IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 2, 2009 Session

DONNA BELLOMY v. AUTOZONE, INC.

Appeal from the Chancery Court for Hamilton County
No. 05-1135 W. Frank Brown, III, Chancellor

No. E2009-00351-COA-R3-CV - FILED NOVEMBER 24, 2009

This discrimination lawsuit was filed by Donna Bellomy ("Plaintiff") against her former employer, AutoZone, Inc. ("Defendant"). Plaintiff claimed Defendant failed to promote her because she was a female and that Defendant otherwise created a hostile environment for female employees. Plaintiff also brought various tort claims, including claims based on negligence and intentional infliction of emotional distress. The Trial Court granted Defendant's motion for summary judgment and dismissed all of Plaintiff's claims. Plaintiff appeals. We affirm the Trial Court's grant of summary judgment with respect to the various tort claims brought by Plaintiff. However, we conclude that there are genuine issues of material fact with respect to Plaintiff's Tennessee Human Rights Act claims. We vacate the grant of summary judgment on Plaintiff's Tennessee Human Rights Act claims and remand this case for further proceedings consistent with this Opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Vacated in Part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Grace E. Daniell, Chattanooga, Tennessee, for the Appellant, Donna Bellomy.

Tracy E. Kern, New Orleans, Louisiana, Laurie M. Chess, Miami, Florida, and Stacy Lynn Archer, Chattanooga, Tennessee, for the Appellee, AutoZone, Inc.

OPINION

Background

This sex discrimination lawsuit was filed in November 2005 pursuant to the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq*. Plaintiff claimed she was discriminated against on the basis of her sex when Defendant failed to promote her to an open managerial position. According to Plaintiff:

> Plaintiff was employed by defendant from June, 1997 through April 14, 2005 as a sales consultant, Parts Sales Manager, and Acting Store Manager in the East Ridge, Tennessee store.
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> Plaintiff maintained an excellent work record with defendant during her seven year employment.
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> In 2005, plaintiff was asked to work as acting store manager in the East Ridge, Tennessee store. Plaintiff performed her duties in accordance with the requirements of the position.
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> Plaintiff applied for the position of store manager on a permanent basis, but the position was given to a younger male who was less qualified than plaintiff for the position.
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> Defendant's decision to promote a younger male employee with less training, experience, and seniority was discrimination against plaintiff based upon her sex. . . .
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> Plaintiff was denied equal opportunity in the terms and conditions of her employment with defendant on account of her sex creating a hostile work environment. . . .
>
> Defendant failed to provide the plaintiff with a work environment free of sexual discrimination even after the plaintiff repeatedly complained of such behavior, which entitles plaintiff to compensatory damages against the defendant.
>
> Additionally, defendant's failure to promote plaintiff based upon her sex constitutes outrageous conduct and intentional infliction of emotional distress and for such willful, reckless and malicious conduct, defendant is liable for punitive damages.

> Additionally, defendant's failure to promote plaintiff based upon her sex constitutes negligent infliction of emotional distress.
>
> Defendant discriminated against plaintiff based upon her sex creating intolerable working conditions for plaintiff.
>
> As a result, plaintiff was compelled to resign her employment with defendant.
>
> Defendant knew or reasonably should have known that its supervisor, Scott Huddleston, was discriminating against Plaintiff based upon her sex, and is therefore liable to the plaintiff for the negligent supervision and retention of its supervisor. (original paragraph numbering omitted)

Plaintiff sought compensatory damages for loss of income and other employment benefits she would have earned had she not been discriminated against. In addition, Plaintiff sought compensation for "mental anguish, humiliation and embarrassment because of defendant's unlawful actions."

Defendant answered the complaint and generally denied all the pertinent allegations contained therein. Defendant later filed a motion for summary judgment and argued that the undisputed material facts demonstrated that it was entitled to judgment as a matter of law on Plaintiff's "sexual discrimination and constructive discharge claims in violation of the Tennessee Human Rights Act, T.C.A. § 4-21-101 *et seq.*, and Plaintiff's common law claims for intentional infliction of emotional distress, outrageous conduct, and negligent infliction of emotional distress." In support of its motion, Defendant filed several depositions and various other exhibits.

The primary crux of Defendant's motion was that Defendant had a policy whereby it would fill open store manager positions with employees who worked at a store *other than* the store where the opening was being filled. This prevented new store managers from having to supervise former co-employees/peers. Defendant claimed that due to this policy, because Plaintiff was actively employed at the East Ridge store, she was not eligible for the East Ridge store manager position. Defendant further claimed that Plaintiff had been selected for a store manager position at its East Brainerd store, but Plaintiff resigned her employment with Defendant before Defendant could inform Plaintiff of that promotion. Even though Plaintiff had resigned, Defendant, nevertheless, formally offered the East Brainerd store manager position to Plaintiff, which she declined.[1]

[1] Plaintiff resigned once she learned she had not been selected for store manager at the East Ridge store and immediately retained counsel. The offer of the store manager position at East Brainerd was made after Defendant received a letter from Plaintiff's attorney. Defendant claims the decision to promote Plaintiff to store manager at the East Brainerd store was made before Plaintiff's attorney became involved.

Plaintiff responded to the motion for summary judgment, asserting that there were genuine issues of material fact with respect to each of her claims and, therefore, Defendant was not entitled to summary judgment as to any of Plaintiff's claims.

Plaintiff testified at her deposition that she began working for Defendant in 1997 as a parts service manager. In 1998 or 1999, Plaintiff transferred to a store in LaFayette, Georgia. The store manager at that store was Richard Adair. When asked if she had any problems with Adair, Plaintiff responded:

> I'm trying to think of how he put it. He didn't believe that women should be working in auto parts. He thought they should be home pregnant, barefoot in the kitchen, which he plainly stated to me to my face.
>
> * * *
>
> Q. How long were you working at the LaFayette store before Mr. Adair made this alleged barefoot and pregnant comment?
>
> A. Probably a couple of weeks. . . .
>
> Q. Did you report [that comment?]
>
> A. I told Scott [Huddleston] about it the next time I saw Scott. . . . And he said he was going to come down there and have a talk with Richard.
>
> Q. Do you know if he ever did that?
>
> A. He came down and talked to Richard, yes.

After this incident, Plaintiff claimed that Mr. Adair told a friend of Plaintiff's husband that she was having an affair with a co-employee. Plaintiff denied having an affair, and she reported what Mr Adair had done, which Plaintiff believed was an intentional attempt by Mr. Adair to damage her reputation.

At some point, Plaintiff was transferred to a different store as a commercial specialist. This was a lateral move. According to Plaintiff, Defendant's commercial advisor would take male commercial specialists out to assist them with generating new business, but he never did that with Plaintiff. "He never once came and rode with me to any accounts, new or old, either way to build my business." Plaintiff claims she asked the commercial advisor when he was going to assist her, and he "kept telling me he was." However, instead of his helping her out, Plaintiff was suddenly replaced by a former employee who had quit without notice. Plaintiff claims she then was

"demoted" to a parts service manager position at the Rossville Boulevard store and, thereafter, was not allowed any overtime. The loss of overtime resulted in a monthly decline in her income of $800. Plaintiff believed the reason she was demoted was because she was female.

Plaintiff was employed as a parts sales manager at Defendant's East Ridge store from 2002 until 2005. Defendant's East Ridge store is in the Chattanooga district. Scott Huddleston has been the district manager for the Chattanooga district since 2004. According to Plaintiff, she expressed her desire on several occasions to become a store manager. Scott Huddleston told her that there was not a lot of turnover with store manager positions. However, Plaintiff testified to several store manager positions that were filled by male employees even though Huddleston told her that generally there was no turnover. According to Plaintiff, on one occasion a 20 year old male with little experience was promoted to store manager over her.

In 2005, a store manager position became available at the East Ridge store where Plaintiff then was working. Plaintiff submitted a letter to Mr. Huddleston expressing her interest in that position. Mr. Huddleston told her that he was considering several people for that position, including Plaintiff. Plaintiff claimed that in the interim, she voluntarily assumed many of the store manager's duties at the East Ridge store. According to Plaintiff:

> [Huddleston] said that he would make his decision by the end of the week. . . . [At the end of the week] I called and asked him if he made the decision and he said yes. He was going to promote Shane to the position. . . .

Plaintiff was informed on April 14, 2005, that it was Shane Norton who received the East Ridge store manager position. Plaintiff claimed that she was so upset by this news that she prepared and submitted a letter of resignation. She also retained an attorney. At the time of her resignation, Plaintiff was not aware that Defendant was in the process of filling store manager positions at two other stores. Plaintiff added that she would have accepted a store manager position at another location.

Plaintiff testified that Huddleston told her that the East Ridge store manager position was going to be filled by Shane Norton. Then:

> [Mr. Huddleston] told me I should have felt privileged to have my . . . of even being considered for the position and I kind of blew up at that point. I said what do you mean I should be – I should feel privileged to even have been considered? You know, I felt like my qualifications were enough to stand on their own. It was like he was doing me a favor to have even considered me for the position.

Plaintiff testified that in her opinion, the reason she was not promoted to store manager at the East Ridge store was because she is female.

While Plaintiff was waiting for Huddleston to make a decision on the East Ridge store manager position, Plaintiff requested three days off work to attend an orientation at McKee Bakery where Plaintiff had applied for and apparently accepted a job. Plaintiff was given the time off. Plaintiff was going to resign her new job at the bakery if she was given a store manager position with Defendant, and she claims she made Huddleston aware of this.[2] If she was passed over again for a store manager position, Plaintiff was going to resign her job with Defendant and begin working at the bakery. When Plaintiff was passed over for the East Ridge store manager position, she resigned her job with Defendant and immediately began working for McKee Bakery.

Plaintiff testified that when she was told Shane Norton was being promoted to the East Ridge store manager position, she was not told that she was being considered for any other store manager position and she was not aware of any other store manager positions in the process of being filled. It necessarily follows, accepting Plaintiff's factual testimony, that she was not told at that time that she had been selected for the East Brainerd store manager position. Although Plaintiff felt like the reason she was not promoted to a store manager position was because she was female, she did not state that in her letter of resignation.

Plaintiff testified that, in her opinion, she has been qualified to be a store manager since 1998 or 1999. Plaintiff claimed she was illegally not promoted to the open store manager position at Red Bank in 2004 and then East Ridge in 2005. Plaintiff stated that she does not want to go back into the auto parts business:

> I don't want no part of it. I will not be humiliated. I don't want to go through all of the pain I was caused emotionally and I just can't do it. . . . It's a male-oriented job and I just don't want any part of it now. I realize they've won. . . .
>
> The humiliation of being looked over and knowing that it was because I'm a woman because if I had been a man and had ASE certification, the college degree that I hold, . . . I wouldn't have been overlooked all those years I worked for [Defendant]. I've lost seven years of my life because I wanted to devote myself to a company that didn't want me basically because I was a female.

Plaintiff acknowledged that she was offered a store manager position at the East Brainerd store after she resigned and after her attorney wrote Defendant a letter. Plaintiff stated that she rejected that offer because she was not going to put herself "in that position again. I mean, there was no guarantee if I accepted the store position, that I would be treated fairly and not be discriminated against and I just wasn't willing to take that type of risk."

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[2] Plaintiff testified that she told Huddleston that "if he gave me the position of store manager, I would turn in my resignation immediately for McKee because my true desire was to be the store manager at East Ridge."

Defendant claims that Plaintiff was not officially offered the East Brainerd store manager position before her resignation because the person then in that position had not been terminated. However, the record, at least as now before us, reflects that the manager of the East Brained store was terminated effective April 13, 2005. Plaintiff officially resigned on April 14, 2005.

Defendant's explanation as to why Plaintiff was not told before she resigned that she was going to be promoted to the East Brainerd store manager position is arguably inconsistent. At one point in its brief, Defendant states that the decision to promote Plaintiff to the East Brainerd store manager position was a fait accompli and Defendant was merely waiting until the current manager was terminated before informing Plaintiff. Later in its brief, Defendant claims that Plaintiff was not offered the East Brainerd store manager position because she had accepted employment elsewhere.

At the hearing on the motion for summary judgment, Defendant acknowledged that Plaintiff was qualified to be a store manager. However, as stated previously, Defendant maintained that it had a policy not to promote an employee within the same store to a store manager position. The reason for this policy was to prevent the new store manager from having to supervise friends and co-workers. Defendant's attorney stated at oral argument:

> I want to be very clear that we're not disputing the fact that [Plaintiff] was qualified to be a store manager for [Defendant]. In fact, it's undisputed that Mr. Huddleston, in fact, recommended her to be a store manager. And, in fact, Mr. Poole agreed with Mr. Huddleston's recommendations to promote her to a store manager position at the East Brainerd Road store.
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> [Plaintiff] was not qualified though to be a store manager at the East Ridge store. Why? Because she had been employed at the East Ridge store as a PSM since 2002, and there was a policy not to promote an employee within the same store that they worked as a store manager. . . .

After reviewing Defendants' motion for summary judgment, the pertinent depositions, and Plaintiff's response to the motion for summary judgment, the Trial Court issued a detailed 28 page memorandum opinion granting the motion for summary judgment in full. We will not set forth the entire memorandum opinion, but we will quote heavily from that opinion in order to set forth the basis for the grant of summary judgment. When rendering its judgment, the Trial Court analyzed each claim separately. According to the Trial Court:

> On November 9, 2005, [Plaintiff] filed her Complaint against her former employer. . . . The basic facts on the case involve [Defendant's] failing to promote [Plaintiff] to the position of store

manager of the East Ridge, Tennessee store. [Plaintiff] was employed as the Parts Manager of the East Ridge AutoZone store. When she was told that she was not going to be promoted to the store manager of the East Ridge store, she submitted a letter of resignation: This lawsuit followed.

The main thrust of her complaint was based upon [Defendant's] failure to promote her to the store manager's position, allegedly due to her gender. If true, such a failure to promote based upon sex would be a violation of the Tennessee Human Rights Act ("THRA"), Tenn. Code Ann. § 4-21-101. In addition to the THRA claim, [Plaintiff] also alleged [Defendant's] failure to promote her constituted causes "of action for constructive discharge, outrageous conduct, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent supervision and retention of employees." . . .

* * *

The court has decided to take and analyze each of [Plaintiff's] enumerated claims separately. . . .

1. Negligent Infliction of Emotional Distress.

[Plaintiff] alleged that [Defendant] was liable to her under a theory of negligent infliction of emotional distress. . . . The Tennessee Supreme Court in *Bain v. Wells*, 936 S.W.2d 618 (Tenn. 1997) discussed the elements of the claim which a claimant had to prove in order to recover under this theory. The *Bain* court specifically discussed this showing at a summary judgment stage, as present here.

> [T]o avoid summary judgment under the general negligence approach, a plaintiff must present material evidence as to each of the five elements of negligence – duty, breach of duty, injury or loss, causation in fact, and proximate, or legal cause. *Id*. Moreover, recovery is only appropriate for "serious" or "severe" emotional injury which is established by expert medical or scientific proof. *Id.*

Id. at 624.

* * *

In this case, [Plaintiff] has produced no expert or scientific proof that she suffered a "serious or severe" emotional injury. [Plaintiff's] own opinion . . . is not expert or scientific proof under the negligent infliction of emotional distress theory. (emphasis in the original)

* * *

The court also holds that [Plaintiff] would not be able to establish liability, based upon [Defendant's alleged] negligent infliction of emotional distress, because of the exclusive remedy provided employees and employers by the [Tennessee Workers' Compensation Law], Tennessee Code Annotated § 50-6-108(a) . . . .

2. Intentional Infliction of Emotional Distress and Outrageous Conduct.

* * *

The Court . . . in *Bain v. Wells*, 936 S.W.2d 618 (Tenn. 1997) . . . itemized three elements that a plaintiff must provide to recover for this tort:

> [U]nder Tennessee law, there are three essential elements to a cause of action: (1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury. *Id.*; *see Johnson v. Women's Hospital*, 527 S.W.2d 133, 144 (Tenn. App. 1975).

The Trial Court then discussed that with respect to claims for intentional infliction of emotional distress, Tennessee has adopted the standard set forth in the Restatement (Second) of Torts which, among other things, emphasizes that the alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Restatement (Second) of Torts § 46 comment d (1965). The Trial Court then concluded that the allegations contained within Plaintiff's

complaint, even if true, failed to state a claim upon which relief could be granted for intentional infliction of emotional distress.[3]

The next cause of action addressed by the Trial Court was Plaintiff's claim for negligent supervision and retention. According to the Trial Court:

> 3. Negligent Supervision and Retention of Employee.
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> [Defendant] asserts that [Plaintiff] cannot recover under this theory for two reasons. First, [Defendant] claims that the Tennessee Workers' Compensation Act ("TWCA") is the exclusive remedy for such a claim. . . . Second, [Defendant] claims that [Plaintiff's] failure to complain to [Defendant] about Mr. Huddleston's alleged discriminatory treatment of women, *i.e.,* failure to promote females to store manager positions, would bar her recovery. Although [Plaintiff] had previously used [Defendant's] hotline number . . . to report issues . . . , she admits she did not call the Hotline after she was not promoted to become the East Ridge store manager.
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> * * *
>
> [T]he court holds that [Plaintiff], as a former employee, cannot sue [Defendant] for this tort because of the defense afforded [Defendant] under the TWCA. . . . In view of this decision, the court does not discuss [Defendant's] other defense that it could not be liable because [Plaintiff] did not complaint to [Defendant] about Mr. Huddleston's alleged unlawful and gender discriminatory practices. [Defendant] had no knowledge about the alleged gender complaint. Because Mr. Huddleston was not the decision maker on the promotion issues and no discrimination by Huddleston in that process was shown to be attributable to him, [Plaintiff's] claim would probably fail under this second defense.
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> 4. Constructive Discharge.
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> * * *

[3] The Trial Court also correctly noted that intentional infliction of emotional distress and outrageous conduct were different names for the same tort. *See Bain v. Wells*, 936 S.W.2d 618, 622 n.3 (Tenn. 1997)("Intentional infliction of emotional distress and outrageous conduct are not two separate torts, but are simply different names for the same cause of action.")(citation omitted).

[Defendant] defends this claim based upon legal principles. [Defendant] points to numerous cases that hold that an employer's failure to promote, in and of itself, is insufficient as a matter of law to constitute a constructive discharge. [Defendant] has cited several federal cases which specifically hold that a failure to promote, by itself, was not sufficient to constitute a constructive discharge. See, for example, *Gold v. FedEx Freight E., Inc.*, 487 F.3d 1001, 1011 (6th Cir. 2007); *Geisler v. Folsom*, 735 F.2d 991, 996 (6th Cir. 1984); *Bielert v. Northern Ohio Properties*, 863 F.2d 47 (6th Cir. 1988); and *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996).

* * *

This case did not involve a demotion, transfer or reduction in pay or duties. See *Walker v. City of Cookeville* No. M2002-01441-COA-R3-CV, 2003 Tenn. App. LEXIS 566 at *19-22 (August 12, 2003). [Plaintiff's] chances of recovery would be barred by her failing to notify [Defendant] of Mr. Huddleston's alleged discriminatory treatment. However, Mr. Poole was the decision maker. Also, [Plaintiff] had already accepted employment at McKee Foods . . . . [Plaintiff] does not cite any case that holds that a failure to promote, by itself, can be the basis for recovery under a constructive discharge claim or theory. All of her authorities cite the general proposition of what one must do to prove discrimination. The holdings in the above quote covers [Plaintiff's] claim and position. (emphasis in the original)

* * *

5. THRA Claim- Failure to Promote Based on Gender.

* * *

There are two different methods of proving sexual discrimination: (1) by direct evidence and (2) by circumstantial evidence. In proving discrimination by the direct method, the claimant must present "[d]irect evidence . . . which, if believed, requires the conclusion that unlawful discrimination was at least *a* motivating factor in the employer's actions." . . .

In this case, [Plaintiff] alleges that Mr. Huddleston made certain discriminatory comments in the presence of another employee, Walter Arrowood, and that these comments constitute direct evidence

> of gender discrimination. Plaintiff does not allege, however, any facts that show any temporal connection between the alleged discriminatory comments and the decision-making process, nor does she allege facts that show that these "statements were related to the decision-making process" in general. In fact, Plaintiff concedes for purposes of summary judgment that Mr. Huddleston never made any discriminatory remarks about her to Mr. Poole, the final decision-maker in the promotion process at issue. Indeed, Mr. Huddleston actually recommended [Plaintiff] to Mr. Poole as a possible new Store manager. It was partially on the bases of these recommendations that Mr. Poole decided to promote [Plaintiff] to manager of the East Brained store. . . .

The Trial Court then discussed the applicable law when trying to prove discrimination by indirect evidence using the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). After discussing the applicable law, the Trial Court noted that Defendant was arguing that Plaintiff had failed to state a prima facie case of discrimination for two reasons: first, Plaintiff was not "qualified" for the position of store manager at the East Ridge store because she was already employed at that store; and second, because Plaintiff was offered a store manager position at the East Brainerd store, she did not suffer an adverse employment decision. Furthermore, Defendant argued that even if Plaintiff could establish a prima facie case, Defendant had articulated a legitimate, non-discriminatory reason for Plaintiff not being selected to manage the East Ridge store, that reason being that Plaintiff was already employed at that store and Defendant did not promote employees of a store to be manager of the same store.

The Trial Court agreed with all three arguments, concluding that Plaintiff failed to establish a prima facie case of discrimination because: (1) she was not eligible to be selected as store manager at East Ridge because she was employed at that store; and (2) Plaintiff did not suffer an adverse employment decision because she was offered a store manager position at the East Brainerd store. Finally, the Trial Court concluded that Plaintiff had failed to create a genuine issue of material fact as to whether Defendant's legitimate, non-discriminatory reason for not promoting Plaintiff at the East Ridge store was pretextual.

Plaintiff appeals claiming the Trial Court should not have granted Defendant's motion for summary judgment on any of her causes of action.

Discussion

Our Supreme Court reiterated the standard of review in summary judgment cases as follows:

> The scope of review of a grant of summary judgment is well established. Because our inquiry involves a question of law, no

presumption of correctness attaches to the judgment, and our task is to review the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Cent. S.*, 816 S.W.2d 741, 744 (Tenn. 1991).

A summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The party seeking the summary judgment has the ultimate burden of persuasion "that there are no disputed, material facts creating a genuine issue for trial . . . and that he is entitled to judgment as a matter of law." *Id*. at 215. If that motion is properly supported, the burden to establish a genuine issue of material fact shifts to the non-moving party. In order to shift the burden, the movant must either affirmatively negate an essential element of the nonmovant's claim or demonstrate that the nonmoving party cannot establish an essential element of his case. *Id*. at 215 n.5; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008). "[C]onclusory assertion[s]" are not sufficient to shift the burden to the non-moving party. *Byrd*, 847 S.W.2d at 215; *see also Blanchard v. Kellum*, 975 S.W.2d 522, 525 (Tenn. 1998). Our state does not apply the federal standard for summary judgment. The standard established in *McCarley v. West Quality Food Service*, 960 S.W.2d 585, 588 (Tenn. 1998), sets out, in the words of one authority, "a reasonable, predictable summary judgment jurisprudence for our state." Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee*, 69 Tenn. L. Rev. 175, 220 (2001).

Courts must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). In making that assessment, this Court must discard all countervailing evidence. *Byrd*, 847 S.W.2d at 210-11. Recently, this Court confirmed these principles in *Hannan*.

Giggers v. Memphis Housing Authority, 277 S.W.3d 359, 363-64 (Tenn. 2009).

Plaintiff's claims can be divided into three groups: (1) tort claims based upon negligence; (2) an intentional tort claim; and (3) discrimination claims pursuant to the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq*.

We first address Plaintiff's tort claims based on negligence, which includes both her claims for negligent infliction of emotional distress and negligent retention. Defendant asserts, and the Trial Court held, that all of Plaintiff's negligence claims are barred by the exclusive remedy rule found in the Tennessee Workers' Compensation Act. The pertinent statutory provision is Tenn. Code Ann. § 50-6-108(a) (2008) which provides as follows:

> **50-6-108. Right to compensation exclusive. –** (a) The rights and remedies granted to an employee subject to this chapter, on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of the employee, the employee's personal representative, dependents or next of kin, at common law or otherwise, on account of the injury or death.

In *Valencia v. Freeland and Lemm Constr. Co.*, 108 S.W.3d 239 (Tenn. 2003), the decedent's next of kin brought a tort suit claiming that the defendant construction company's failure to follow safety regulations resulted in a substantial certainty that the decedent would be killed.[4] The Tennessee Supreme Court held that workers' compensation benefits were an employee's exclusive remedy unless that employee could show that the employer actually intended to injure the employee. "Proof of gross or criminal negligence is insufficient in this regard." *Id*. at 243. In reaching this conclusion, our Supreme Court stated:

> Pursuant to [Tenn. Code Ann. § 50-6-108(a)] . . . , workers' compensation law provides the exclusive remedy for an employee who is injured during the course and scope of his employment, meaning the employee is precluded from seeking tort damages for the injury. *Liberty Mut. Ins. Co. v. Stevenson*, 212 Tenn. 178, 368 S.W.2d 760 (1963).
>
> As have other jurisdictions, Tennessee courts have created an exception to the exclusivity provision for intentional torts committed by an employer against an employee; these torts give rise to a common-law tort action for damages. *Mize v. Conagra, Inc.*, 734 S.W.2d 334, 336 (Tenn. Ct. App. 1987) (Rule 11 permission to appeal denied); *King v. Ross Coal Co.*, 684 S.W.2d 617, 620 (Tenn. Ct. App. 1984) (Rule 11 permission to appeal denied); *Estate of Schultz v. Munford, Inc.*, 650 S.W.2d 37, 40 (Tenn. Ct. App. 1982)

[4] A separate workers' compensation lawsuit also was filed. *Valencia*, 108 S.W.3d at 240.

(Rule 11 permission to appeal denied); *Cooper v. Queen*, 586 S.W.2d 830, 833 (Tenn. Ct. App. 1979) (Rule 11 permission to appeal denied). The court in *Mize* explained the reason for this exception as:

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common law liability of the employer cannot be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of general intentional injury. . . . Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character. [*King*,] 684 S.W.2d at 619.

Mize, 734 S.W.2d at 336 (alteration in original). Further, proof of actual intent goes beyond that sufficient to prove gross negligence or even criminal negligence. *Gonzales v. Alman Constr. Co.*, 857 S.W.2d 42, 45 (Tenn. Ct. App. 1993) (Rule 11 permission to appeal denied).

Valencia, 108 S.W.3d at 242-43.

In *Coltraine v. Fluor Daniel Facility Servs. Co.*, No. 01A01-9309-CV-00419, 1994 WL 279964 (Tenn. Ct. App. June 22, 1994), *no appl. perm. appeal filed*, this Court discussed the exclusive remedy rule at follows:

> An exception to the exclusive remedy provision of the Workers' Compensation Act is if an employee is able to prove that the employer had an actual intent to injure the employee. *Cooper v. Queen*, 586 S.W.2d 830, 833 (Tenn. App. 1979); *King v. Ross Coal Co. Inc.*, 684 S.W.2d 617, 619-20 (Tenn. App. 1984); *Mize v. Conagra, Inc.*, 734 S.W.2d 334, 336-37 (Tenn. App. 1987); *Gonzales v. Alman Const. Co.*, 857 S.W.2d 42, 45-48 (Tenn. App. 1993). The theoretical basis for this exception is that the employer cannot allege an accident when he has intentionally committed the act.

* * *

> The rationale behind the narrow exception to the exclusive remedy provision of the Workers' Compensation Act is that:
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> > The Workers' Compensation Law takes away from the employee his common law rights and gives him others, on the guarantee that these substituted rights shall be generously awarded, both for foregoing his common law rights and in consideration of the obligations of his employer to keep his employee from becoming a public charge. The legislature has made the rights of the employee and employer the exclusive remedy. Those who accept benefits under an act of this kind must likewise take the burdens.
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> *King*, 684 S.W.2d at 619-20.
>
> Under Tennessee case authority, a plaintiff's allegations that an employer knowingly permitted dangerous working conditions to exist is insufficient to subject an employer to common law liability. *Mize*, 734 S.W.2d at 336; *Gonzales*, 857 S.W.2d at 47. "Proof of gross negligence or even criminal negligence is insufficient to establish the requisite and actual intent to injure that allows an employee to maintain a common law action against his employer." *Cooper*, 586 S.W.2d at 833; *King*, 684 S.W.2d at 619; *Gonzales*, 857 S.W.2d at 46.

Coltraine, 1994 WL 279964, at *2-3.

Based on the foregoing, it is clear that Plaintiff's tort claims based upon negligence cannot withstand Defendant's motion for summary judgment. These negligence claims are barred by the exclusive remedy rule found at Tenn. Code Ann. § 50-6-108(a) (2008). Accordingly, we affirm the Trial Court's grant of summary judgment to Defendant on Plaintiff's claim for negligent infliction of emotional distress[5] and negligent retention.

We next discuss Plaintiff's outrageous conduct claim. As the Trial Court correctly noted, an essential element of an outrageous conduct claim is that the conduct "must be so

[5] Because we conclude that the Trial Court correctly concluded that Plaintiff's negligent infliction of emotional distress claim was barred by the exclusive remedy rule, we need not decide whether the Trial Court correctly determined that Defendant further was entitled to summary judgment on this claim because Plaintiff failed to establish a severe mental injury.

outrageous that it is not tolerated by civilized society." *Bain v. Wells*, 936 S.W.2d at 622. The *Bain* Court noted that this was a "high threshold." *Id.* While we will not go so far as to say that discrimination claims can never rise to the level of outrageous conduct, Plaintiff's allegations in this case, even if taken as true, do not rise to the level necessary to state a claim for outrageous conduct. *See*, *e.g.*, *Sawyer v. Memphis Education Ass'n*, No. W2006-00437-COA-R3-CV, 2006 WL 3298326 (Tenn. Ct. App. Nov. 14, 2006) (allegations of employer discrimination by an African-American male employee who claimed that he experienced race and gender discrimination because he was treated differently than his co-workers and who claimed to have been retaliated against after he filed various grievances and complaints against his employer, insufficient to state a claim for outrageous conduct). To hold otherwise would result in every discrimination claim also being an outrageous conduct claim. In short, we conclude, as did the Trial Court, that Plaintiff fails to state a claim for outrageous conduct, and we affirm the grant of summary judgment to Defendant on this claim.[6]

The next set of claims involve Plaintiff's failure to promote claim and constructive discharge claim brought pursuant to the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq*. As set forth previously, at this summary judgment stage, we must view all of the evidence in a light most favorable to Plaintiff. *See Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997).

Defendant's primary argument is that Plaintiff was not qualified for the East Ridge store manager position because she already worked at that store, and she simply quit before she officially could be offered the store manager position at East Brainerd. What troubles us most about this argument is that, at least according to Plaintiff, she made Huddleston aware that if she was turned down for the East Ridge store manager position, she would resign her employment with Defendant. Regardless of whether Plaintiff actually told Huddleston that she felt she was being denied promotions because of her sex, there is no doubt, from the record now before us, that she made Huddleston aware that she believed she was qualified for a store manager position[7] and that if she continued to be over-looked for promotions, she would resign and keep her new job at the bakery. Despite knowing this, when Plaintiff was told she was not being promoted to the East Ridge store manager position, Huddleston stood silent regarding the East Brained store. Huddleston did not tell Plaintiff either that she was being considered for other store manager positions or that she already had been selected for promotion to the East Brainerd store manager position.

Huddleston learned on April 8th or 9th that Plaintiff had accepted a full-time job at McKee Bakery. As stated previously, Plaintiff testified that she told Huddleston that she would resign at the bakery if she received a store manager position with Defendant. Huddleston testified

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[6] As discussed previously, there is an exception to the exclusive remedy provision of the Workers' Compensation Act if an employee can establish an actual intent to injure the employee. *See Coltraine*, 1994 WL 279964, at *2-3. Because we conclude that the Trial Court correctly found that Plaintiff failed to state a claim upon which relief could be granted for outrageous conduct, we need not decide if Plaintiff's outrageous conduct claim otherwise was barred by the exclusive remedy rule.

[7] We emphasize that not only did Plaintiff believe she was qualified to be a store manager, Defendant also admits that she was so qualified.

at deposition that when he told Plaintiff on April 14th she was not being promoted to the East Ridge store manager position, he also told her that other opportunities were coming available and that she was being considered for those positions. This is inconsistent both with Plaintiff's testimony and with Defendant's previous statement that the reason Plaintiff was not informed of her promotion to the East Brainerd store was because she had accepted employment elsewhere. If Defendant considered Plaintiff no longer eligible for promotion because she had accepted employment at McKee Bakery, it makes no sense for Huddleston to tell Plaintiff on the 14th that other opportunities were coming available and she was being considered for those opportunities.

At a minimum, there is a fact issue as to why Huddleston, a district manager, stood silent if he already knew Plaintiff had been selected for the East Brainerd store manager position given that: (1) Defendant claims it wanted to wait until the East Brainerd manager was terminated before telling Plaintiff she got that promotion; and (2) the former East Brainerd manager already had been terminated when Plaintiff was told she did not get the East Ridge position. Drawing all reasonable inferences in Plaintiff's favor, this supports an inference that Huddleston deliberately failed to provide existing information to Plaintiff knowing she would quit. On the other hand, *if* the decision to promote Plaintiff had not yet been made at the time of her resignation, this scenario supports an inference that the promotion to East Brainerd store manager was pretextual and after the fact.

Plaintiff's constructive discharge claim is not premised solely on her failure to get the East Ridge store manager position. Rather, her claim is premised on being qualified, which is undisputed, and not being selected for store manager positions when less qualified males were selected. Plaintiff claims this occurred in 2004 and 2005. Her claim also is premised upon comments pertaining to treatment of female employees in general. According to Plaintiff, all of these events, when combined with her not being promoted to store manager at East Ridge, create intolerable working conditions. We find that Plaintiff has created a genuine issue of material fact as to whether she was constructively discharged.

Defendant argues that the decision not to promote Plaintiff to East Ridge store manager and the decision to promote her to East Brainerd store manager was made by Scott Poole, Defendant's regional manager, and not Scott Huddleston, Defendant's district manager. Defendant further argues that Plaintiff has no proof of any discriminatory animus by Poole towards her. There are, however, questions of material fact related to these actual decisions including whether the decisions were made by Huddleston or by Poole. Plaintiff testified that Huddleston told her that he, Huddleston, was considering several people for the position of store manager at the East Ridge store and that he would make his decision by the end of the week. Plaintiff also testified that Huddleston told her at the end of that week that he had made his decision to promote a man, Shane Norton, as store manager at East Ridge. There also is a genuine issue as to when Defendant made the decision actually to promote Plaintiff to East Brainerd store manager. Additionally, if this decision was made before Plaintiff left her employment with Defendant, there is a genuine issue as to why Huddleston, Defendant's district manager, never told Plaintiff the decision had been made to promote her to store

manager at the East Brainerd store despite knowing full well that this would result in her immediate resignation.

Finally, we conclude that there likewise is a fact issue as to whether Plaintiff's refusal to accept the East Brainerd store manager position which was offered to her only after she had resigned and after her attorney sent a letter to Defendant was reasonable. In other words, we cannot say that Plaintiff's refusal to return to Defendant's employment was unreasonable as a matter of law.

Gager v. River Park Hosp. and Se. Emergency Servs., P.C., No. M2007-02470-COA-R3-CV, 2009 WL 112544 (Tenn. Ct. App. Jan. 14, 2009), involved a grant of summary judgment in a gender discrimination claim. We noted:

> As set forth in *Martin v. Norfolk Southern Railway Co.*, *supra*, if the moving party makes a properly supported motion, the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *See also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:
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> > (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

Gager, 2009 WL 112544 , at *9. Plaintiff has met her burden of establishing that genuine issues of material fact exist.

We emphasize that the issue before this Court at this stage of the proceedings is not whether Plaintiff was discriminated against because she was female. The question is whether she has created a genuine issue of material fact. As to her claims pursuant to the Tennessee Human Rights Act, we conclude that she has.

Conclusion

We affirm the Trial Court's grant of summary judgment to Defendant on Plaintiff's claims for: (1) negligent retention; (2) negligent infliction of emotional distress; and (3) intentional infliction of emotional distress/outrageous conduct. We vacate the grant of summary judgment on Plaintiff's Tennessee Human Rights Act claims. This case is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed one-half to the Appellant, Donna Bellomy, and her surety, and one-half to the Appellee, AutoZone, Inc., for which execution may issue, if necessary.

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D. MICHAEL SWINEY, JUDGE