CITY OF ALBUQUERQUE V. TRUJILLO

CITY OF ALBUQUERQUE,
Plaintiff-Appellee,
v.
MARIE TRUJILLO,
Defendant-Appellant.

No. 32,302

COURT OF APPEALS OF NEW MEXICO

December 16, 2013

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, C. Shannon Bacon, District Judge

COUNSEL

French & Associates, P.C., Paula I. Forney, Stephen G. French, Albuquerque, NM, for Appellee

Daniel J. Sanchez, Albuquerque, NM, for Appellant

JUDGES

JONATHAN B. SUTIN, Judge. I CONCUR: TIMOTHY L. GARCIA, Judge. MICHAEL D. BUSTAMANTE, Judge, dissenting.

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} The Human Rights Commission (the Commission) determined that the City of Albuquerque engaged in sexual discrimination against Defendant Marie Trujillo. The City appealed the Commission's order to the district court. In a de novo court

proceeding, the district court entered summary judgment in favor of the City. Defendant appeals from the court's judgment. We affirm.

BACKGROUND

{2} Defendant filed a charge of discrimination with the Human Rights Division (the Division) of the State Labor Department, currently known as the Workforce Solutions Department, against the City on October 4, 2007. *See generally* NMSA 1978, § 28-1-2(D), (K) (2007). Separately, on August 7, 2008, Defendant and a union acting on her behalf entered into an agreement (the agreement) with the City to resolve a grievance involving adverse actions taken by the City against Defendant. The City's actions against Defendant that were the subject of the agreement grew out of essentially the same circumstances that caused Defendant to file her charge of discrimination. Pursuant to the agreement, Defendant agreed, among other things, to transfer to another position that would not result in any loss of wages and compensation. Further, Defendant was to receive twenty-three days of pay, and "[a]ny files contained within [Defendant's] permanent personnel file . . . relating to [the] agreement" were to be purged.

{3} Based on the allegations of discrimination in Defendant's complaint, the Division conducted an investigation, pursuant to NMSA 1978, Section 28-1-10(C) (2005). Having found that there was sufficient evidence to believe that discrimination on the basis of sex had occurred, the Division issued a probable cause determination to that effect on September 22, 2008. *See id.* (granting authority to the Division director to determine whether probable cause exists for the discrimination complaint). This determination was followed by a complaint issued by the Commission pursuant to Section 28-1-10(F) alleging that the City discriminated against Defendant on the basis of sex. *See id.* (stating that "the [C]ommission shall issue a written complaint in its own name against the respondent," setting forth "the alleged discriminatory practice, the ... regulation or the section of the Human Rights Act alleged to have been violated[,] and the relief requested"). The Commission held a hearing on the matter on June 17 and 18, 2009, and, on August 26, 2009, the Commission entered a final order concluding that the City had discriminated against Defendant on the basis of sex. The Commission found that Defendant suffered adverse employment action from two circumstances: (1) demotion by reassignment of duty, and (2) changes in the terms and conditions of her employment. The Commission awarded Defendant damages, representing actual and compensatory damages, as well as future lost wages, totaling $116,360, plus $19,818 in attorney fees.

{4} The City appealed to the district court. The proceeding was de novo. *See* NMSA 1978, § 28-1-13(A) (2005) ("A person aggrieved by an order of the [C]ommission may obtain a trial de novo in the district court of the county where the discriminatory practice occurred ... by filing a notice of appeal within ninety days from the date of service of the [C]ommission's order."). The court granted summary judgment in favor of the City, stating the following:

1. That Defendant . . . signed the agreement transferring her from the Transit Department to [the] Solid Waste Management Department and resolving other issues with the City . . . Transit Department.

2. The only issue before the [c]ourt was Defendant[']s] . . . claim for gender discrimination which requires a showing of adverse employment action.

3. Defendant . . . did not demonstrate any adverse employment action as the agreement, ... which she entered into reimbursed her for any suspensions without pay, purged her personnel file and the transfer to which she agreed ... was ... without loss of pay or other benefits.

Before entry of the order granting summary judgment, at the hearing on the motion for summary judgment, the court discussed its reasons for favoring the City's position. Paraphrased, the court reasoned that, in part, the case was one of buyer's remorse occurring after Defendant agreed to a resolution of her issues with the City pursuant to the agreement in which she was reimbursed for the time she spent on suspension, her personnel file was purged, and she agreed to withdraw her complaints and to transfer out of the department without any loss of wages or compensation. The court saw no evidence that Defendant did not freely sign the agreement, and the court stated that it would be very difficult to demonstrate that the agreement was not freely negotiated and signed when she had been represented by the union during the negotiations.

{5} Further, the court saw Defendant as attempting to improperly bootstrap a hostile workplace type of allegation into a gender claim through reliance on what had occurred before the agreement was reached and on factual claims that might support allegation of a hostile workplace. In looking at a gender claim, which required proof of an adverse employment action, the court stated that Defendant had not demonstrated that there was a question of fact with respect to an adverse employment action. The court reiterated that it saw "a tendency to try and bootstrap hostile work type of allegations into the adverse employment action[,]" leaving little "to go on[] in terms of adverse employment action."

{6} In conclusion, based on what the court presumably determined were undisputed material facts, the court found that the evidence indicated that there was no adverse employment action. Accordingly, the court granted the City's motion for summary judgment. Defendant's counsel made no effort following these comments to disabuse the court of its view of the facts.

{7} In her brief in chief on appeal, Defendant characterizes the district court's summary judgment as one finding "that there was no showing of adverse employment action against [Defendant], because the City reimbursed [Defendant] for the disciplinary actions taken by the City against [Defendant], the City purged her personnel file[,] and the City allowed [Defendant to] transfer to a different division of the City without loss of pay or benefits." At the outset, we observe that Defendant's seven-page brief in chief violates several appellate rules on briefing. The type is twelve point, instead of the

required fourteen point or larger. *See* Rule 12-305(C) NMRA. Defendant fails to set out the standard of review and how the issue she raises was preserved with citations showing the preservation. *See* Rule 12- 213(A)(4) NMRA. More importantly, while she does cite to the record proper when mentioning some documents, critical factual statements are not supported with citations to the record proper and, in particular, to any document in the record such as an affidavit or deposition that contains the alleged fact. *See* Rule 12-213(A)(3).

{8} Defendant asserts that while the union represented her in the grievance process that resulted in the agreement, the union did not represent her in her discrimination complaint process. And she argues that the agreement represented an "amicable settlement to the Union's grievance procedures[,]" but it did not resolve her discrimination claim. Thus, according to Defendant, "[t]he City has failed to prove that the actions taken against [her] were non-discriminatory." Defendant fails to show how these assertions support her view that the district court erred in finding no genuine issue of material fact existed. Because this Court "will not review unclear arguments, or guess at what [a party's] arguments might be[,]" we decline to consider this argument further. *Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076.

{9} Defendant argues that it was the agreement itself that resulted in adverse employment action taken by the City. She essentially asserts that what occurred under the agreement created genuine issues of material fact to preclude summary judgment. Defendant contends that her transfer from a position in the Transit Department to a position in the Solid Waste Department, to which she assented in the agreement, prevented her from receiving any kind of pay raise or promotion. In particular, with no citation to the record proper, Defendant asserts that she was transferred from a position classified as M-14 with a "maxed" salary of $27.06 per hour to a position classified as M-12 with a "maxed" salary of $21.27 per hour. The result, she agues, was that she never made more than the $22.27 that she made in her former position, because in her new position she already exceeded the maximum range salary in the M-12 position. Defendant also asserts, again with no citation to the record proper and with no detail, that she was given job duties beyond those stated in the job description for her new position at the Solid Waste Department. She also asserts that were it not for the sex discrimination, she would not have agreed to the transfer. These assertions, unaccompanied by citation to the record, do not constitute evidence. *See Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 (stating that "mere assertions and arguments . . . are not evidence").

{10} Even if we were to overlook Defendant's failure to cite to the record proper for support for her factual allegations that presumably were before the district court by appropriate affidavit or deposition to preclude summary judgment, we are unable to agree with Defendant that any material fact created a genuine issue to preclude summary judgment. The district court determined that, notwithstanding Defendant's facts about the result of a transfer to which she had agreed, Defendant's discrimination claim could not, as a matter of law, prevail. The court concluded that the agreement did not constitute adverse employment action, in that Defendant agreed to the transfer

without any loss of wages or compensation and received full compensation that had been denied pursuant to the disciplinary action taken against her by the City. She agreed, as well, to the benefit of her personnel file being wiped clean of any adverse action taken against her by the City. Defendant nowhere indicates on appeal that the Commission's final order provided relief beyond that which she achieved in the agreement. We hold that Defendant failed to create a genuine issue of material fact on the issue of adverse employment action.

{11} We note Defendant's contention that but for the discrimination to which she was exposed she would have never transferred from the Transit Department and "take[n] a hold in pay." Her discrimination complaint was pending when she entered into the agreement, and she did not seek any provision in the agreement stating that it would have no effect on relief under her discrimination claim. We fail to see how this contention helps Defendant or would supply a basis to preclude the district court's entry of summary judgment. Defendant knew of the discrimination, yet Defendant nowhere shows how the grievance and agreement failed to remedy the claims.

CONCLUSION

{12} We affirm the district court's entry of summary judgment in favor of the City.

{13} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

I CONCUR:

TIMOTHY L. GARCIA, Judge

MICHAEL D. BUSTAMANTE, Judge, dissenting.

DISSENTING OPINION

Bustamante, Judge (dissenting).

{14} I respectfully dissent. Summary judgment may only be granted if there are no questions of material fact and, based on the uncontradicted facts, a party is entitled to judgment as a matter of law. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. It is commonplace that courts cannot engage in weighing or assessment of the evidence when deciding a motion of summary judgment. I conclude that the district court did just that.

{15} The City's motion for summary judgment asserted that (1) the "analysis in *McDonnell-Douglas* defeats Ms. Trujillo's claim that she was discriminated against on the basis of her gender"; (2) she could not "support a prima facie case of discrimination"; and (3) if she did prove a prima facie case, the City had

nondiscriminatory reasons for its action. The City's eighteen-page memorandum in support argued at length about the propriety of the City's actions. The majority of the City's argument focused on the lack of evidence of discrimination against Ms. Trujillo, though it did make one assertion that Ms. Trujillo could not show any adverse employment actions. Ms. Trujillo filed a response and attached excerpts from the testimony provided during the Commission hearing as well as the Commission's final order.

{16} At the hearing, the City focused exclusively on its argument that the August 2008 settlement of her union grievance proved conclusively that Ms. Trujillo could not demonstrate any adverse employment action. In the end, the district court decided the matter on that basis.

{17} The district court's approach to the issue is problematic. First, as noted by the majority, the district court mused about Ms. Trujillo's thoughts and motives in bringing the action—labeling them "buyer's remorse." This type of consideration should simply not occur in the summary judgment context because it indicates a weighing of positions. Second, the district court recounted the terms of the union grievance settlement, noted that it was apparently freely signed by Ms. Trujillo with help from the union, and then observed these circumstances were "problematic for Ms. Trujillo's claims." This indicates to me that the district court was treating the grievance settlement as a settlement of all claims or perhaps as a waiver of further claims. Again, these considerations are not appropriate in the context of a summary judgment proceeding.

{18} By themselves, the concerns noted would not be enough to disagree with the ruling below. I am driven to disagree by the following statements made by the district judge as part of her ruling.

> And I agree with the City, based on their representations to the [c]ourt and in the briefing itself, that driving of the Sun Van was not an adverse employment action, and the concept of red circling, I think, has been misconstrued by Ms. Trujillo, and, in fact, demonstrates there wasn't adverse employment action, so the motion for summary judgment filed by the City will be granted.

These statements indicate to me that the district court resolved a question of fact, instead of deciding on the basis of uncontroverted facts as required by our case law. The comment concerning "red circling" is particularly troublesome because the parties argued completely different meanings for "red circling." The parties agree that the transfer pursuant to the grievance settlement resulted in a demotion for Ms. Trujillo. Ms. Trujillo argued—and the Commission found—that "red circling" meant that, after the transfer, Ms. Trujillo had no possibility of promotion or raise in pay. The City argued that "red circling" meant that on transfer Ms. Trujillo would not suffer a decrease in pay. The district court could not properly resolve this difference on summary judgment.

{19} As a separate matter, I echo the majority's frustration with the briefing provided by Ms. Trujillo's counsel on appeal. The brief in chief is well-nigh useless to this Court

and the reply brief is only marginally better. Counsel's failure to adequately cite to the record and make arguments tethered to the record and the applicable law is unfortunate in the extreme.

MICHAEL D. BUSTAMANTE, Judge