversing the Title VII retaliation claim when plaintiff alleged that and was then Downs v. United States Postal Serv., No. 3:19-CV-00057-RGJ, 2019 WL 3947921, at *5 6 (W.D. Ky. Aug. 21, 2019) qual Employment Opportunity complaints and was later expelled from a training program); Percell v. Ky. Dep t of Mil. Affs., No. 3:16-CV-721-TBR-LLK, 2017 WL 6347973, at *4 (W.D. Ky. Dec. 12, 2017) (denying motion to dismiss when plaintiff alleged she was terminated after complaining to an Equal Employment Officer that defendant, her employer, engaged in discrimination). will therefore be denied as to s. B. Gender Discrimination Cimbalo also contends that BASF discriminated against her based on her gender, in violation of the KCRA, § 344.040(1)(a). (D.N. 5, PageID # 44) Specifically, Cimbalo asserts that management-level male employees received written warnings warnings .

(Id.) She further contends that the male employees then received a pay raise, while she was terminated. (Id.) Like retaliation claims, gender-discrimination claims under the KCRA are evaluated under the same standard as Title VII claims. See Roof, 641 F. App x at 497 (citing Smith v. Leggett Wire Co., 220 F.3d 752, 758 (6th Cir. 2000)); Bd. of Regents of N. Ky. Univ. v. Weickgenannt, 485 S.W.3d 299, 306 (Ky. 2016). order to survive Roof, 641 F. App x at 497 (citing Keys, 684 F.3d at 609 10). Rather, she must Iqbal, 556 U.S. at 678, and

Twombly, 550 U.S. at 555. Roof, 641 F. App x at 497. Cimbalo therefore , Keys, 684 F.3d at 610 (quoting Iqbal, 556 U.S. 678 79),

[her] compensation, terms, conditions, or because of her gender. § 344.04(1)(a); see Keys, 684 F.3d at 610.

fails to meet this pleading standard because she does not sufficiently allege that similarly situated male employees. -1, PageID # 58) contention that two male employees received an increase in pay after they received warnings for a

more serious violation than Cimbal violation. (Id.; see D.N. 5, PageID # 44) In support of its argument, BASF cites Han v. University of Dayton, 541 F. App x 622, 626 27 (6th Cir. 2013). (D.N. 7-1, PageID # 59 60)

Han, however, were not as detailed See 541 F. App x at 625. In Han, the plaintiff, a tenure-track Asian-American professor, claimed that he was given a negative evaluation and ultimately



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terminated based on his race, despite

positive reviews from peers and students. Id. He further alleged that a white adjunct professor was hired to teach one of classes after the . Id. The Sixth Circuit found that he failed to state a race-discrimination claim because professor to teach one class is not a replacement hire for a tenure-track professor teaching several

classes Id. at 627. Moreover, the plaintiff failed to allege with specificity that any negative evaluation from the tenure committee was because of his race. Id.

Cimbalo, in contrast, meets the pleading standard for her gender-discrimination claim. See Roof, 641 F. App x at 497. Cimbalo alleges that two - given pay raises , even though they received warnings

ations than she did. (D.N. 5, PageID # 41, 44) These allegations, at the motion-to-dismiss stage, are sufficient to assert a gender-discrimination claim. See Roof, 641 F. App x at 498 (a male was promoted in her place, whom [the plaintiff] then trained on how to perform some crucial aspects of the job); Dillworth v. Wormuth, No. 3:20-CV-629-CHB, 2021 WL 5749097, at *13 (W.D. Ky. Dec. 2, 2021) he received negative performance reviews for making certain mistakes in his job duties, while

female employees who made similar mistakes received training opportunities); Carson v. Little Clinic Mgmt. Servs. LLC, No. 3:19-CV-682-DJH, 2020 WL 2748501, at *2 3 (W.D. Ky. Feb. 12, 2020) (- and sex-discrimination claims when plaintiff, a Black male, alleged he was treated differently than white, female employees and was terminated and replaced by a female); cf. Poursaid v. Norton Brownsboro Hosp., No. 3:18-CV-720-DJH, 2019 WL 4655908, at *4 (W.D. Ky. Sept. 24, 2019) gender-discrimination claim

when she alleged only that she was fired because patient families complained about her ability to do her job safely).

III. Cimbalo has sufficiently alleged that BASF retaliated and discriminated against her in violation of the KCRA. Accordingly, and the Court being otherwise sufficiently advised, it is hereby ORDERED as follows:

(1) motion to dismiss (D.N. 7) is DENIED. (2) initial motion to dismiss (D.N. 4) is DENIED as moot. (3) Pursuant to 28 U.S.C. § 636(b)(1)(A), this matter is hereby REFERRED to U.S. Magistrate Judge Regina S. Edwards for resolution of all litigation planning issues, entry of scheduling orders, consideration of amendments thereto, and resolution of all non-dispositive matters, including discovery issues. Judge Edwards is further authorized to conduct a settlement conference in this matter at any time.

